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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 10 CFR 500.1 refers to title 10, part 500, section 1.
Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

- Title 1 through Title 16..........................as of January 1
- Title 17 through Title 27..........................as of April 1
- Title 28 through Title 41..........................as of July 1
- Title 42 through Title 50..........................as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 2002), consult the “List of CFR Sections Affected (LSA),” which is issued monthly, and the “Cumulative List of Parts Affected,” which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cutoff date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request.
Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1986, consult either the List of CFR Sections Affected, 1949–1963, 1964–1972, or 1973–1985, published in seven separate volumes. For the period beginning January 1, 1986, a “List of CFR Sections Affected” is published at the end of each CFR volume.

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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 523–4534.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of “Title 3—The President” is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the “Contents” entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.
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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency’s name appears at the top of odd-numbered pages.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.

January 1, 2002.
Title 10—ENERGY is composed of four volumes. The parts in these volumes are arranged in the following order: parts 1-50, 51-199, 200-499 and part 500-end. The first and second volumes containing parts 1-199 are comprised of chapter I—Nuclear Regulatory Commission. The third and fourth volumes containing part 200-end are comprised of chapters II, III and X—Department of Energy, and chapter XVII—Defense Nuclear Facilities Safety Board. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2002.
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SUBCHAPTER E—ALTERNATE FUELS

PART 500—DEFINITIONS

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Source: 46 FR 59884, Dec. 7, 1981, unless otherwise noted.

§ 500.1 Purpose and scope.

Unless otherwise expressly provided or the context clearly indicates otherwise, this section defines the terms used in these regulations. The use of the male gender is to include female; the use of singular to include plural.

§ 500.2 General definitions.

For purposes of this part and parts 501–507 term(s):


Action means a prohibition by rule or order, in accordance with sections 301(b) and (c) of FUA; any order granting or denying an exemption in accordance with sections 211, 212, 311 and 312 of FUA; a modification or rescission of any such order, or rule; an interpretation; a notice of violation; a remedial order; an interpretive ruling; or a rulemaking undertaken by DOE.

Affiliate, when used in relation to person, means another person who controls, is controlled by, or is under common control, with such person.

Aggrieved, for purposes of administrative proceedings, describes and means a person (with an interest sought to be protected under FUA) who is adversely affected by an action proposed or undertaken by DOE.

Alternate fuel means electricity or any fuel, other than natural gas or petroleum. The term includes, but is not limited to:

(1) Coal;
(2) Solar energy;
(3) Petroleum coke; shale oil; uranium; biomass, tar sands, oil-impregnated diatomaceous earth; municipal, industrial, or agricultural wastes; wood; and renewable and geothermal energy sources (For purposes of this paragraph (3), the term industrial does not include refineries.);
(4) Liquid, solid or gaseous waste by-products of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity. (For purposes of this paragraph (4), the term waste by-product is defined as an unavoidable by-product of the industrial or refinery operation.) A waste by-product of a refinery or industrial operation is commercially unmarketable if it meets the criteria listed in the definition of “commercial unmarketability,” set forth below;
(5) Any fuel derived from an alternate fuel; and
(6) Waste gases from industrial operations. (For purposes of this subsection, the term industrial does not include refineries.)
§ 500.2 Applicable environmental requirements

includes:

(1) Any standard, limitation, or other requirement established by or pursuant to Federal or State law (including any final order of any Federal or State Court) applicable to emissions of environmental pollutants (including air and water pollutants) or disposal of solid waste residues resulting from the use of coal or other alternate fuels, natural gas, or petroleum as a primary energy source or from the operation of pollution control equipment in connection with such use, taking into account any variance of law granted or issued in accordance with Federal law or in accordance with State law to the extent consistent with Federal law; and

(2) Any other standard, limitation, or other requirement established by, or pursuant to, the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Resource Conservation and Recovery Act of 1976, or the National Environmental Policy Act of 1969.

Base load powerplant means a powerplant, the electrical generation of which in kilowatt hours exceeds, for any 12-calendar-month period, such powerplant’s design capacity multiplied by 3,500 hours.

Boiler means a closed vessel in which water is heated electrically or by the combustion of a fuel to produce steam of one percent or more quality.

Btu means British thermal unit.

Capability to use alternate fuel, for the purposes of Title II prohibitions relating to construction of new powerplants, means the powerplant to be constructed:

(1) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(2) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

Capability to use coal or another alternate fuel shall not be interpreted to require any such powerplant to be immediately able to use coal or another alternate fuel as its primary energy source on its initial day of operation. In addition, the owner or operator of a baseload powerplant need not have adequate on-site space for either a coal gasifier or any facilities for handling coal or related fuels.

Certification means a document, signed by an official of the owner or operator, notarized, and submitted to OFE, which declares that a new powerplant will have the “capability to use alternate fuel” (as defined herein).

Certifying powerplant means an existing powerplant whose owner or operator seeks to obtain a prohibition order against the use of natural gas or petroleum either totally or in a mixture with coal or an alternate fuel by filing a certification as to both the technical capability and financial feasibility of conversion to coal or another alternate fuel pursuant to section 301 of FUA, as amended.


Coal means anthracite, bituminous and sub-bituminous coal, lignite, and any fuel derivative thereof.

Cogeneration facility means an electric powerplant that produces:

(1) Electric power; and

(2) Any other form of useful energy (such as steam, gas or heat) that is, or will be used, for industrial, commercial, or space heating purposes. In addition, for purposes of this definition, electricity generated by the cogeneration facility must constitute more than five (5) percent and less than ninety (90) percent of the useful energy output of the facility.

Note—Any cogeneration facility selling or exchanging less than fifty percent (50%) of the facility’s generated electricity is considered an industrial cogenerator and is exempt from the fuel use prohibitions of FUA.

Combined cycle unit means an electric power generating unit that consists of a combination of one or more combustion turbine units and one or more steam turbine units with a substantial portion of the required energy input of the steam turbine unit(s) provided by the exhaust gas from the combustion turbine unit(s).

Substantial amounts of supplemental firing for a steam turbine or waste heat
boiler to improve thermal efficiency will not affect a unit’s classification as a combined cycle unit.

Combustion turbine means a unit that is a rotary engine driven by a gas under pressure that is created by the combustion of any fuel.

Commercial unmarketability as used in the definitions of “alternate fuel,” “natural gas” and “petroleum” shall be determined as follows:

(1) A waste by-product of industrial or refinery operations is commercially unmarketable by reason of:
   (i) Quality, where the cost of processing (limited to upgrading the waste by-product to commercial quality), storing, and distributing the waste by-product would not be covered by reasonably expected revenues from its sale;
   (ii) Quantity, where the cost of aggregating the waste by-product into commercial quantities through storing and distributing the waste by-product would not be covered by reasonably expected revenues from its sale;

(2) A fuel will not be classified as “natural gas” when it is commercially unmarketable by reason of:
   (i) Quality, where the cost of producing, upgrading to commercial quality, storing, and distributing the fuel would not be covered by reasonably expected revenues from its sale; or
   (ii) Quantity, where the quantities of the fuel are so small that the revenues to be reasonably expected from its sale would not cover the cost of its production, distribution or storage.

(3) Costs associated with upgrading, storing, distributing, and aggregating a by-product or other fuel (to determine if such fuel is natural gas) may properly include a reasonable rate of return on any capital investment required to overcome the problems posed by the quality or quantity of a fuel because the return on investment is a normal aspect of any investment decision. A firm may account for this reasonable rate of return by using its customary discount rate for an investment of similar risk.

(4) As part of any consideration of the rate of return on investment, the cost of replacing the Btu’s lost if the by-product or other fuel were upgraded and sold instead of used as a fuel may be taken into consideration. The actual expense that would result from burning a replacement fuel in lieu of the by-product or other fuel in question may therefore be considered. The costs associated with using a replacement fuel are indirect costs that result from upgrading and selling the fuel, instead of burning it. These indirect costs as well as the direct costs associated with the upgrading, storing, distributing, and aggregating of by-products or other fuel may be considered in any assessment of commercial unmarketability.

Conference means an informal meeting incident to any proceeding, between DOE and any interested person.

Construction means substantial physical activity at the unit site and includes more than clearance of a site or installation of foundation pilings.

Costs means total costs, both operating and capital, incurred over the estimated remaining useful life of an electric powerplant, discounted to the present, pursuant to rules established in parts 503 and 504 of these regulations.


Design capability defined in section 103(a)(7) of FUA, shall be determined as follows:

(1) Boiler and associated generator turbines. The design fuel heat input rate of a steam-electric generating unit (Btu/hr) shall be the product of the generator’s nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall boiler-turbine-generator unit design efficiency (decimal); or if the generator’s nameplate does not have a rating measured in kilowatts, the product of the generator’s kilovolt-amperes nameplate rating and the power factor nameplate rating; and 3412 (Btu/kWh), divided by the boiler turbine-generator unit’s design efficiency (decimal). (The number 3412 converts kilowatt-hours (absolute) into Btu’s (mean.).)

(2) Combustion turbine and associated generator. The design fuel heat input rate of a combustion turbine (Btu/hr) shall be the product of its nameplate rating, measured in kilowatts, and 3412
§ 500.2  10 CFR Ch. II (1–1–02 Edition)

(Btu/kWh), divided by the combustion turbine-generator unit’s design efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) at the unit’s elevation. (The number 3412 converts kilowatt-hours (absolute) into Btu’s (mean).)

(3) Combined cycle unit. The design fuel heat input rate of a combined cycle unit (Btu/hr) shall be the summation of the product of its generator’s nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall combustion turbine-generator unit’s efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) and at the unit’s elevation, plus the product of the maximum fuel heat input to any supplemental heat recovery steam generator/boiler in gallons or pounds per hour and the fuel’s heat content. If the generator’s nameplate does not have a rating measured in kilowatts, the product of the generator’s kilowatt-amperes nameplate rating and power factor nameplate rating must be substituted for kilowatts. (The number 3412 converts kilowatt-hours (absolute) into Btu’s (mean).)

Design capacity of a powerplant pursuant to section 103(a)(18) of FUA, is determined according to 18 CFR 287.101.

DOE or the Department means the United States Department of Energy, as defined in sections 201 and 301(a) of the DEOA, including the Secretary of Energy or his designee.

Duly authorized representative means a person who is authorized to appear before DOE in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. Such appearance may include the submission of applications, petitions, requests, statements, memoranda of law, other documents, or of a personal appearance, oral communication, or any other participation in a proceeding.

Electing powerplant means an existing powerplant, which (1) has been issued a proposed prohibition order under former section 301 (b) or (c) of FUA prior to August 13, 1981, the date of enactment of the Omnibus Budget Reconciliation Act of 1981, Public Law 97–35 (OBRA); and (2) files an election to continue the current prohibition order proceeding under provisions of the former section 301 of FUA, rather than under amended section 301 of FUA. Under the election provisions, an existing powerplant which has an order pending against it under section 2 of the Energy Supply and Environmental Coordination Act of 1974, as amended, 15 U.S.C. 791 et seq. (ESECA), as of August 13, 1981, may also elect to continue the current proceeding under section 2 of ESECA. Electing powerplants under ESECA are not included in the FUA definition of “electing powerplant”. Relevant regulations governing ESECA proceedings are found at 10 CFR part 303 and 305. These elections must have been filed with DOE by November 30, 1981 in the case of FUA orders and by January 14, 1982 in the case of ESECA orders.

Electric generating unit does not include:

(1) Any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission (NRC); and
(2) Any cogeneration facility from which less than 50 percent of the net annual electric power generation is sold or exchanged for resale. Excluded from ‘sold or exchanged for resale’ are sales or exchanges to or with an electric utility for resale by the utility to the cogenerating supplier, and sales or exchanges among owners of the cogeneration facility.

Note: For purposes of subparagraph (1) of this definition, OFE will not consider any unit located at a site subject to NRC’s licensing authority to be jurisdictional for purposes of FUA.

Electric powerplant means any stationary electric generating unit consisting of (a) a boiler, (b) a gas turbine, or (c) a combined cycle unit which employs a generator to produce electric power for purposes of sale or exchange and has the design capability consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu’s per hour or greater. In accordance with section 103(a)(7)(C) of FUA, the Secretary has determined that it is

1The election provisions are published at 46 FR 48118 (October 1, 1981) and will not be codified in the Code of Federal Regulations.
appropriate to exclude from this definition any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu’s per hour.

Electric Region is as defined in §500.3 of this part.

Electric utility means any person, including any affiliate, or Federal agency, which sells electric power.

Emission offset means emission reductions as defined by EPA’s regulations set forth at 40 CFR part 51, appendix S. EPA means the United States Environmental Protection Agency.


Existing powerplant means any powerplant other than a new powerplant.

Federal Water Pollution Control Act means the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., as amended.

FERC means the Federal Energy Regulatory Commission.

Firm means a parent company and the consolidated or unconsolidated entities (if any) that it directly or indirectly controls.

Fluidized bed combustion means combustion of fuel in connection with a bed of inert material, such as limestone or dolomite, that is held in a fluid-like state by the means of air or other gases being passed through such materials.

FTC means the Federal Trade Commission.


Fuel Use Act means FUA.

Fuel use order means a directive issued by OFE pursuant to §501.167 of these regulations.

Gas turbine means “combustion turbine”.

High-priority user, for purposes of subsection 312(j) of FUA, means any residential user of natural gas, or any commercial user whose consumption of natural gas on peak day is less than 50 MCF.

Internal combustion engine means a heat engine in which the combustion that generates the heat takes place inside the engine proper.

Interpretation means a written statement issued by the DOE General Counsel or his delegate, in response to a written request, that applies the regulations, rulings, and other precedents previously issued by the DOE to the particular facts of a prospective or completed act or transaction.

Mcf means 1,000 cubic feet of natural gas.

Mixture, when used in relation to fuels used in a unit, means a mixture of petroleum or natural gas and an alternate fuel, or a combination of such fuels, used simultaneously or alternately in such unit.

Natural gas means any fuel consisting in whole or in part of natural gas, including components of natural gas such as methane and ethane; liquid petroleum gas; synthetic gas derived from petroleum or natural gas liquids; or any mixture of natural gas and synthetic gas. Natural gas does not include:

1. Gaseous waste by-products or waste gas specifically designated as an alternate fuel in §500.2 of these regulations;

2. Natural gas which is commercially unmarketable, as defined in these rules;

3. Natural gas produced by the user from a well, the maximum efficient production rate of which is less than 250 million Btu’s per day. For purposes of paragraph (3) of this definition:

   (i) Produced by the user means:

   (A) All gas produced by the well, when such gas is delivered for use in the user’s facility through a gas delivery, gathering, or transportation system which could not deliver such gas to any other user; or

   (B) Only that amount which represents the user’s net working (mineral) interest in the gas produced from such well, where such gas is delivered for use in the user’s facility through a gas delivery, gathering, or transportation system which could deliver such gas to any other user.

   (ii) Maximum efficient production rate (MEPR) means that rate at which production of natural gas may be sustained without damage to the reservoir or the rate which may be sustained without damage to the ultimate recovery of oil or gas through the well.
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(4) Occluded methane in coal seams within the meaning of section 107(c)(3) of the Natural Gas Policy Act of 1978 (NGPA);

(5) The following gas from wells spudded prior to January 1, 1990:
   (i) Gas produced from geopressurized brine, within the meaning of section 107(c)(2) of the NGPA;
   (ii) Gas produced from Devonian shale, within the meaning of section 107(c)(4) of the NGPA;
   (iii) Gas produced from tight sands, as designated by the FERC in accordance with section 107(c)(5) of the NGPA; and
   (iv) Other gases designated by FERC as "high-cost natural gas" in accordance with section 107(c)(5) of the NGPA, except as specifically designated as "natural gas" by OFE;

(6)(i) Synthetic gas derived from coal or other alternate fuel, the heat content of which is less than 600 Btu’s per cubic foot at 14.73 pounds per square inch (absolute) and 60°F; and
   (ii) Commingled natural gas and synthetic gas derived from coal consumed as part of the necessary process of a major fuel burning installation used in the iron and steel industry, so long as the average annual Btu heat content of the commingled stream as consumed within a major fuel burning installation does not exceed 600 Btu’s per cubic foot at 14.73 pounds per square inch (absolute) and 60°F;

(7) Mixtures of natural gas and synthetic gas derived from alternate fuels for which the person proposing to use the gas certifies to OFE that:
   (i) He owns, or is entitled to receive at the point of manufacture, synthetic gas derived from alternate fuels;
   (ii) He delivers, or arranges for the delivery of such synthetic gas to a pipeline which by transport or displacement is capable of delivering such synthetic gas, mixed with natural gas, to facilities owned by the user;
   (iii) The total annual Btu content of the synthetic gas delivered to a pipeline is equal to or greater than the total annual Btu content of the natural gas delivered to the facilities owned by the user, plus the approximate total annual Btu content of any natural gas consumed or lost in transportation; and
   (iv) All necessary permits, licenses, or approvals from appropriate Federal, State, and local agencies (including Indian tribes) have been obtained for construction and operation of the facilities for the manufacture of the synthetic gas involved, except that for purposes of the prohibition under section 301(2) of FUA against powerplants being constructed without the capability of using coal or another alternate fuel, only permits, licenses, and approvals for the construction of such synthetic gas facilities shall be required under this subparagraph, to be certified and documented; and

(8) A mixture of natural gas and an alternate fuel when such mixture is deliberately created for purposes of (i) complying with a prohibition order issued pursuant to section 301(c) of the Act, or (ii) qualifying for a fuel mixtures exemption under the Act, provided such exemption is granted.


New electric powerplant means any electric powerplant: (1) That was not classified as existing under part 515 of this subchapter; (2) That was reconstructed, as defined in these rules under the definition of "reconstruction"; or (3) For which construction was begun after November 9, 1978.


Nonboiler means any powerplant which is not a boiler and consists of either a combustion turbine unit or combined cycle unit.

Notice of violation means a written statement issued to a person by DOE that states one or more alleged violations of the provisions of these regulations, any order issued pursuant thereto, or the Act.


OFE means the Office of Fossil Energy of OFE.

Offset means "emission offset".

Order means a final disposition, other than the issuance of a rule, issued by DOE pursuant to these regulations or the Act.

Person means any:
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(1) Individual, corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company;

(2) Any State; or

(3) Any Federal, State, or local agency or instrumentality (including any municipality) thereof.

Petroleum means crude oil and products derived from crude oil, other than:

(1) Petroleum products specifically designated as alternate fuels pursuant to these regulations;

(2) Synthetic gas derived from crude oil;

(3) Liquid petroleum gas;

(4) Petroleum coke or waste gases from industrial operations; and

(5) A liquid, solid, or gaseous waste by-product of refinery operations which is commercially unmarketable under the definition of "commercial unmarketability" in these rules.

NOTE: For the purposes of this subparagraph, waste by-products do not include components (such as butane and propane) that can be extracted from the waste by-product by reasonable further processing of the waste by-product at the refinery, nor do they include final products that use the waste by-product as a blend stock at the refinery.

Petition means a formal request for any action including an exemption submitted to DOE under these regulations.

Powerplant means "electric powerplant."

Product or process requirements means that product or process for which the use of an alternate fuel is not technically feasible due to the necessity to maintain satisfactory control of product quality and for which the substitution of steam is not technically feasible due to process requirements.

Primary energy source means the fuel or fuels used by any existing or new electric powerplant except:

(1) Minimum amounts of fuel required for unit ignition, startup, testing, flame stabilization, and control uses. OFE has determined that, unless need for a greater amount is demonstrated, twenty-five (25) percent of the total annual Btu heat input of a unit shall be automatically excluded under this paragraph.

(2) Minimum amounts of fuel required to alleviate or prevent:

(i) Unanticipated equipment outages as defined in §501.191 of these regulations; and

(ii) Emergencies directly affecting the public health, safety, or welfare that would result from electric power outages as defined in §501.191 of these regulations.

NOTE: (1) Any fuel excluded under the provisions of paragraph (1) of this definition is in addition to any fuel authorized to be used in any order granting a fuel mixtures exemption under parts 503 and 504 of these rules. The exclusion of fuel under paragraph (1), together with the authority for such additive treatment, shall apply to any jurisdictional facility, regardless of whether or not it had received an order granting an exemption as of the date these rules are promulgated.

(2) If an auxiliary unit to an electric powerplant consumes fuel only for the auxiliary functions of unit ignition, startup, testing, flame stabilization, and other control uses, its use of minimum amounts of natural gas or petroleum is not prohibited by FUA. The measurement of such minimum amounts of fuel is discussed in Associated Electric Cooperative, et al., Interpretation 1980–42 [45 FR 82572, Dec. 15, 1980].

Prohibition order means:

(1) An order issued pursuant to section 301(b) of the Act that prohibits a powerplant from burning natural gas or petroleum as its primary energy source; or

(2) An order issued pursuant to section 301(c) of the Act that prohibits excessive use of natural gas or petroleum in mixtures burned by a powerplant as its primary energy source.

Rated capacity for the purpose of determining reduction in the rated capacity of an existing powerplant, means design capacity, or, at the election of the facility owner or operator, the actual maximum sustained energy output per unit of time that could be produced, measured in power output, expressed in kilowatts, per unit of time.

Reconstruction means the following:

(1) Except as provided in paragraph (2) of this definition, reconstruction shall be found to have taken place whenever the capital expenditures for refurbishment or modification of an electric powerplant on a cumulative basis for the current calendar year and
§ 500.3 Electric regions—electric region groupings for reliability measurements under the Powerplant and Industrial Fuel Use Act of 1978.

(a) The following is a list of electric regions for use with regard to the Act. The regions are identified by FERC Power Supply Areas (PSA’s) as authorized by section 202(a) of the Federal Power Act except where noted. They will be reviewed annually by ERA.

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Each grouping meets one or more of the following criteria:

(1) Existing centrally dispatched pools and hourly power brokers;
(2) Systems with joint planning and construction agreements;
(3) Systems with coordination agreements in the areas of:
   (i) Generation reserve and system reliability criteria;
   (ii) Capacity and energy exchange policies;
   (iii) Maintenance scheduling; and
   (iv) Emergency procedures for dealing with capacity or fuel shortages; or
(4) Systems within the same National Electric Reliability Council (NERC) region with historical coordination policies.

(b) The PSA’s referred to in the definition of electric regions in paragraph (a) of this section were first defined by the Federal Power Commission in 1936. The most recent reference to them is given in the 1970 National Power Survey, Vol. 1, Pg. 1–3–16. In cases where a petitioner finds an ambiguity in a regional assignment, he shall consult with DOE for an official determination.

Electric Region Groupings and FERC PSA’s:

3. New England Planning Pool (NEPOOL)—1, 2.
7. Florida Coordination Group (FCG)—24.
8. Middle South Utilities—25.
11. Tennessee Valley Authority (TVA)—20.
16. Indiana Group—Indiana Utilities except AEP.
17. Illinois—Missouri Group (ILLMO)—15, 40.
20. Mid-Continent Area Power Pool (MAAP)—16, 17, 26, 27, 28.
22. Oklahoma Group—33, 36.
24. Rocky Mountain Power Pool (RMPP)—31, 32.
27. Southern California—Nevada—47, 48.
29. Alaska (non-interconnected systems to be considered separately)—49.
30. Idaho—Utah Group—41.

**PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS**

**Subpart A—General Provisions**

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501.1 Purpose and scope.
501.2 Prepetition conference.
501.3 Petitions.
501.4–501.5 [Reserved]
501.6 Service.
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501.9 Effective date of orders or rules.
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**Subpart B [Reserved]**

**Subpart C—Written Comments, Public Hearings and Conferences During Administrative Proceedings**

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501.31 Written comments.
501.32 Conferences (other than prepetition conferences).
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**Subpart D—Subpoenas, Special Report Orders, Oaths and Witnesses**

501.40 Issuance.

**Subpart E—Prohibition Rules and Orders**

501.50 Policy.
§ 501.1 Purpose and scope.

501.1 Purpose and scope.

501.2 Prepetition conference.

(a) Owners and operators of powerplants may request a prepetition conference with OFE for the purpose of discussing the applicability of 10 CFR parts 503 and 504 to their situations and the scope of any exemption or other petition that OFE would accept as adequate for filing purposes.

(b) The owner or operator who requests a prepetition conference may personally represent himself or may designate a representative to appear on his behalf. A prepetition conference or a request for a prepetition conference does not commence a proceeding before OFE.

(c) If OFE agrees to waive any filing requirements under §501.3(d), a memorandum of record stating this fact will...
be furnished to the potential petitioner within thirty (30) days after the conference. Copies of all applicable memoranda of record must be attached to any subsequently-filed petition.

(d) A record of all prepetition conferences will be included in the public file. OFE may provide for the taking of a formal transcript of the conference and the transcript will be included in the public file.

§ 501.7 General filing requirements.

Except as indicated otherwise, all documents required or permitted to be filed with OFE or DOE in connection with a proceeding under parts 503 and 504 shall be filed in accordance with the following provisions:

(a) Filing of documents. (1) Documents including, but not limited to, applications, requests, complaints, petitions (including petitions for exemption), and other documents submitted in connection therewith, filed with OFE are considered to be filed upon receipt.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, an application for modification or rescission in accordance with subpart G of this chapter, a reply to a notice of violation, a response to a denial of a claim of confidentiality, or a comment submitted in connection with any proceeding transmitted by registered or certified mail and addressed to the appropriate office is considered to be filed upon mailing.

(b) Timeliness. Documents are to be filed with the appropriate DOE or OFE office listed in § 501.11. Documents that
are to be considered filed upon receipt under paragraph (a)(1) of this section and that are received after regular business hours are deemed filed on the next regular business day. Regular business hours are 8 a.m. to 4:30 p.m.

(4) Computation of time. In computing any period of time prescribed or allowed by FUA, these regulations or by an order, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or Federal legal holiday in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a Federal legal holiday.

(5) Additional time after service by mail. Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time and the order, notice, interpretation or other document is served by mail, three (3) days shall be added to the prescribed period.

(6) Extension of time. When a document is required to be filed within a prescribed time, an extension of time to file may be granted upon good cause shown.

(7) Signing. All applications, petitions, requests, comments, and other documents that are required to be signed, shall be signed by the person filing the document or a duly authorized representative. Any application, petition, request, complaint, or other document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless an OFE form otherwise requires. (A false certification is unlawful under the provisions of 18 U.S.C. 1001 (1970).)

(8) Labeling. An application, petition, or other request for action by DOE or OFE should be clearly labeled according to the nature of the action involved, e.g., “Petition for Temporary Exemption;” “Petition for Extension (or Renewal) of Temporary Exemption,” both on the document and on the outside of the envelope in which the document is transmitted.

(9) Obligation to supply information. A person who files an application, petition, complaint, or other request for action is under a continuing obligation during the proceeding to provide DOE or OFE with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, complaint, or request for action that is subsequently filed by that person with any DOE office or OFE office.

(10) The same or related matters. In filing a petition or other document requesting OFE action, the person must state whether, to the best of his knowledge, the same or a related issue, act or transaction has been or presently is being considered or investigated by a DOE office, other Federal agency, department or instrumentality, or a State or municipal agency.

(11) Request for confidential treatment. (i) If any person filing a document with DOE or OFE claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552); is information referred to in 18 U.S.C. 1905; or is otherwise exempt by law from public disclosure, and if such person requests DOE or OFE not to disclose such information, such person shall make a filing in accordance with paragraph (b)(2) of this section. The person shall indicate in the original document that it is confidential or contains confidential information and may file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If a document is not so filed, OFE may assume that there is no objection to public disclosure of the document in its entirety, unless the person subsequently files a claim of confidentiality prior to public disclosure of the document.

(ii) DOE or OFE retains the right to make its own determination with regard to any claim of confidentiality.
§ 501.14 Notice to Environmental Protection Agency.

A copy of any proposed rule or order that imposes a prohibition, order that imposes a prohibition, or a petition for an exemption or permit, shall be transmitted for comments, if any, to the Administrator and the appropriate Regional Administrator of the Environmental Protection Agency (EPA). The Administrator of EPA shall be given the same opportunity to comment and question as is given other interested persons.

[54 FR 52891, Dec. 22, 1989]
§ 501.30 Purpose and scope.

This subpart establishes the procedures for requests for and the conduct of public hearings; for submission of written comments; and for requests for and conduct of conferences pursuant to an administrative proceeding before OFE. Hearings shall be convened at the request of any interested person, in accordance with section 701(d) of FUA, and shall be held at a time and place to be decided by the Presiding Officer.

§ 501.31 Written comments.

(a) New facilities. Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least forty-five (45) days, commencing with publication of the Notice of Acceptance of Petition, of in the case of certification exemptions, Notice of Acceptance and availability of Certification, in the FEDERAL REGISTER in accordance with § 501.63(a), for submission of written comments concerning a petition for an exemption. Written comments shall be made in accordance with § 501.7.

(b) Existing facilities. Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least 45 days for submission of written comments concerning a proposed prohibition rule or order or a petition for a permit. In the case of a proposed prohibition rule or order issued to an existing electing powerplant, OFE shall also provide for a period of at least 45 days for submission of written comments concerning a Tentative Staff Analysis. This period shall commence on the day after publication of the Notice of Availability of the Tentative Staff Analysis in the FEDERAL REGISTER. In the case of prohibition order proceedings for certifying powerplants under section 301 of FUA, as amended, OFE shall provide a period of at least 45 days, beginning the day after the Notice of Acceptance of certification is published, for submission of written comments concerning the certification and OFE’s proposed prohibition order, and requests for public hearings. Prohibition order proceedings under section 301, as amended by OBRA, will have only one period of 45 days, since no Tentative Staff Analysis will be prepared. The comment period may be extended by OFE in accordance with § 501.7. See § 501.52(b) of this part for further information with respect to the comment period. Written comments shall be filed in accordance with § 501.7.

§ 501.32 Conferences (other than prepetition conferences).

(a) At any time following commencement of a proceeding before OFE, an interested person may request a conference with the staff of OFE to discuss a petition, permit or any other issue pending before OFE. The request for a conference should generally be in writing and should indicate the subjects to be covered and should describe the requester’s interest in the proceeding. Conferences held after the commencement of an administrative proceeding before OFE shall be convened at the discretion of OFE or the Presiding Officer.

(b) When OFE convenes a conference in accordance with this section, any person invited may present views as to the issue or issues involved. Documentary evidence may be submitted at the conference and such evidence, to the extent that it is not deemed to be confidential, will be included in the administrative record. OFE will not normally have a transcript of the conference prepared but may do so at its discretion.

(c) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal report or findings by OFE unless OFE in its discretion determines that the preparation of a report or findings would be
advisable. OFE will, however, place in the public file a record of any conference.

§ 501.33 Request for a public hearing.

(a) New facilities. In the case of a petition for an exemption under title II of FUA, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA no later than forty-five (45) days after publication of either the Notice of Acceptance of a petition, or in the case of a certification exemption, the publication of the Notice of Acceptance of Certification. This time period may be extended at the discretion of OFE.

(b) Existing powerplants. In the case of a petition for an exemption from a prohibition imposed by a final rule or order issued by OFE to an electing powerplant under former sections of title III of FUA or a petition for a permit under § 504.1, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA within 45 days after the notice of the filing of a petition is published in the Federal Register. In the case of a proposed prohibition rule or order issued to an electing powerplant under former section 301, the 45 day period in which to request a public hearing shall commence upon the publication of the Notice of Availability of the Tentative Staff Analysis. In the case of a proposed prohibition rule or order issued to certifying powerplants under section 301 of FUA, as amended, the 45 day period in which to request a public hearing shall commence upon publication of the Notice of Acceptance of Certification. This time limit may be extended at the discretion of OFE in accordance with § 501.7.

(c) Contents of request. A request for a public hearing must be in writing and must include a description of the requesting party’s interest in the proceeding and a statement of the issues involved. The request should, to the extent possible, identify any witnesses that are to be called, summarize the anticipated testimony to be given at the hearing, and outline questions that are to be posed.


§ 501.34 Public hearing.

(a) A public hearing under this subsection is for the purpose of insuring that all issues are fully and properly developed, but is not a formal adjudicatory hearing subject to the provisions of 5 U.S.C. 554 and 556.

(b) Opportunity to be heard at a public hearing. (1) Any interested person, may request, and OFE will provide, an opportunity to present oral or written data, views and arguments at a public hearing on any proposed prohibition rule or order, or on any petition for an exemption or permit. An interested person may file a request to be listed as a party to a hearing on the service list prepared by the Presiding Officer pursuant to § 501.34(d) of this part.

(2) Participants at the public hearing will have an opportunity to present oral or written data, views and arguments.

(3) A request for a public hearing may be withdrawn by the requestor at any time. If other persons have requested to participate as parties in the public hearing, OFE may cancel the hearing only if all parties agree to cancellation. OFE will give notice, whenever possible, in the Federal Register of the cancellation of any hearings for which there has been prior notice.

(c) Presiding Officer. OFE will appoint a Presiding Officer to conduct the public hearing.

(d) Powers of the Presiding Officer. The Presiding Officer is responsible for orderly conduct of the hearing and for certification of the record of the public hearing. The Presiding Officer will not prepare any recommended findings, conclusions, or any other recommendations for disposition of a particular
§ 501.34

The Presiding Officer has, but is not limited to the following powers:

(1) Administer oaths, affirmations and protective orders;
(2) Issue administrative subpoenas and rule on motions to modify or withdraw subpoenas that he has issued;
(3) Rule on questions as to relevance and materiality of evidence;
(4) Regulate the course of the public hearing;
(5) Hold conferences for the simplification of issues by consent of the parties;
(6) Require submission of evidence in writing where appropriate;
(7) Establish service lists;
(8) Dispose of procedural requests and similar matters; and
(9) Take other actions authorized by these rules.

The Presiding Officer may also limit the number of witnesses to be presented by any party and may impose reasonable time limits for testimony. The Presiding Officer shall establish and maintain a service list that contains the names and addresses of all parties to the OFE proceeding. At the time the Presiding Officer certifies the record, he will provide the staff of OFE with an index of the issues addressed in the record.

(e) Notice. OFE will convene a public hearing only after publishing a notice in the FEDERAL REGISTER that states the time, place and nature of the public hearing.

(f) Opportunity to question at the public hearing. At any public hearing requested pursuant to paragraph (b) of this section, with respect to disputed issues of material fact, OFE will provide any interested person an opportunity to question:

(1) Other interested persons who make oral presentations;
(2) Employees and contractors of the United States who have made written or oral presentations or who have participated in the development of the proposed rule or order or in the consideration of the petition for an exemption or permit; and
(3) Experts and consultants who have provided information to any person who makes an oral presentation and which is contained in or referred to in such presentation.

(g) OFE encourages persons who wish to question Government witnesses to submit their questions at least ten (10) days in advance of the hearing.

(h) The Presiding Officer will allow questions by any interested person to be asked of those making presentations or submitting information, data, analyses or views at the hearing. The Presiding Officer may restrict questioning if he determines that such questioning is duplicative or is not likely to result in a timely and effective resolution of issues pending in the administrative proceeding for which the hearing is being conducted.

(i) The Presiding Officer or OFE may exercise discretion to control a hearing by denying, temporarily or permanently, the privilege of participating in a particular OFE hearing if OFE finds, for example, that a person:

(1) Has knowingly made false or misleading statements, either orally or in writing;
(2) Has knowingly filed false affidavits or other writings;
(3) Lacks the specific authority to represent the person seeking an OFE action; or
(4) Has disrupted or is disrupting a hearing.

(j) Evidence. (1) The Presiding Officer is responsible for orderly submission of information, data, materials, views or other evidence into the record of the public hearing. The Presiding Officer may exclude any evidence that is irrelevant, immaterial or unduly repetitious. Judicial rules of evidence do not apply.

(2) Documentary material must be of a size consistent with ease of handling, transportation and filing, and a reasonable number of copies should be made available at the public hearing for the use of interested persons. An original and fourteen (14) copies shall be furnished to the Presiding Officer and one copy to each party listed on the service list. Large exhibits that are used during the hearing must be provided on no larger than 11½"×14" legal size paper if they are to be submitted into the hearing record.

(k) Hearing record. OFE will have a verbatim transcript made of the public
The hearing record shall remain open for a period of fourteen (14) days following the public hearing, unless extended by OFE, during which time the participants at the hearing may submit additional written statements which will be made part of the administrative record and will be served by the Presiding Officer upon those parties listed on the service list. OFE may also request additional information, data or analysis following the hearing in order to resolve disputed issues in the record. If OFE receives or obtains any relevant information or evidence that is placed in the record after the close of the public hearing or comment period, it will so notify all participants, and allow an additional fourteen (14) days for submission of evidence in rebuttal. In addition, OFE may, in its discretion, re-open the hearing at the request of a party or participant, to permit further rebuttal of evidence or statements submitted to OFE and made part of the hearing record after the close of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, will be made part of the record available for public inspection and copying at the OFE Public Information Office, as provided in §501.12.

### §501.35 Public file.

(a) **Contents.** The public file shall consist of the rule, order, or petition, with supporting data and supplemental information, and all data and information submitted by interested persons. Materials which are claimed by any party to be exempt from public disclosure under the Freedom of Information Act (5 U.S.C. 552) shall be excised from the public file provided OFE has made a determination that the material is confidential in accordance with §501.7(a)(11) of this part.

(b) **Availability.** The public file shall be available for inspection at room 1E190, 1000 Independence Avenue SW., Washington, DC. Photocopies may be made available, on request. The charge for such copies shall be made in accordance with a written schedule.

with the applicable procedural and substantive requirements of law.


[47 FR 50848, Nov. 10, 1982]

§ 501.51 Prohibitions by order—electing powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with reasonable fuel efficiency in an electing powerplant, if:

(1) That facility has not been identified as a member of a category subject to a final rule at the time of the issuance of such order; and

(2) The requirements of §504.6 have been met.

(b) Notice of order and public participation. (1) OFE may hold a conference with the proposed order recipient prior to issuing the proposed order.

(2) Pursuant to section 701 of FUA, prior to the issuance of a final order to an electing powerplant, OFE shall publish a proposed order in the FEDERAL REGISTER together with a statement of the reasons for the order. In the case of a proposed order that would prohibit the use of petroleum or natural gas as a primary energy source, the finding required by former section 301(b)(1) of the Act shall be published with such proposed order.

(3) OFE shall provide a period for the submission of written comments of at least three months after the date of the proposed order. During this period, the recipient of the proposed order and any other interested person must submit any evidence that they have determined at that time to support their respective positions as to each of the findings that OFE is required to make under section 301(b) of the Act. A proposed order recipient may submit additional new evidence at any time prior to the close of the public comment period which follows publication of the Tentative Staff Analysis or prior to the close of the record of any public hearing, whichever occurs later. A request by the proposed order recipient for an extension of the three-month period may be granted at OFE’s discretion.

(4) Subsequent to the end of the comment period, OFE will issue a notice of whether OFE intends to proceed with the prohibition order proceeding.

(5) An owner or operator of a facility that may be subject to an order may demonstrate prior to issuance of a final prohibition order that the facility would qualify for an exemption if the prohibition had been established by rule. OFE will not delay the issuance of a final prohibition order or stay the effective date of such an order for the purpose of determining whether a proposed order recipient qualifies for a particular exemption unless the demonstration or qualification is submitted prior to or during the second three-month comment period, commencing after issuance of a notice of intention to proceed, or unless materials submitted after the period (i) could not have been submitted during the period through the exercise of due diligence, (ii) address material changes in fact or law occurring after the close of the period, or (iii) consist of amplification or rebuttal occasioned by the subsequent course of the proceeding. A request by the proposed order recipient for an extension of this time period may be granted at OFE’s discretion.

(6) Subsequent to the end of the second three (3) month period, OFE will, if it intends to issue a final prohibition order, prepare and issue a Notice of Availability of a Tentative Staff Analysis. Interested persons wishing a hearing must request a hearing within forty-five (45) day after issuance of the Notice of Availability of the Tentative Staff Analysis. During this forty-five (45) days period, interested persons may also submit written comments on the Tentative Staff Analysis.

(7) If a hearing has been requested, OFE shall provide interested persons with an opportunity to present oral data, views and arguments at a public hearing held in accordance with subpart C of this part. The hearing will consider the findings which OFE must make in order to issue a final prohibition order and any exemption for which the proposed order recipient submitted
§ 501.52 Prohibitions by order—certifying powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency in an existing powerplant if the owner or operator of the powerplant certifies, and OFE concurs in such certification in accordance with the requirements of §§504.5, 504.6 and 504.8.

(b) Notice of order and participation. (1) OFE may hold a conference with the
proposed order recipient, at the recipient’s election, prior to issuing the proposed order. The conference may resolve any questions regarding the certification required by section 301 of the Act, as amended, and §§504.5, 504.6, and 504.8, and OFE’s review and concur-
rence therein.

(2) Pursuant to section 701(b) of FUA, prior to the issuance of a final order to a certifying powerplant owner or operator, OFE must publish in the Federal Register, a proposed prohibition order stating the reasons for such order. OFE will review all of the information submitted by a proposed order recipient within 60 days after receipt by OFE. If the certification is complete, OFE will, within 30 days after the end of the 60 day review period, publish in the Federal Register a Notice of Acceptance of certification together with a proposed prohibition order stating therein the reasons for such order. This commences the prohibition order proceeding. If OFE does not believe it is able to concur in the certification, OFE shall notify the proposed order recipient and shall publish a Notice of Proposed Non-Concurrence in the Federal Register within 30 days after the end of the 60 day review period. If OFE finds that the certification with compliance schedule is incomplete, OFE will notify the proposed prohibition order recipient as to the deficiencies, and provide an additional period of 30 days for the certification to be amended and resubmitted. If a complete certification is not submitted within this period, the proceeding shall be terminated in accordance with §501.52(b)(5). OFE will notify the proposed order recipient and other parties to the proceeding of the termination and publish a notice in the Federal Register. OFE, on its own motion, may extend any period of time by publishing a notice to that effect in the Federal Register.

(3) The publication of the Notice of Acceptance or Notice of Proposed Non-Concurrence commences a period of 45 days during which interested persons may submit written comments or request a public hearing. During this period, the recipient of the proposed order and any other interested person may submit any evidence that they have available relating to the proposed order, the certification or the concurrence that OFE must make. A proposed order recipient may submit additional new evidence at any time prior to the close of the public comment period which follows the commencement of the proceeding or prior to the close of the record of any public hearing, whichever occurs later. A request for an extension of the 45 day period may be granted at OFE’s discretion. In the case of a Notice of Acceptance, as set forth in §504.9, no final prohibition order can be issued until any necessary environmental review pursuant to the National Environmental Policy Act of 1969, 42 U.S.C 4321 et seq. (NEPA) has been completed. Upon completion of the NEPA review and unless OFE determines on the basis of the record of the proceeding that the certification fails to meet the requirements of §§504.5, 504.6, and 504.8, OFE shall publish a final prohibition order, together with the information required by paragraph (c) of this section. In the case of a Notice of Proposed Non-Concurrence, at the end of the 45 day comment period, OFE will notify the proposed order recipient and parties to the proceeding and publish a final Notice of Non-Concurrence in the Federal Register, if OFE determines it cannot concur in the certification based upon additional information submitted during the proceeding. If, at the end of the 45 day period, OFE believes it can concur in the certification, OFE will notify the proposed order recipient and parties to the proceeding and publish a Notice of Acceptance followed by a new 45 day comment period.

(4) If a hearing has been requested, OFE shall provide interested persons with an opportunity to present oral data, views and arguments at a public hearing held in accordance with subpart C of this part. The hearing may consider, among other matters, the sufficiency of the certification of the owner or operator of the powerplant required by section 301 of FUA, as amended, and §§504.5, 504.6, and 504.8 of these regulations.

(5) OFE may terminate a prohibition order proceeding at any time prior to the date upon which a final prohibition order is issued whenever OFE believes,
from any information contained in the record of the proceeding, that the certification does not meet the requirements of section 301 of the Act, as amended, or §§504.5, 504.6, and 504.8 of these regulations. If OFE terminates the proceeding or publishes a final Notice of Non-Concurrence, or the proposed order recipient fails to submit a complete certification, OFE will notify the proposed order recipient and other parties to the proceeding and publish a notice in the FEDERAL REGISTER. In such event, the proposed order recipient may submit a new certification under any provision of section 301 of the Act, as amended, at a later date. Specifically, a Notice of Non-Concurrence under either section 301(b) or 301(c) shall not affect a proposed order recipient’s ability to make a certification under the other subsection.

(c) Record and decision to issue a final order. (1) OFE will base its determination to issue an order on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

(2) OFE shall include in the final order a written statement of the basis upon which the final order is issued, and its concurrence in the required certification. A copy of the final order and a summary of the basis therefor will be published in the FEDERAL REGISTER. While the prohibition order is final for purposes of judicial review under section 702 of FUA, the prohibitions contained in the final order shall not become effective for purposes of amendment under section 301(d) of FUA, as amended, and §501.52(d) of these regulations until the effective date of the prohibitions stated in the order, or, where the order is subject to one or more conditions subsequent listed in the prohibition order compliance schedule, until all its conditions are met.

(d) Amendment to certifications under §§504.5 and 504.6. The proposed prohibition order recipient may amend its compliance schedule under §504.5(d), or its certification under section 301 of FUA, as amended, and §§504.5, 504.6 and 504.8 of these regulations in order to take into account changes in relevant facts and circumstances at any time prior to the effective date of the prohibitions contained in the final prohibition order.

(e) Rescission of prohibition orders. The rescission or modification of final prohibition orders issued to existing electric powerplants will be governed by the procedures in §501.101 of these regulations.

(Approved by the Office of Management and Budget under control number 1903–0077)


[47 FR 17042, Apr. 21, 1982]

§§501.53–501.56 [Reserved]

Subpart F—Exemptions and Certifications

§ 501.60 Purpose and scope.

(a) (1) If the owner or operator plans to construct a new baseload powerplant and the unit will not be in compliance with the prohibition contained in section 201(a) of FUA, this subpart establishes the procedures for filing a petition requesting a temporary or permanent exemption under, respectively, sections 211 and 212 of FUA.

(2) Self-certification alternative. If the owner or operator plans to construct a new baseload powerplant not in compliance with the prohibitions contained in section 201(a) of FUA, this subpart establishes the procedures for the filing of a self-certification under section 211 of FUA.

(3) If the petitioner owns, operates or controls a new powerplant, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under sections 211 or 311 of FUA.

(4) If the petitioner owns, operates or controls a new or existing powerplant or MFBI, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under section 211 or section 311 of FUA.
§ 501.61 Certification contents.

(a) A self-certification filed under section 201(d) of FUA should include the following information:

(1) Owner’s name and address.
(2) Operator’s name and address.
(3) Plant location and address.
(4) Plant configuration (combined cycle, simple cycle, topping cycle, etc.)
(5) Design capacity in megawatts (MW).
(6) Fuel(s) to be used by the new facility.
(7) Name of utility purchasing electricity from the proposed facility and percent of total output to be sold.
(8) Date unit is expected to be placed in service.
(9) Certification by an officer of the company or his designated representative certifying that the proposed facility:

(i) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(ii) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

(b) A self-certification filed pursuant to §501.61(a) shall be effective to establish compliance with the requirement of section 201(a) of FUA as of the date filed.

c. OFE will publish a notice in the Federal Register within fifteen days reciting that the certification has been filed. Publication of this notice does not serve to commence a public comment period.

d. OFE will notify the owner or operator within 60 days if supporting documentation is needed to verify the certification.

§ 501.62 Petition contents.

(a) A petition for exemption should include the following information:

(1) The name of the petitioner;
(2) The name and location of the unit for which an exemption is being requested;
(3) The specific exemption(s) being requested; and

(4) The name, address, and telephone number of the person who can supply further information.

(b) Table of contents. Include only those sections contained in the petition.

c. Introduction. Include the following:

(1) Description of the facility under consideration;
(2) Description of the unit and fuel the petitioner proposes to burn in that unit, including the purpose of and need for the unit; and

(3) Description of the operational requirements for the unit, including size (capacity, input and output in millions of Btu’s per hour), output in terms of product or service to be supplied, fuel capability, and operating mode, including capacity factor, utilization factor, and fluctuations in the load.

d. General requirements. The evidence required under part 503 subpart B for each exemption(s) for which the petitioner is applying:

(1) No alternate power supply (§503.8);
(2) Use of mixtures (§503.9);
(3) Alternative site (§503.11);
(4) Compliance Plan (§503.12);
(5) Environmental impact analysis (§503.13);

(6) Fuels search (§503.14).

(e) Specific evidence. Evidence required for each exemption, segregated by exemption (part 503 subparts C and D).

(f) References. (1) Specify the reports, documents, experts, and other sources consulted in compiling the petition. Cite these sources in accordance with acceptable documentation standards,
§ 501.63 Notice of the commencement of an administrative proceeding on an exemption petition.

(a)(1) When a petition is accepted, OFE will publish in the Federal Register a Notice of Acceptance, or, in the case of a certification exemption, a Notice of Acceptance and Availability of Certification, signifying that an exemption proceeding has commenced. The notice will include a summary of the exemption petition, and publication will commence a public comment period of no less than forty-five (45) days during which interested parties may file written comments concerning the petition. In the case of a certification exemption, interested persons may request a public hearing during this period, pursuant to § 501.33.

(2) OFE will notify the appropriate State agency having apparent primary authority to permit or regulate the construction or operation of a powerplant that an exemption proceeding has commenced and will consult with this agency to the maximum extent practicable. Copies of all accepted petitions also will be forwarded to EPA, as provided in § 501.14(a).

(b) In processing an exemption petition, OFE shall comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality’s implementing regulations, and the DOE guidelines implementing those regulations (45 FR 20694, Mar. 28, 1980). Compliance with NEPA may involve the preparation of (1) an environmental impact statement (EIS) evaluating the grant or denial of an exemption petition, (2) an environmental assessment (EA), or (3) a memorandum to the file finding that the grant of the requested petition would not be considered a major federal action significantly affecting the quality of the human environment. If an EIS is required, OFE will publish in the Federal Register a Notice of Intent (NOI) to prepare an EIS as soon as practicable after commencement of the proceeding. A public meeting may be held pursuant to 40
§ 501.64 Publication of notice of availability of tentative staff analysis.

OFE will publish in the FEDERAL REGISTER a Notice of the Availability of Tentative Staff Analysis for the non-certification temporary public interest exemption, for noncertification environmental exemptions, and for a cogeneration exemption based on the public interest. OFE will provide a public comment period of at least fourteen (14) days from the date of publication during which interested persons may make written comments and request a public hearing.

§ 501.65 Publication of notice of availability of draft EIS.

A Notice of Availability of any draft EIS will be published in the FEDERAL REGISTER and comments thereon will also be solicited. Interested persons may request a hearing on any draft EIS. Such hearing must be requested within thirty (30) days of publication of the Notice of Availability of the draft EIS.

§ 501.66 OFE evaluation of the record, decision and order.

(a) The administrative record in a proceeding under this part will consist of the proposed prohibition order and/or petition and related documents, all relevant evidence presented at the public hearing, all written comments, and any other information in the possession of OFE and made a part of the public record of the proceeding. OFE will base its determination to issue a rule or order on consideration of the whole record, or those parts thereof cited by a party and supported by reliable, probative, and substantial evidence.

(b) OFE may investigate and corroborate any statement in any petition, document, or public comments submitted to it. OFE also may use any relevant facts it possesses in its evaluation and may request submissions from third persons relevant to the petition or other documents. OFE also may request additional information, data, or analyses following a public hearing, if any, if this information is necessary to resolve disputed issues in the record.

§ 501.67 Petition redesignations.

OFE, with the petitioner's approval, will redesignate an exemption petition if the petitioner qualifies for an exemption other than the one originally requested, even though he may not qualify for the specific exemption originally requested, or be entitled to the full exemption period provided by requested exemption. OFE shall give public notice of any redesignation of an exemption petition, and where a public hearing has been requested notice shall be given at least thirty (30) days prior to such hearing.

§ 501.68 Decision and order.

(a)(1) OFE shall issue an order either granting or denying the petition for an exemption or permit within six (6) months after the end of the period for public comment and hearing applicable to any petition.

(2) OFE may extend the six (6) month period for decision to a date certain by publishing notice in the FEDERAL REGISTER, and stating the reasons for such extension.

(3) OFE will publish a final EIS at least thirty (30) days prior to take
issuance of the final order in all cases where an EIS is required.

(b)(1) OFE shall serve a copy of the order granting or denying a petition for exemption to the petitioner and all persons on the service list in cases involving a public hearing.

(2) OFE shall publish any order granting or denying a petition under this subpart in the FEDERAL REGISTER together with a statement of the reasons for the grant or denial.

(c)(1) Any order granting or denying a petition for exemption shall be based upon consideration of the whole record or those parts thereof cited by a party and supported by, and in accordance with, reliable, probative and substantive evidence.

(2) The denial of a petition for exemption shall be without prejudice to the petitioner’s right to submit an amended petition. OFE may, however, reject the amended petition if it is not materially different from the denied petition.

(d) OFE may design any terms and conditions included in any temporary exemption issued or extended under section 211 of FUA, to ensure, among other things, that upon expiration of the exemption the persons and power- plant covered by the exemption will comply with the applicable prohibitions under FUA. For purposes of the provision, the subsequent grant of a permanent exemption to the subject unit shall be deemed compliance with applicable prohibitions.

§ 501.69 Judicial review.

Any person aggrieved by any order issued by OFE under this subpart, must file, within sixty (60) days of publication of the final order in the FEDERAL REGISTER, a petition for judicial review in the United States Court of Appeals for the Circuit wherein he resides, or has his principal place of business. Exhaustion of administrative remedies for purposes of judicial review does not require filing a petition pursuant to subpart G for modification or rescission of the order to be reviewed.

Subpart G—Requests for Modification or Rescission of a Rule or Order

§ 501.100 Purpose and scope.

(a) Anyone may request that OFE commence a rulemaking proceeding pursuant to 5 U.S.C. 553(e); however, this subpart provides the procedures to be followed by—

(1) An interested person seeking the modification or rescission of a prohibition by rule applicable to a new facility;

(2) An owner or operator of a facility named in a prohibition by rule requesting the modification or rescission of that rule; or

(3) An owner or operator subject to an exemption order or a specific prohibition imposed by order requesting the modification or rescission of that order.

(b) OFE also may commence a modification or rescission proceeding on its own initiative.

§ 501.101 Proceedings to modify or rescind a rule or order.

(a) In response to a request duly filed by an interested person, OFE may commence a proceeding to modify or rescind a rule or order. If OFE determines that a request to modify or rescind a rule or order does not warrant commencement of a proceeding, it will deny the request and issue a brief statement of the reason(s) for the denial.

(b) A request for modification or rescission of a rule or order must comply with the requirements of §501.7 and must be filed at the address set forth in §501.11.

(c) Notice of the request for modification or rescission of an order must be given by the requester to each party to the original proceeding that resulted in the issuance of the original order for which modification or rescission is sought. If the number of parties to the original proceeding is too large to allow actual notice at a reasonable
§ 501.102 OFE evaluation of the record, decision and order for modification or rescission of a rule or order.

(a) OFE will consider the entire administrative record in its evaluation of the decision and order for modification or rescission of a rule or order. OFE may investigate and corroborate any statement in the petition or related documents and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to any request under this subpart and all interested persons will be afforded an opportunity to respond to these submissions. OFE may, in its discretion and on its own initiative, convene a conference, if it considers that a conference will advance its evaluation of the request.

(b) Criteria. Except where modification or rescission of a rule or order is initiated by OFE, OFE's decision to rescind or modify a rule or order will be based on a determination that there are significantly changed circumstances with respect to the applicability of a particular prohibition or exemption to the requester. OFE believes that there may be "significantly changed circumstances", if:

(1) Significant material facts are subsequently discovered which were not known and could not have been known to the petitioner or to OFE at the time of the original proceeding;

(2) A law, regulation, interpretation, ruling, order or decision on appeal that was in effect at the time of the proceeding upon which the rule or order is based and which, if it had been made known to OFE, would have been relevant to the proceeding and would have substantially altered the outcome is subsequently discovered; or

(3) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order was based, which change...
§ 501.123 Evaluation of the record.

(a) The record in a proceeding on a petition for stay shall consist of the petition and any related documents, evidence submitted at any public proceedings and any other information in the possession of OFE and made part of the record. OFE may investigate and corroborate any statement in the petition or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to the petition for stay or other document and any interested person will be afforded an opportunity to respond to these submissions. OFE, on its initiative, may convene a conference, if, in its discretion, it considers that the conference will advance its evaluation of the petition.

(b) Criteria. (1) OFE may grant a stay incident to a proceeding on a petition for modification of a rule or order if the petitioner shows:
   (i) Irreparable injury will result if the stay is denied;
   (ii) There is a strong likelihood of success on the merits;
   (iii) The denial of a stay will result in a more immediate hardship or inequity

Subpart H—Requests for Stay

§ 501.120 Purpose and scope.

(a) This subpart sets forth the procedures for the request and issuance of a stay of a rule or order or other requirement issued or imposed by OFE or these regulations but does not apply to the mandatory stays provided for in sections 202(b) and 301(a) of FUA. The application for a stay under this subpart will only be considered incidental to a proceeding on a request for modification or rescission of a final prohibition rule or order.

(b) The petitioner must comply with all final and effective OFE orders, regulations, rulings, and generally applicable requirements unless a petition for a stay is granted or is applicable under FUA.

§ 501.121 Filing and notice of petitions for stays.

(a)(1) The petition for a stay must be in writing and comply with the general filing requirements stated in §501.7, in addition to any other requirements set forth in this subpart, and must be filed at the address provided in §501.11.

(2) A claim for confidential treatment of any information contained in the petition for stay and supporting documents must be in accordance with §501.7(a)(11), and filed at the address provided in §501.11.

(b) OFE will publish notice of receipt of a petition for a stay under this subpart in the Federal Register.

§ 501.122 Contents.

(a) A petition for a stay shall contain a full and complete statement of all facts believed to be pertinent to the act or transaction for which a stay is sought. The facts shall include, but not be limited to, the criteria listed below in §501.123(b).

(b) The petitioner may request a conference regarding the application. If the request is not made at the time the application is filed, it must be made as soon thereafter as possible. The request and OFE's determination regarding it will be made in accordance with subpart C of this part.

§ 501.123 Evaluation of the record.

(a) The record in a proceeding on a petition for stay shall consist of the petition and any related documents, evidence submitted at any public proceedings and any other information in the possession of OFE and made part of the record. OFE may investigate and corroborate any statement in the petition or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to the petition for stay or other document and any interested person will be afforded an opportunity to respond to these submissions. OFE, on its initiative, may convene a conference, if, in its discretion, it considers that the conference will advance its evaluation of the petition.

(b) Criteria. (1) OFE may grant a stay incident to a proceeding on a petition for modification of a rule or order if the petitioner shows:
   (i) Irreparable injury will result if the stay is denied;
   (ii) There is a strong likelihood of success on the merits;
   (iii) The denial of a stay will result in a more immediate hardship or inequity
§ 501.124 Decision and order.

(a) OFE will issue an order granting or denying the petition for a stay upon consideration of the request and other relevant information received or obtained during the proceeding.

(b) OFE will include in the order a brief written statement setting forth the relevant facts and the basis of the decision, including any appropriate terms and conditions of the stay.

Subpart I—Requests for Interpretation

§ 501.130 Purpose and scope.

This subpart establishes procedures for filing a formal request for and the issuance of an interpretation of a rule, order or other action by DOE. Any response, whether oral or written, to a general inquiry, or to other than a formal written request for interpretation filed with DOE, is not an interpretation and merely provides general information that may not be relied upon in any proceeding to determine compliance with the applicable requirements of FUA.

§ 501.131 Filing a request for interpretation.

A proceeding to request an interpretation is commenced by the filing of a “Request for Interpretation (FUA).” The request must be in writing and must also comply with the general filing requirements stated in §501.7. Any claims for confidential treatment for any information contained in the request or other related documents must be made pursuant to §501.7(a)(11). A request for interpretation should be filed with the Assistant General Counsel for Interpretations and Rulings at the address provided in §501.11.

§ 501.132 Contents of a request for interpretation.

(a) A request for an interpretation must contain a complete statement of all the facts believed to be relevant to the circumstances, acts or transactions that are the subject of the request. The facts must include the names and addresses of all potentially affected persons (if reasonably ascertainable) and a full discussion of the pertinent provisions and relevant facts contained in any documents submitted with the request. Copies of relevant contracts, agreements, leases, instruments, and other documents relating to the request must be submitted if DOE believes they are necessary for determination of any issue pending in the proceeding under this subpart. When the request pertains to only one step in a larger integrated transaction, the requesting party must also submit the facts, circumstances, and other relevant information pertaining to the entire transaction.

(b) The requesting party must include in the request a discussion of all relevant legal authorities, rulings, regulations, interpretations and decisions on appeal relied upon to support the particular interpretation sought.

(c) DOE may refuse to issue an interpretation if it determines that there is insufficient information upon which to base an interpretation.

§ 501.133 DOE evaluation.

(a)(1) The record shall consist of the request for an interpretation and any supporting documents, all relevant evidence presented at any public proceedings, written comments and any information in the possession of DOE that has been made part of the record.

(2) DOE may investigate and corroborate any statement in a request or related documents and may utilize in its evaluation any relevant facts obtained by the investigation. DOE may solicit or accept submissions from third persons relevant to the request for interpretation, or any other document submitted under this subpart, and the person requesting the interpretation will be afforded an opportunity to respond to these submissions.

(3) The General Counsel or his delegate will issue an interpretation on the basis of the information provided in the request, unless that information is supplemented by other information brought to the attention of DOE during the proceeding. DOE’s interpretation will, therefore, depend on the accuracy
§ 501.141 Criteria for issuance.

(a) The General Counsel may issue a ruling whenever:

(1) There has been a substantial number of inquiries with regard to similar factual situations or a particular section of the regulations; or

(2) It is determined that a ruling will be of assistance to the public in applying the regulations to a specific situation.

(f) Any person who believes he is directly affected by an interpretation issued by DOE, and who believes that he will be aggrieved by its implementation, may submit a petition for reconsideration of that interpretation to the General Counsel. DOE will acknowledge receipt of all requests for reconsideration; however, this acknowledgement in no way binds DOE to commence any proceeding on the request. If within sixty (60) days of DOE’s acknowledgement of the receipt of a request for reconsideration, DOE has not issued either a notice of intent to commence a proceeding to reconsider the interpretation or a modification, revision or rescission of the original interpretation, the request for reconsideration will be deemed denied. DOE may, in its discretion, issue a formal denial of a request for reconsideration if:

(1) The request has not been filed in a timely manner, and good cause therefore has not been shown;

(2) The person requesting reconsideration is not aggrieved or otherwise injured substantially by the interpretation;

(3) The request is defective because it fails to state and to present facts and legal argument that the interpretation was erroneous in fact or in law, or that it was arbitrary or capricious.

Subpart J—Rulings

§ 501.140 Purpose and scope.

DOE may issue rulings in accordance with the provisions of this subpart. DOE will publish each ruling in the Federal Register and in 10 CFR part 518. A person is entitled to rely upon a ruling to the extent provided in this subpart.

§ 501.141 Criteria for issuance.

(a) The General Counsel may issue a ruling whenever:

(1) There has been a substantial number of inquiries with regard to similar factual situations or a particular section of the regulations; or

(2) It is determined that a ruling will be of assistance to the public in applying the regulations to a specific situation.
§ 501.142 Modification or rescission.
(a) A ruling may be modified or rescinded by—
(1) Publication of the modification or rescission by DOE in the Federal Register and in 10 CFR part 518; or
(2) Adoption of a rule that supersedes or modifies a prior ruling.
(b) A person shall not be subject to the sanctions or penalties stated in these regulations for actions taken in reliance upon a ruling, notwithstanding that the ruling is subsequently declared to be invalid or no longer applicable. A person affected by a ruling may not rely upon it for more than 30 days after it has been rendered invalid pursuant to issuance of a superseding rule by OFE, or after it has been rescinded or modified by DOE.

§ 501.143 Comments.
Any interested person may file a written comment on or objection to a published ruling at any time with the Assistant General Counsel for Interpretations and Rulings at the address provided in § 501.11.

Subpart K—Enforcement
§ 501.160 Purpose and scope.
This subpart provides the procedures by which OFE may initiate enforcement proceedings on its own behalf and by which complaints concerning a violation of the Act or any rule or order thereunder may be filed.

§ 501.161 Filing a complaint.
(a) A complaint under this subpart must be submitted in writing over the signature of the person making the complaint in accordance with the general filing requirements stated in § 501.7. OFE will accept oral complaints that otherwise satisfy the requirements of this subpart, but OFE may request written verification.
(b) A complaint shall be filed at the address provided in § 501.11.

§ 501.162 Contents of a complaint.
A complaint must contain a complete statement of all relevant facts pertaining to the act or transaction that is the subject of the complaint. It must also include the names and addresses of all persons involved (if reasonably ascertainable), a description of the events that led to the complaint, and a statement describing the statutory provision, regulation, ruling, order, rule, or interpretation that allegedly has been violated.

§ 501.163 OFE evaluation.
(a) The record shall consist of the complaint and any supporting documents and all other relevant information developed in the course of any investigations or proceedings related to that complaint. OFE may investigate and corroborate any statement in the complaint or related documents submitted, and may utilize in its evaluation any relevant facts obtained by such investigation or from any other source of information. OFE may solicit or accept submissions from third persons relevant to the complaint or other related documents.
(b) Confidentiality of information. OFE will treat as confidential information received in any investigation of a complaint, including the identity of the complainant and the identity of any other persons who provide information to the extent such information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. OFE reserves the right to make disclosures that would be in the public interest.

§ 501.164 Decision to initiate enforcement proceedings.
After investigation of a specific complaint or based on any relevant information received or obtained during an investigation, OFE may issue a notice of violation, determine that no violation has occurred, or take such other actions as it deems appropriate. Prior to issuance of a notice of violation, and before commencement of an enforcement proceeding, OFE may transmit a draft of the notice of violation to the potentially affected person in order to promote an informal resolution of the violation.

§ 501.165 Commencement of enforcement proceedings.
(a) Whenever, on the basis of any information available, OFE determines that a person is in violation or about
to be in violation of any provision of these regulations, OFE may issue a notice of violation stating, in writing and with reasonable specificity, the nature of the violation. An enforcement proceeding commences with the issuance of a notice of violation.

(b) Contents of the notice of violation. OFE will set forth in the notice of violation the nature of the violation, the relevant facts that OFE believes establish the violation and the legal basis for the conclusions reached therein. OFE may also include with the notice of violation a copy of a proposed order. The notice of violation will also state whether or not OFE proposes to assess civil penalties.

(1) If OFE proposes to assess a civil penalty, a notice of violation will be issued to the violator with an opportunity for a hearing before an Administrative Law Judge, as set forth in §501.166(a)(1) of this part, before any final determination on the violation and penalty are made by OFE. The recipient of the notice will also be informed of his right to elect to have the procedures of §501.166(a)(2) apply, in lieu of the hearing, with respect to a final determination on the assessment of any civil penalty.

(2) If OFE does not propose to assess a civil penalty, the violator will be provided the opportunity for a conference, as set forth in §501.166(b), before a final determination on the violation is made by OFE. OFE may, in its discretion, also provide the violator an opportunity for a hearing pursuant to §501.166(a)(1).

(c) Service. OFE will serve the notice of violation in accordance with provisions set forth in §501.6.

(1) Reconsideration. If, after issuance of a notice of violation and any related investigation, OFE finds no basis for the belief that a violation has occurred, is continuing to occur, or is about to occur, OFE may rescind the notice of violation by giving written notice to that effect to the recipient.

§501.167 Fuel use order.

(a) General. OFE will issue a Fuel Use Order if, after considering all the information received during the proceeding, OFE determines that a person has committed, is committing, or is about to commit a violation of FUA or of an order or rule thereunder.

(1) When a civil penalty is proposed. (1) Hearing alternative in civil penalty assessment proceedings. Unless the recipient of a notice of violation elects in writing to have the provisions of paragraph (a)(2) of this section apply, OFE will commence a proceeding to assess a penalty and, prior to a final determination on the violation and assessment of a penalty, provide an opportunity for a hearing pursuant to 5 U.S.C. 554 before an Administrative Law Judge.

(b) Contents of the notice of violation. OFE will set forth in the notice of violation the nature of the violation, the relevant facts that OFE believes establish the violation and the legal basis for the conclusions reached therein. OFE may also include with the notice of violation a copy of a proposed order. The notice of violation will also state whether or not OFE proposes to assess civil penalties.

(1) If OFE proposes to assess a civil penalty, a notice of violation will be issued to the violator with an opportunity for a hearing before an Administrative Law Judge, as set forth in §501.166(a)(1) of this part, before any final determination on the violation and assessment of a penalty are made by OFE. The recipient of the notice will also be informed of his right to elect to have the procedures of §501.166(a)(2) apply, in lieu of the hearing, with respect to a final determination on the assessment of any civil penalty.

(2) If OFE does not propose to assess a civil penalty, the violator will be provided the opportunity for a conference, as set forth in §501.166(b), before a final determination on the violation is made by OFE. OFE may, in its discretion, also provide the violator an opportunity for a hearing pursuant to §501.166(a)(1).

(c) Service. OFE will serve the notice of violation in accordance with provisions set forth in §501.6.

(1) Reconsideration. If, after issuance of a notice of violation and any related investigation, OFE finds no basis for the belief that a violation has occurred, is continuing to occur, or is about to occur, OFE may rescind the notice of violation by giving written notice to that effect to the recipient.

§501.166 Hearings and conferences.

(a) When a civil penalty is proposed. (1) Hearing alternative in civil penalty assessment proceedings. Unless the recipient of a notice of violation elects in writing to have the provisions of paragraph (a)(2) of this section apply, OFE will commence a proceeding to assess a penalty and, prior to a final determination on the violation and assessment of a penalty, provide an opportunity for a hearing pursuant to 5 U.S.C. 554 before an Administrative Law Judge.

(b) Contents of the notice of violation. OFE will set forth in the notice of violation the nature of the violation, the relevant facts that OFE believes establish the violation and the legal basis for the conclusions reached therein. OFE may also include with the notice of violation a copy of a proposed order. The notice of violation will also state whether or not OFE proposes to assess civil penalties.

(1) If OFE proposes to assess a civil penalty, a notice of violation will be issued to the violator with an opportunity for a hearing before an Administrative Law Judge, as set forth in §501.166(a)(1) of this part, before any final determination on the violation and assessment of a penalty are made by OFE. The recipient of the notice will also be informed of his right to elect to have the procedures of §501.166(a)(2) apply, in lieu of the hearing, with respect to a final determination on the assessment of any civil penalty.

(2) If OFE does not propose to assess a civil penalty, the violator will be provided the opportunity for a conference, as set forth in §501.166(b), before a final determination on the violation is made by OFE. OFE may, in its discretion, also provide the violator an opportunity for a hearing pursuant to §501.166(a)(1).

(c) Service. OFE will serve the notice of violation in accordance with provisions set forth in §501.6.

(1) Reconsideration. If, after issuance of a notice of violation and any related investigation, OFE finds no basis for the belief that a violation has occurred, is continuing to occur, or is about to occur, OFE may rescind the notice of violation by giving written notice to that effect to the recipient.
§ 501.180 Investigations.

(a) General. Pursuant to section 711 of FUA, the DEOA, and in accordance with the provisions of 10 CFR 205.201, OFE may initiate and conduct investigations relating to the scope, nature, and extent of compliance by any person with the rules, regulations, and orders issued by OFE under the authority of the Act, or any order or decree of court relating thereto, or any other agency action. When the circumstances warrant, OFE may issue subpoenas as provided in subpart D of this part. OFE may also conduct investigative conferences in conjunction with any investigation.

(b) Any duly authorized representative of OFE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation.

(c) Notification. If any person is required to furnish information or documentary evidence pursuant to a subpoena or special report order, OFE will, upon written request, inform that person as to the general purposes of the investigation.

(d) Confidentiality. OFE shall not disclose any information received during an investigation under this section, including the identities of the person investigated and any other person who provides information, to the extent it is exempt from public disclosure pursuant to 5 U.S.C. 552 and 10 CFR part 1004.

§ 501.181 Sanctions.

(a) General. (1) A violation of any provision of the Act (other than section 402 of FUA), or any rule or order thereunder shall be subject to the penalties and sanctions provided in subtitle C of title VII of FUA.

(2) Each day that any provision of the Act (other than section 402), or any rule or order thereunder is violated constitutes a separate violation within the meaning of the provisions of this section relating to civil penalties.

(b) Criminal penalties. Any person who willfully violates any provision of the Act (other than section 402), or any rule or order thereunder will be subject to a fine of not more than $50,000, or to imprisonment for not more than 1 year, or both, for each violation.

(c) Civil penalties. (1) Any person who violates any provisions of the Act (other than section 402) or any rule or order thereunder will be subject to the following civil penalty, which may not exceed $27,500 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of not more than $3.30 for each MCF of natural gas or up to $11 for each barrel of oil used in excess of that authorized in the exemption.

(2) OFE may compromise and settle, and collect civil penalties whenever it considers it to be appropriate or advisable.

(d) Corporate personnel. (1) If a director, officer, or agent of a corporation willfully authorizes, orders, or performs any act or practice constituting in whole or in part a violation of the Act, or any rule or order thereunder, he will be subject to the penalties specified in paragraphs (b) and (c) of this section without regard to any penalties to which the corporation may be subject. He will not, however, be subject to imprisonment under paragraph (b) of
Subpart M—Use of Natural Gas or Petroleum for Emergency and Unanticipated Equipment Outage Purposes

§ 501.190 Purpose and scope.

(a) If a person operates a powerplant covered by any of the prohibitions of titles II, III, or IV of FUA, §501.191 of this subpart establishes procedures to be followed for the use of minimum amounts of natural gas or petroleum under FUA section 103(a)(15)(B) in order to alleviate or prevent unanticipated equipment outages and emergencies directly affecting the public health, safety, or welfare that would result from electric power outages.

(b) Explanatory note: If a person operates a rental boiler as a powerplant covered by any of the prohibitions of titles II, III, or IV of FUA, he may be able to use the provisions of this subpart for the emergency use of natural gas or petroleum.

[54 FR 52883, Dec. 22, 1989]

§ 501.191 Use of natural gas or petroleum for certain unanticipated equipment outages and emergencies defined in section 103(a)(15)(B) of the act.

(a) In the event of the occurrence or imminent occurrence of an emergency, or of the occurrence or imminent occurrence of an unanticipated equipment outage in the unit, an owner or operator of a powerplant is automatically permitted to use minimum amounts of natural gas or petroleum in the unit or in a substitute unit to prevent or alleviate the outage or to prevent or alleviate the emergency if he complies with procedures contained in paragraph (b) of this section.

(b) If the use of minimum amounts of petroleum or natural gas is required for purposes specified in this section, the owner or operator must notify OFE of such use by telegram or telephone within 24 hours after the commencement of such use. Immediately thereafter, a written confirmation must be submitted to OFE, describing, to the best estimate of the owner or operator, (1) the nature of the emergency and (2) how long petroleum or natural gas use is likely to be required.
§ 501.192

(c) For purposes of this section only:

(1) An emergency is the occurrence or threat of imminent occurrence of a condition which results or would result from an electric power outage and directly effects or would directly effect the public health, safety or welfare;

(2) Unanticipated equipment outage shall mean an unexpected outage due to equipment failure.

(3) Minimum amounts required to alleviate or prevent shall mean:

(i) For powerplants, the amounts of natural gas or petroleum required to prevent curtailment of electric supply where the operating utility has, to the maximum extent possible, utilized alternate fuel-fired capacity to prevent such curtailment. Note—A utility operating hydroelectric facilities may take into account seasonal fluctuations in storage capacity and shall be permitted to prevent depletion of stored power-producing capacity as deemed necessary by the utility; and

(ii) For installations, the amounts of natural gas or petroleum required to meet plant protection or human health and safety needs, including services to hospitals, public transportation facilities, sanitation, or water supply and pumping.


§ 501.192 [Reserved]

PART 503—NEW FACILITIES

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503.38 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.
503.39–503.44 [Reserved]


SOURCE: 46 FR 59903, Dec. 7, 1981, unless otherwise noted.

Subpart A—General Prohibition

§ 503.1 Purpose and scope.

This subpart sets forth the statutory prohibition imposed by the Act upon new powerplants. The prohibition in the subpart applies to all new baseload electric powerplants unless an exemption has been granted by OFE under
subparts C and D of this part. Any person who owns, controls, rents, leases or operates a new powerplant that is subject to the prohibition may be subject to sanctions provided by the Act or these regulations.

[54 FR 52893, Dec. 22, 1989]

§ 503.2 Prohibition.

Section 201 of the Act prohibits, unless an exemption has been granted under subpart C or D of this part, any new electric powerplant from being constructed or operated as a baseload powerplant without the capability to use coal or another alternate fuel as a primary energy source.

[54 FR 52893, Dec. 22, 1989]

§ 503.3 [Reserved]

Subpart B—General Requirements for Exemptions

§ 503.4 Purpose and scope.

This subpart establishes the general requirements necessary to qualify for either a temporary or permanent exemption under this part and sets out the methodology for calculating the cost of using an alternate fuel and the cost of using imported petroleum.

§ 503.5 Contents of petition.

Before OFE will accept a petition for either a temporary or permanent exemption under this part, the petition must include all of the evidence and information required in this part and part 501 of this chapter.

§ 503.6 Cost calculations for new powerplants and installations.

(a) General. (1) This calculation compares the cost of using alternate fuel to the cost of using imported petroleum. It must be performed for each alternate fuel and/or alternate site that the petitioner is required to examine.

(2) The cost of using an alternate fuel as a primary energy source will be deemed to substantially exceed the cost of using imported petroleum if the difference between the cost of using alternate fuel and the cost of using imported oil is greater than zero.

(3) There are two comparative cost calculations—a general cost test and a special cost test. Both take into consideration cash outlays for capital investments, annual expenses, and the effect of depreciation and taxes on cash flow. To demonstrate eligibility for a permanent exemption, a petitioner must use the procedures specified in the general cost test (paragraph (b) of this section). To demonstrate eligibility for a temporary exemption, the petitioner may apply the procedures specified in either the general cost test or the special cost test (paragraph (c) of this section).

(b) Cost calculation—general cost test.

(1) A petitioner may be eligible for a permanent exemption if he can demonstrate that the cost of using an alternate fuel from the first year of operation substantially exceeds the cost of using imported petroleum. Unless the best practicable cost estimates as prescribed below will not materially change during the first ten years of operation of the unit (given the best information available at the time the petition is filed), the petitioner must also demonstrate that the cost of using an alternate fuel beginning at any time within the first ten years of operation and using imported petroleum or natural gas until such time (i.e., delayed use of alternate fuel) would substantially exceed the cost of using only imported petroleum.

(2) The petitioner would only be eligible for a temporary exemption if the computed costs of delayed alternate fuel use, commencing at the start of the second through eleventh years of operation, do not always substantially exceed the cost of using only imported petroleum. The length of the temporary exemption would be the minimum period from the start of operation in which the cost of using alternate fuel substantially exceeds the cost of using imported petroleum.

(3) To conduct the general cost test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST(ALTERNATE)) and the cost of using imported petroleum (COST(OIL)) using Equations 1 through 3 below and the comparison procedures in paragraph (b)(5) of this section.
§503.6

DELT A = COST (ALTERNATE) - COST (OIL)

where COST(ALTERNATE) and COST(OIL) are determined by:

\[ \text{EQ 2} \quad \text{COST} = I + \sum_{i=1}^{N} \frac{(O M_{i} + F L_{i})(1 - t_{i})}{(1 + k)^{i}} \]

and I (capital investment) is:

\[ \text{EQ 3} \quad I = \sum_{i=-g}^{N} \frac{I_{i} - I T C_{i} - S_{i} - t_{i}(D P R_{i})}{(1 + k)^{i}} \]

(4) The terms in Equations 2 and 3 are defined as follows:

- \( i = \) Year. \( i \) is a specified year either before year 0 or after year 0. Year 0 is the year before the unit becomes operational. For example, in the third year before the unit becomes operational, \( i \) would equal -2, and in the third year following commencement of operations of the unit, \( i \) would equal +3. Years are represented by 52 week periods prior to or following the date on which the unit becomes operational. Outlays before the unit becomes operational are future valued to the year before the unit becomes operational (year 0), and outlays after the unit becomes operational are present valued to the year before the unit becomes operational. Year 0 must be the same for the units being compared.

- \( g = \) The number of years prior to the year before the unit becomes operational (year 0) that (1) a cash outlay is first made for capital investments, or (2) an investment tax credit is first used—whichever occurs first.

- \( N = \) The useful life of the unit (see paragraph (d)(5) of this section).

- \( I = \) Yearly cash outlay (in dollars) from the year outlays first occur to the last year of the unit's useful life for capital investments. (See paragraph (d)(2) of this section for the items that must be included.)

- \( O M = \) Annual cash outlay in year \( i \) (in dollars) for all operations and maintenance expenses except fuel (i.e., all non-capital and non-fuel cash outlays caused by putting the capital investments (\( I \)) into service). This may include labor, materials, insurance, taxes (except income taxes), etc. (See paragraph (d)(3) of this section.)

- \( S_{i} = \) Salvage value of capital investment (in dollars) in year \( i \).

- \( F L_{i} = \) Annual cash outlay for delivered fuel expenses (in dollars) in year \( i \). (See paragraph (d)(3) of this section for \( F L_{i} \) calculation instructions and appendix II of these regulations for the procedures to determine fuel price.)

- \( k = \) The discount rate expressed as a fraction (see paragraph (d)(4) of this section).

- \( I T C_{i} = \) Federal investment tax credit used in year \( i \) resulting from capital investments (see paragraph (d)(6) of this section).

- \( D P R_{i} = \) Depreciation in year \( i \) resulting from capital investments (see paragraph (d)(6) of this section).

- \( t_{i} = \) Marginal income tax rate in year \( i \) (see paragraph (d)(6) of this section).

- \( I X = \) Inflation index value for year \( i \) (see appendix II to part 504 for method of computation).

- \( I X_{e} = \) Inflation index value for the year \( e \), the year before the asset is placed in service.

(5) The step-by-step procedure that follows shows the comparison that the petitioner must make.
(i) Compute the cost of using an alternate fuel (COST(ALTERNATE)) unit throughout the useful life of the unit using Equations 2 and 3.

(ii) Compute the cost of using oil or natural gas (COST(OIL)) throughout the useful life of the unit using Equations 2 and 3.

(iii) Using Equation 1, compute the difference (DELTA) between COST(ALTERNATE) and COST(OIL). If the difference (DELTA) is less than or equal to zero, a petitioner is not eligible for a permanent or temporary exemption using the general cost test and need not complete the remainder of the general cost test calculation. However, he still may be eligible for a temporary exemption using the special cost test (paragraph (c) of this section). If the difference (DELTA) is greater than zero and if the best practicable cost estimates will not materially change during the first ten years of operation (given the best information available at the time the petition is filed), the petitioner has completed the test and is eligible for a permanent exemption. However, if the best practicable cost estimate will materially change during the first ten years, the petitioner must complete the remainder of the general cost test—the delayed use calculations which follow.

(iv) Recompute COST(ALTERNATE) with Equations 2 and 3, assuming that an alternate fuel is not used as the primary energy source until the start of the second year of operation and that imported petroleum or natural gas is used for the first year of operation. All cash outlays should reflect postponed use of alternate fuel.

(v) Successively recompute COST(ALTERNATE) with Equations 2 and 3, assuming that the alternate fuel use is postponed until the start of the third year, fourth year, and so on, through the beginning of the eleventh year of operation (with imported petroleum or natural gas used in the years preceding alternate fuel use).

(vi) Compute the difference (DELTA) between each of the ten COST(ALTERNATE)s calculated in paragraph (b)(5) (iv) and (v) of this section and the COST(OIL) calculated in paragraph (b)(5)(ii) of this section.

(vii) If all the DELTAs computed in paragraph (b)(5) (iii) and (vi) of this section are greater than zero, the petitioner is eligible for a permanent exemption. If one or more of the DELTAs is less than or equal to zero, he is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a DELTA is zero or less.

(c) Cost calculations—special cost test.

(1) A petitioner may be eligible for a temporary exemption if he demonstrates that the cost of using an alternate fuel will substantially exceed the cost of using imported petroleum or (natural gas) over the period of the proposed exemption. The period of the proposed temporary exemption may not exceed ten years.

The petitioner must demonstrate that the cost of using an alternate fuel substantially exceeds the cost of using imported petroleum for the first year of operation, the first two years of operation, and so forth, through the period of the proposed exemption. OFE will limit the duration of a temporary exemption to the shortest time possible.

(2) To conduct the test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST(ALTERNATE)) and the cost of using imported petroleum (COST(OIL)) using Equations 4 and 5 below, Equation 3 (paragraph (b)(3) of this section), and the comparison procedures in paragraph (c)(4) of this section.
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Capital investment (I) is calculated with Equation 3 (paragraph (b)(3) of this section).

(3) The terms in Equation 5 are the same as those in Equation 2 with the addition of \( P \), the length of the proposed temporary exemption in years. (See paragraph (b)(4) of this section for other terms.)

(4) The step-by-step procedure that follows shows the comparisons which must be made.

(i) Using Equation 5, compute the cost of using an alternate fuel (\( \text{COST(ALTERNATE)} \)) assuming the length of the proposed exemption is one year.

(ii) Likewise, compute the cost of using imported petroleum or natural gas (\( \text{COST(OIL)} \)) assuming the length of the proposed exemption is one year.

(iii) Compute the difference (\( \text{DELTA} \)) between \( \text{COST(ALTERNATE)} \) and \( \text{COST(OIL)} \) using Equation 4.

(iv) Repeat the calculations made in (i), (ii), and (iii) above, assuming the length of the proposed exemption is two years, three years, four years, and so on, up through the period of the proposed exemption.

(v) A petitioner is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a \( \text{DELTA} \) is zero or less.

(d) Information on parameters used in the calculations. (1) All estimated expenditures, except fuel, shall be expressed in real terms (unadjusted for inflation) by using the prices in effect at the time the petition is submitted. Instructions for fuel price calculations are contained in Appendix II.

(2) Capital investment yearly cash outlays (\( I_i \)) must include all items that are capital investments for Federal income tax purposes. All purchased equipment that has a useful life greater than one year, capitalized engineering costs, land, construction, environmental offsets, fuel inventory, transmission facilities, piping, etc., that are necessary for the operation of the unit must be included. However, an item must only be included if a cash outlay is required after the decision has been made to build the unit; sunk costs must not be included (e.g., if the firm owns the land, its purchase price may not be included).

Note: The guidelines for the fuel inventory for powerplants not using natural gas shall be: (a) all powerplants with only steam driven turbines—78 days, (b) all powerplants with only combustion turbines—142 days, (c) all powerplants with combined cycles—both steam driven turbines and combustion turbines—142 days. The guidelines for the fuel inventory for installations not using natural gas shall be the greater of: (1) 21 days fuel supply, or (2) sufficient fuel to fill sixty (60) percent of the storage volume. The guidelines for the fuel inventory for all facilities using natural gas shall be zero unless the gas supply is interruptible in which case an appropriate inventory of back-up fuel must be included. Other inventory levels may be used if they are more appropriate than these guidelines; however, the source or derivation of these levels must be discussed in the evidential summary.
(3)(i) The annual cash outlays for operations and maintenance expense (OM\textsubscript{i}) and fuel expense (FL\textsubscript{i}) for a powerplant may be computed by one of the following three methods; however, the one chosen must be consistently applied throughout the analysis.

(A) Assume the energy produced by the powerplant equals seventy (70) percent of design capacity times 8760 hours for each year during the life of the powerplant, and compute cash outlays for operations, maintenance, and fuel expenses for the powerplant.

(B) Economically dispatch the new powerplant. The cash outlays for operations, maintenance, and fuel expenses of all powerplants being dispatched (where oil and natural gas are priced according to the procedures of appendix II\textsuperscript{1}) are the corresponding expenses for the purpose of the cost calculation. The dispatch analysis area must be that area with which the firm currently dispatches, anticipates dispatching, and will be interconnected. It must also include all anticipated exchanges of energy with other utilities or powerpools. The outlays for operations, maintenance, and fuel may also be estimated using a methodology that incorporates the benefits of economically dispatching units and provides consistent treatment in the alternate fuel and oil or natural gas cases being compared.

(C) Use a dispatch analysis to project the energy produced by the powerplant for a representative (not atypical) year of operation when consuming an alternate fuel. Compute the cash outlays for operations, maintenance, and fuel expenses for the powerplant based upon the level of energy production estimated for the representative year. The dispatch analysis and fuel expenses for the cost calculation must include oil and natural gas priced according to the procedures of appendix II\textsuperscript{1}.

(ii) When computing the annual cash outlays for operations and maintenance expense (OM\textsubscript{i}) and fuel expense (FL\textsubscript{i}) for an installation, specify the firing rates and the length of time each firing rate will be maintained.

(4) The discount rate (k) for analyses is 2.9 percent or that which is computed as specified in appendix I. The method of computing the inflation index (IX) is shown in appendix II to part 504. OFE will modify these specified rates from time to time as required by changed conditions after public notice and an opportunity to comment. However, the relevant set of specified rates for a specific petition for exemption will be the set in effect at the time the petition is submitted or the set in effect at the time a decision is rendered, whichever set is more favorable to the petitioner.

(5)(i) The guidelines for the useful life (N) of all powerplants except nuclear will be thirty-five (35) years. The guidelines for the useful life of a nuclear powerplant will be forty (40) years. Other useful life projections may be used if they are more appropriate than these guidelines; however, the source or derivation of these projections must be contained in the evidential summary. The summary should include a discussion of engineering, economic historical or other evidence.

(ii) If the units being compared have different useful lives, the petitioner will have to modify his calculation so that the two cash flows being compared have the length of the shorter useful life. To do this, (A) use the shorter of the two useful lives in Equations 2 and 5 for both units, and (B) multiply capital investment (I) of the unit with the longer life (computed with Equation 3) by the following adjustment factor (A):

\[
A = \frac{\sum_{i=1}^{Q} (1+k)^{-i}}{\sum_{i=1}^{R} (1+k)^{-i}}
\]

where:
- R=The useful life of the facility with the longer life.
- Q=The useful life of the facility with the shorter life.
- k=The discount rate (see paragraph (d)(4) above).

(6) All Federal investment tax credits (ITC\textsubscript{i}) and depreciation (PR\textsubscript{i}) values are those used for Federal income tax purposes and must be applied consistently throughout the analysis and in a manner consistent with the Federal tax
laws. All investment tax credits allowed under Federal tax law must be reflected in the computations. The petitioner must use the method of depreciation which results in the greatest present value of the cash flow due to the tax and depreciation effect. The marginal income tax rate \( t_i \) is the firm’s anticipated marginal Federal income tax rate in year \( i \). The relevant investment tax credits, depreciation methodology, and marginal Federal income tax rates for a specific exemption petition will be those prescribed by Federal law in effect (or those tax parameters which are known with certainty will be in effect) at the time a decision is rendered. (However, if an investment tax credit expires in a certain year under the law which is in effect at the time the petition is submitted, the petitioner must assume that it will in fact expire in that year.)

(7) If powerplants are being compared, the design capacities or the maximum sustained energy per unit of time that could be produced must be the same. If installations are being compared, the maximum sustained energy per unit of time that could be produced must be the same.

(8) All estimated cash outlays must be computed in accordance with generally accepted accounting principles consistently applied.

(9) The scope of the estimates of relevant costs (as discussed above) of units being compared must be the same.

(10) All allowances for uncertainty and risk in the cost estimates must be explicit.

(11) All cash outlays must be net of any government subsidies or grants.

Evidence in support of the cost calculation. Petitioners for an exemption which requires the use of the cost calculation shall certify that the cost of using alternate fuel substantially exceeds the cost of using oil as primary energy source as calculated in this section. A brief summary of the petitioner’s supporting calculations and estimates shall be submitted with the certification. The summary should include the following:

(1) Cash outlays. Investment tax credits, depreciation methodologies, and anticipated salvage for capital investments including a description of all major construction and equipment;

(2) Annual cash outlays for operations and maintenance expenses including the formulas used to compute them; and

(3) Annual cash outlays for delivered fuel expenses including the formulas used to compute them.


§ 503.7 State approval—general requirement for new powerplants.

(a) Where approvals by the appropriate State regulatory authority are required prior to the construction or use of a new powerplant, a petition for an exemption for consideration by OFE may be submitted to OFE prior to obtaining such approvals from the State regulatory authority.

(b) An exemption granted for a powerplant shall not become effective until an adequate demonstration has been made to OFE that all applicable approvals required by the State regulatory authorities have been obtained.

§ 503.8 No alternate power supply—general requirement for certain exemptions for new powerplants.

(a) Application. To qualify for an exemption, except in the case of an exemption for cogeneration units, section 213(c) of the Act requires a demonstration that, despite reasonable good faith efforts, there is no alternative supply of electric power available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service. If a petitioner is unable to demonstrate that there is no alternate supply during the first year of operation, OFE will conclude that the absence of the proposed powerplant will not impair short-term reliability of service, and as a result will not grant the exemption. Such action would not impair long-term reliability of service, since a petition may be submitted for a powerplant that would begin operation in a subsequent year.

(b) Criteria. To meet the demonstration required under paragraph (a) of this section, a petitioner must certify that:
(1) A diligent effort has been made to purchase firm power for the first year of operation to cover all or part of the projected shortfall at a cost that is less than ten (10) percent above the annualized cost of generating power from the proposed plant (including the capital, operation and maintenance expenses, and fuel prices); and

(2)(i) Despite these efforts, the reserve margin in the petitioner's electric region, normal dispatch area, or service area, in the absence of the proposed plant, would fall below twenty (20) percent during the first year of proposed operation; or

(ii) Despite these efforts, the reserve margin will be greater than twenty (20) percent but reliability of service would be impaired. In such case, the certification must be related to factors not included in the calculation of reserve margin, such as transmission constraints.

c (Evidence) The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certification required under paragraph (b) of this section; and

(2) Exhibits containing the basis for the certification submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement.)

Note: In meeting this general requirement, OFE will require a petitioner to examine only mixtures of oil and coal and natural gas and coal, or, where petitioner wishes to examine an additional or substitute mixture, such other alternate fuels as OFE and the petitioner agree are reasonable to petitioner's circumstances.

§ 503.10 Use of fluidized bed combustion not feasible—general requirement for permanent exemptions.

(a) OFE finding. Except in the case of an exemption for fuel mixtures, OFE may deny permanent exemptions authorized under section 212 of the Act if OFE finds on a site-specific or generic basis that use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(b) Demonstration. If OFE has made such a finding, OFE will deny a petitioner's request for exemption unless the petitioner demonstrated that the use of a method of fluidized bed combustion is not economically or technically feasible. The petition or any supplement thereto required by OFE must include the following evidence:

(1) If use of a method of fluidized bed combustion were to be required, evidence that the petitioner would be eligible for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, lack of adequate capital, or State or local requirements; or

under 10 CFR 503.38 (Fuel mixtures) would be available, would not be economically or technically feasible.

(b) Evidence. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement.)

Note: In meeting this general requirement, OFE will require a petitioner to examine only mixtures of oil and coal and natural gas and coal, or, where petitioner wishes to examine an additional or substitute mixture, such other alternate fuels as OFE and the petitioner agree are reasonable to petitioner's circumstances.

§ 503.11 Alternative sites—general requirement for permanent exemptions for new powerplants.

(a) Criteria. To qualify for permanent exemption due to lack of alternate fuel supply, site limitations, environmental requirements, or inadequate capital, section 212(a) of the Act requires a demonstration that one of these exemptions would be available for any reasonable alternative site for the facility.

(b) Evidence. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement).

§ 503.12 Terms and conditions; compliance plans.

(a) Terms and conditions generally. A petitioner must comply with any terms and conditions imposed upon the grant of an exemption petition. OFE will limit any such terms and conditions to the unit(a) which is the subject of the petition.

(b) Compliance plans for temporary exemptions. (1) Any compliance plan required to accompany a petition for a temporary exemption shall include the following:

(i) A detailed schedule of progressive events and the dates upon which the events are to take place, indicating how compliance with the applicable prohibitions of the Act will occur;

(ii) Evidence of binding contracts for fuel, or for facilities for the production of fuel, which are required for compliance with the applicable prohibitions of the Act;

(iii) A schedule indicating how any necessary permits and approvals required to burn an alternate fuel will be obtained; and

(iv) Any other documentary evidence which indicates an ability to comply with the applicable prohibitions of the Act.

(2) Any exemption for which a compliance plan is required shall not be effective until the compliance plan is approved by DOE.

(3) If the petition is granted, an updated, duly executed plan must be submitted to OFE within one (1) month of an alteration of any milestone in the compliance plan, together with the reasons for the alteration and its impact upon the scheduling of all other milestones in the plan.

§ 503.13 Environmental impact analysis.

In order to enable OFE to comply with NEPA, a petitioner must include the information indicated in this section if a permanent exemption is requested. Material which has been prepared pursuant to any Federal, State or local requirement for environmental information for this unit or site may be incorporated by reference and appended to the petition. Guidelines issued by OFE for environmental reports should be used in preparing this analysis (44 FR 63740, November 5, 1979). These guidelines, which are also available in the OFE public document room, have been designed to insure that environmental reports follow the format prescribed by Council on Environmental Quality final regulations implementing NEPA. The guidelines are subject to discussion at a prepetition conference and to modification according to the facts of a particular case.

(a) All petitions for permanent exemptions must contain the following information:

(1) A description of the facility, including site location, and surroundings, alternative site(s), the facility’s current proposed operations, its
fuel capability, and its pollution abatement systems and equipment (including those systems and equipment necessary for all fuel scenarios considered);

(2) A description of the existing environment, including air, water, and land resources;

(3) Direct and indirect environmental impacts of the proposed action including impacts of alternative fuel scenarios, and no build alternatives.

(4) Regulatory requirements governing the facility, including a description of Federal, State and local requirements for air, water, noise and solid waste disposal which must be met for each fuel considered.

(b) For exemptions for cogeneration, the information enumerated below is to be submitted in lieu of the information required by paragraph (a) of this section. However, submission of the following information merely establishes a rebuttable presumption that the grant or denial of the exemption would have no significant environmental impact. OFE may, in individual cases, during the course of the administrative proceeding, determine that additional environmental information is required. In such cases, the petitioner will be required to submit the information described in paragraph (a) of this section.

(1) A certification that the petitioner will, prior to operating the unit under the exemption, secure all applicable environmental permits and approvals pursuant to, but not limited to, the following: Clean Air Act, Rivers and Harbors Act, Coastal Zone Management Act, Safe Drinking Water Act, Resource Conservation and Recovery Act; and

(2) Information required by the following environmental checklist must be provided and certified as accurate:

Environmental Checklist for FUA Certification Exemptions Instructions

All questions are to be answered by placing a check in the appropriate box. N/A represents (not applicable). Although it is not required, the petitioner may elaborate on any question in writing on a separate sheet of paper.

(1) Is your facility located in, or will it affect a wetland (Protection of Wetlands Executive Order No. 11990)?

(2) Is your facility located in, or will it affect, a 100-year floodplain (Floodplain Management Executive Order No. 11988)?

(3) Will your facility affect a designated wild, scenic, or recreational river (Wild and Scenic Rivers Act)?

(4)(A) Is your facility located within a county in which critical habitat for threatened or endangered species are known to exist (Endangered Species Act)?

(4)(B) Has a qualified biologist determined that your facility will not affect any species on the Threatened and Endangered Species list?

(5) Is your facility located on, or will it affect land that has been classified as prime or unique farmland or rangeland by the U.S. Department of Agriculture?

(6) Is your facility located on, or will it affect, historical archaeological, or cultural resources that have been designated pursuant to the National Historic Preservation Act?

§ 503.14 Fuels search.

Prior to submitting a petition for a permanent exemption for lack of alternate fuel supply, site limitations, inadequate capital, or state or local requirements, a petitioner must examine the use of conventional solid coal as a primary energy source at the site under consideration, and at reasonable alternative sites. Where a petitioner believes that its use of such coal would be infeasible, however, and where OFE and the petitioner can reach accord, it may evaluate use of a different alternate fuel in lieu of solid coal. A petitioner of these exemptions must demonstrate for any fuel examined that he would qualify for an exemption.

[54 FR 52894, Dec. 22, 1989]
§ 503.20 Purpose and scope.
(a) This subpart implements the provisions contained in section 211 of the Act with regard to temporary exemptions for new facilities.
(b) This subpart establishes the criteria and standards which owners or operators of new powerplants who petition for a temporary exemption must meet to sustain their burden of proof under the Act.
(c) All petitions for temporary exemptions shall be submitted in accordance with the procedures set out in part 501 of this chapter and the applicable requirements of part 503 of these regulations.
(d) The duration of any temporary exemption granted under this subpart shall be measured from the date that the facility is placed in service using petroleum or natural gas.

§ 503.21 Lack of alternate fuel supply.
(a) Eligibility. Section 211(a)(1) of the Act provides for a temporary exemption due to the unavailability of an adequate and reliable supply of an alternate fuel at a cost which does not substantially exceed the cost of using imported petroleum. To qualify, a petitioner must certify that:
(1) A good faith effort has been to obtain an adequate and reliable supply of an alternate fuel of the quality necessary to conform to the design and operational requirements of the unit;
(2) For the period of the proposed exemption, the cost of using such alternate fuel would substantially exceed the cost of using imported petroleum as a primary energy source as defined in §503.6 (Cost calculation) of these regulations;
(3) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and
(4) No alternate power supply exists, as required under §503.8 of these regulations.
(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:
(1) Duly executed certifications required under paragraph (a) of this section;
(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);
(3) All data required by §503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula; and
(4) The anticipated duration of the lack of alternate fuel supply which constitutes the basis for the exemption.
(c) Duration. This temporary exemption, taking into account any extensions or renewals, may not exceed 10 years.

§ 503.22 Site limitations.
(a) Eligibility. Section 211(a)(2) of the Act provides for a temporary exemption due to a site limitation. To qualify for such an exemption, a petitioner must certify that:
(1) One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite diligent good faith efforts, cannot be overcome before the end of the proposed exemption period;
(2) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and
(3) No alternate power supply exists, as required under §503.8 of these regulations.

Note: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:
(1) Inaccessibility of alternate fuels as a result of a specific physical limitation;
(2) Unavailability of transportation facilities for alternate fuels;
(iii) Unavailability of adequate land or facilities for handling, using, or storing an alternate fuel;

(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;

(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or

(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(3) The anticipated duration of the site limitation which constitutes the basis for the exemption.

(c) Duration. This temporary exemption, taking into account any extensions and renewals, may not exceed five years.


§ 503.23 Inability to comply with applicable environmental requirements.

(a) Eligibility. Section 211(a)(3) of the Act provides for a temporary exemption due to an inability to comply with applicable environmental requirements. To qualify a petitioner must demonstrate that despite diligent good faith efforts:

(1) The petitioner will be unable, as of the projected date of commencement of operation, to comply with the applicable prohibitions of the Act without violating applicable Federal or State environmental requirements; and

(2) The petitioner will be able to comply with the applicable prohibitions of the Act and with applicable environmental requirements by the end of the temporary exemption period.

Note: (1) For purposes of considering an exemption under this section, OFE’s decision will be based solely on an analysis of the petitioner’s capacity to physically achieve applicable environmental requirements. The petition should be directed toward those conditions or circumstances which make it physically impossible to comply during the temporary exemption period. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under §503.21. (2) Prior to submitting an exemption petition, it is recommended that a meeting be requested with OFE and EPA or the appropriate State or local regulatory agency to discuss options for operating an alternate fuel fired facility in compliance with applicable environmental requirements.

(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Where the petitioner has applied for a construction permit from EPA or an appropriate State agency prior to petitioning for an exemption under this section, a copy of that application and synopsis of supporting documents filed with or subsequent to that application must be submitted to OFE with the petition or at the time filed with the permitting agency;

(2) To the extent applicable, a copy of the EPA or State denial of the construction permit application;

(3) To the extent applicable, a synopsis of the administrative record of the EPA or State or local permit proceedings;

(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of its ability to meet applicable standards and criteria when using both the proposed fuel and the alternate fuel(s) which would provide the basis for exemption. All such analysis must be based on accepted analytical techniques, such as air quality
modeling, and reflect current conditions of the area which would be affected by the facility. The petitioner is responsible for obtaining the necessary data to accurately characterize these conditions. Environmental compliance must be examined in the context of available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain: (i) Requests for bids and other inquiries made and responses received by the petitioner concerning the availability and performance of pollution control equipment; (ii) contracts signed, if any, for an alternate fuel supply and for the purchase and installation of pollution control equipment; or (iii) other comparable evidence such as technical studies documenting the efficacy of equipment to meet applicable requirements;

(6) An examination of any regulatory options available to the petitioner in seeking to achieve environmental compliance (such as offsets, variances, and State Implementation Plan revisions);

(7) Any other documentation which demonstrates an inability to comply with applicable environmental requirements;

(6) No alternate power supply exists, as required under §503.8 of these regulations.

(c) Duration. This temporary exemption, taking into account any extension and renewals, may not exceed 5 years.

(d) Certification alternative. (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (b) of this chapter, a petitioner may certify that, for the period of the exemption:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region, of a pollutant for which any national ambient air quality standard is or would be exceeded; and

(ii) No alternate power supply exists, as required under §503.8 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(iii) The anticipated duration of the circumstances which constitute the basis for the exemption.


§ 503.24 Future use of synthetic fuels.

(a) Eligibility. Section 211(b) of the Act provides for a temporary exemption based upon the future use of synthetic fuels. To qualify, a petitioner must certify that:

(1) The petitioner will be able to comply with the applicable prohibitions imposed by the Act by the use of a synthetic fuel derived from coal or another alternate fuel as a primary energy source in the proposed facility by the end of the proposed exemption period;

(2) The petitioner will not be able to comply with the applicable prohibitions imposed by the Act by use of a synthetic fuel until the end of the proposed exemption period; and

(3) No alternate power supply exists, as required under §503.8 of these regulations.

(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;
§ 503.31 Lack of alternate fuel supply for the first 10 years of useful life.

(a) Eligibility. Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to lack of an adequate and reliable supply of alternate fuel within the first 10 years of useful life of the proposed unit. To qualify, a petitioner must demonstrate that:

(1) The unit will be capable of complying with the applicable prohibitions at the end of the proposed exemption period;
(2) The granting of the exemption would be in accord with the purposes of the Act and would be in the public interest; and
(3) No alternate power supply exists, as required under §503.8 of these regulations.

(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:

(1) Substantial evidence to corroborate the eligibility requirements identified above; and
(2) The anticipated duration of the circumstances which constitute the basis for the exemption.

(c) Certification alternative. If the petitioner requires use of oil or natural gas in a unit, during the construction of an alternate-fuel fired unit, the petitioner may substitute, in lieu of the evidentiary requirements of paragraphs (b)(1) and (2) of this section:

(1) A duly executed certification, including the requested duration of the exemption, that the unit will be operated on oil or natural gas only during the construction of an alternate fuel fired unit to be owned or operated by the petitioner; and
(2) Exhibits containing the basis for the certifications required under paragraph (c)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption).

(d) Duration. This temporary exemption, taking into account extension and renewals, may not exceed 5 years.


Subpart D—Permanent Exemptions for New Facilities

§ 503.30 Purpose and scope.

(a) This subpart implements the provisions contained in section 212 of the Act with regard to permanent exemptions for new facilities.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants and installations who petition for a permanent exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for permanent exemptions for new facilities shall be submitted in accordance with the procedures set out in part 501 of this chapter and the applicable requirements of part 503 of these regulations.

§ 503.31 Lack of alternate fuel supply for the first 10 years of useful life.

(a) Eligibility. Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to lack of an adequate and reliable supply of alternate fuel within the first 10 years of useful life of the proposed unit. To qualify, a petitioner must certify that:
§ 503.32 Lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.

(a) Eligibility. Section 212(a)(1) (A)(ii) of the Act provides for a permanent exemption due to lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. To qualify for such an exemption, a petitioner must certify that:

1. A good faith effort has been made to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the proposed unit;

2. The cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source during the useful life of the proposed unit as defined in § 503.6 (cost calculation) of these regulations;

3. No alternate power supply exists, as required under § 503.8 of these regulations.

4. Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

5. Alternative sites are not available, as required under § 503.11 of these regulations.

(b) Evidence required in support of a petition. A petition must include the following evidence in order to make the demonstration required by this section:

1. Duly executed certifications required under paragraph (a) of this section;

2. Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

3. Environmental impact analysis, as required under § 503.13 of these regulations;

4. Fuels search, as required under § 503.14 of these regulations; and

5. All data required by § 503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula.


§ 503.33 Site limitations.

(a) Eligibility. Section 212(a)(1)(B) of the Act provides for a permanent exemption due to site limitations. To qualify for such an exemption, a petitioner must certify that:

1. One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite good faith efforts, cannot reasonably be expected to be overcome within five years after commencement of operations;
(2) No alternate power supply exists, as required under § 503.8 of these regulations;
(3) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and
(4) Alternative sites are not available, as required under § 503.11 of these regulations.

Note: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:
(i) Inaccessibility of alternate fuels as a result of a specific physical limitation;
(ii) Unavailability of transportation facilities for alternate fuels;
(iii) Unavailability of adequate land or facilities for handling, using or storing an alternate fuel;
(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;
(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or
(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) Evidence required in support of the petition. A petitioner must include in the petition the following evidence in order to make the demonstration required by this section:
(1) Duly executed certifications required under paragraph (a) of this section;
(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);
(3) Environmental impact analysis, as required under § 503.13 of these regulations; and
(4) Fuels search, as required under § 503.14 of these regulations.


§ 503.34 Inability to comply with applicable environmental requirements.

(a) Eligibility. Section 212(a)(1)(C) of the Act provides for a permanent exemption due to the inability to comply with applicable environmental requirements. To qualify, a petitioner must demonstrate that despite good faith efforts:
(1) The petitioner will be unable within 5 years after beginning operation, to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or state environmental requirements; and
(2) Reasonable alternative sites, which would permit the use of alternate fuels in compliance with applicable Federal or state environmental requirements, are not available.

Note: (1) For purposes of considering an exemption under this section, OFE’s decision will be based solely on an analysis of the petitioner’s capacity to physically achieve applicable environmental requirements. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under § 503.32 (Lack of alternate fuel supply).
(2) Prior to deciding to submit an exemption petition, it is recommended that a petitioner request a meeting with OFE and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with the applicable environmental requirements.

(b) Evidence required in support of a petition. The petitioner must include in the petition the following evidence in order to make the demonstration required by this section:
(1) Where the petitioner has applied for a construction permit from EPA or an appropriate state agency prior to petitioning for an exemption from OFE under this section, a copy of such application and a synopsis of all supporting documents filed with or subsequent to the application must be submitted to OFE with the petition or at the time filed with the permitting agency;
(2) To the extent applicable, a copy of the EPA or state denial of the construction permit application;
(3) To the extent applicable, a synopsis of the administrative record of the EPA or state or local permit proceedings;
(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which
§ 503.35 Inability to obtain adequate capital.

(a) Eligibility. Section 212(a)(1)(D) of the Act provides for a permanent exemption due to inability to obtain adequate capital. To qualify, a petitioner must certify that:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region of a pollutant for which any national ambient air quality standard is or would be exceeded;

(ii) No alternate power supply exists, as required under §503.8 of these regulations;

(iii) Alternative sites are not available, as required under §503.11 of these regulations; and

(iv) Use of mixtures is not feasible, as required under §503.19 of these regulations.

(b) Certification alternative. (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (c) of this section, a petitioner may certify that:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region of a pollutant for which any national ambient air quality standard is or would be exceeded;

(ii) No alternate power supply exists, as required under §503.8 of these regulations;

(iii) Alternative sites are not available, as required under §503.11 of these regulations; and

(iv) Use of mixtures is not feasible, as required under §503.19 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(iii) Environmental impact analysis, as required under §503.13 of these regulations; and

(iv) Fuels search, as required under §503.14 of these regulations.

(1) Despite good faith efforts the petitioner will be unable to comply with the applicable prohibitions imposed by the Act because the additional capital required for an alternate fuel-capable unit beyond that required for the proposed unit cannot be raised;
(2) The additional capital cannot be raised;
   (i) Due to specific restrictions (e.g., covenants on existing bonds) which constrain management’s ability to raise debt or equity capital;
   (ii) Without a substantial dilution of shareholder equity;
   (iii) Without an unreasonably adverse affect on the utility’s credit rating; or
   (iv) In the case of non-investor-owned public utilities, without jeopardizing the utility’s ability to recover its capital investment, through tariffs, without unreasonably adverse economic effect on its service area (such as adverse impacts on local industry or undue hardship to ratepayers).
(3) No alternative power supply exists, as required under §503.8 of these regulations;
(4) Use of mixtures is not feasible, as required under §503.9 of these regulations; and
(5) Alternative sites are not available, as required under §503.11 of these regulations.

(b) Evidence required in support of a petition. A petition must include the following evidence in order to make the demonstration required by this section:
(1) Duly executed certifications required under paragraph (a) of this section;
(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);
(3) Environmental impact analysis, as required under §503.13 of these regulations; and
(4) Fuels search, as required under §503.14 of these regulations.

§503.36 State or local requirements.
(a) Eligibility. Section 212(b) of the Act provides for an exemption due to certain State or local requirements. To qualify a petitioner must certify that:
(1) With respect to the proposed site of the unit, the operation or construction of the new unit using an alternate fuel is infeasible because of a State or local requirement other than a building code, nuisance, or zoning law;
(2) The petitioner has made a good faith effort to obtain a variance from the State or local requirement but has been unable to do so or has demonstrated why none is available;
(3) The granting of the exemption would be in the public interest and would be consistent with the purposes of the Act;
(4) The petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital at the site of the proposed powerplant or at any reasonable alternative site for the alternate fuel(s) considered;
(5) At the proposed site and every reasonable alternative site where the petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital, the petitioner nevertheless would be barred at each such proposed or alternate site from burning an alternate fuel by reason of a State or local requirement;
(6) No alternate power supply exists, as required under §503.8 of these regulations; and
(7) Use of mixtures is not feasible, as required under §503.9 of these regulations.
(b) Evidence required in support of a petition. The petition must include the following evidence in order to make the demonstration required by this section:
(1) Duly executed certifications required under paragraph (a) of this section;
(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials

§ 503.37 Cogeneration.

The following table may be used to determine eligibility for a permanent exemption based on oil and natural gas savings.

AVERAGE ANNUAL UTILIZATION OF OIL AND NATURAL GAS FOR ELECTRICITY GENERATION BY STATE

<table>
<thead>
<tr>
<th>State name</th>
<th>Oil/gas savings Btu/kWh</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>33</td>
</tr>
<tr>
<td>Arizona</td>
<td>802</td>
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Data are based upon 1987 oil, natural gas and electricity statistics published by DOE's Energy Information Administration.

EXAMPLE: The proposed cogeneration project is to be located in Massachusetts and is to use distillate oil. It will have a capacity of 50 MW, an average annual heat rate of 7600 BTU/KWHR, and be operated at a capacity factor of 90%. The annual fuel consumption is therefore calculated to be \(2,996 \times 0.9 \times 50,000 \times 8760\) BTU/yr since the proposed unit would consume more oil that would be "backed off" the grid, the unit would not be eligible for a permanent exemption based on savings of oil and natural gas.

§ 503.38 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.

(a) Eligibility. Section 212(d) of the Act provides for a permanent exemption for certain fuel mixtures. To qualify a petitioner must certify that:

1. The petitioner proposes to use a mixture of natural gas or petroleum and an alternate fuel as a primary energy source;

2. The amount of petroleum or natural gas proposed to be used in the mixture will not exceed the minimum percentage of the total annual Btu heat input of the primary energy sources needed to maintain operational reliability of the unit consistent with maintaining a reasonable level of fuel efficiency; and

3. No alternate power supply exists, as required under §503.8 of these regulations.

(b) Evidence required in support of a petition. The petition must include the following evidence in order to make
§ 504.2 Purpose and scope.

(a) Sections 504.5, 504.6, and 504.8, set forth the prohibitions that OFP, pursuant to section 301 of the Act, as amended, may impose upon existing powerplants after a review of the certification and prohibition order compliance schedule submitted by the owner or operator of a powerplant. Sections 504.5 and 504.8 are explanatory sections, and § 504.6 provides the informational requirements necessary to support the certification.

(b) Sections 504.6 and 504.7, set forth the prohibitions that OFP may impose upon certain electing powerplants, pursuant to former section 301 (b) and (c) of FUA, where OFP can make the findings as to the unit’s technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source. The prohibitions may be made to apply to electing powerplants unless an exemption is granted by OFP under the provisions of the Final Rule for Existing Facilities (10 CFR parts 500, 501 and 504) published at 45 FR 53682, Aug. 12, 1980 and 46 FR 59872, Dec. 7, 1981. Any person who owns, controls, rents or leases an existing electing powerplant may be subject to the prohibitions imposed by and the sanctions provided for in the Act or these regulations, if OFP can make the findings required by former section 301 (b) and (c) of FUA.


(Approved by the Office of Management and Budget under control number 1903–0075. See 46 FR 63209, Dec. 31, 1981.)

SOURCE: 45 FR 53692, Aug. 12, 1980, unless otherwise noted.

§§ 503.39–503.44 [Reserved]

PART 504—EXISTING POWERPLANTS

504.2 Purpose and scope.

504.3–504.4 [Reserved]

504.5 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).

504.6 Prohibitions by order (case-by-case).

504.7 Prohibition against excessive use of petroleum or natural gas in mixtures—certifying powerplants.

504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.

504.9 Environmental requirements for certifying powerplants.

APPENDIX I TO PART 504—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL

APPENDIX II TO PART 504—FUEL PRICE COMPUTATION


[47 FR 50849, Nov. 10, 1982]
§§ 504.3–504.4

§ 504.3 [Reserved]

§ 504.4 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).

(a) In the case of existing powerplants, OFP may prohibit, in accordance with section 301 of the Act, as amended, the use of petroleum or natural gas as a primary energy source where the owner or operator of the powerplant presents a complete certification concurrent in by OFP. The certification, which may be presented at any time, pertains to the unit’s technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source in the unit. The informational requirements necessary to support a certification are contained in §504.6 of these regulations. A prohibition compliance schedule which meets the requirements of §504.5(d) shall also be submitted.

(b) If OFP concurs with the certification, a prohibition order on the powerplant’s use of petroleum or natural gas will be issued following the procedure outlined in §501.52 of these regulations.

(c) The petitioner may amend its certification at any time prior to the effective date of the prohibitions contained in the final prohibition order in order to take into account changes in relevant facts and circumstances by following the procedure contained in §501.52(d).

(d) Prohibition order compliance schedule. The certification described above, which forms the basis for the issuance of a prohibition order to a powerplant, shall include a prohibition order compliance schedule. The compliance schedule should contain the following:

(1) A schedule of progressive events involved in the conversion project, including construction of any facilities for the production of fuel or fuel handling equipment, and contracts for the purchase of alternate fuels, and estimated date of compliance with the applicable prohibitions of the Act; and

(2) A schedule indicating estimated dates for obtaining necessary federal, state, and local permits and approvals. Any prohibition order issued under the certification provisions of §§504.3, 504.6, and 504.8 will be subject to appropriate conditions subsequent so as to delay the effectiveness of the prohibitions contained in the final prohibition order until the above events or permits have occurred or been obtained.

(Approved by the Office of Management and Budget under control number 1903–0077)

(10 CFR Ch. II (1–1–02 Edition))

§ 504.5 Prohibitions by order (case-by-case).

(a) OFP may prohibit, by order, the use of natural gas or petroleum as a primary energy source in existing powerplants under certain circumstances. In the case of certifying powerplants under section 301 of the Act, as amended, the petitioner must present evidence to support the certification, required by §504.6 (c), (d), (e), and (f). In the case of electing powerplants, OFP must make the following findings required by §504.6 (c), (d), (e), and (f), in order to issue a prohibition order to the unit, pursuant to former section 301(b) or (c):

(1) The unit currently has, or previously had, the technical capability to use an alternate fuel as a primary energy source;

(2) The unit has this technical capability now, or it could have the technical capability without:

(i) A substantial physical modification of the unit; or

(ii) A substantial reduction in the rated capacity of the unit; and

(3) It is financially feasible for the unit to use an alternate fuel as its primary energy source.

(b) In the case of electing powerplants, OFP must make a proposed finding regarding the technical capability of a unit to use alternate fuel as identified in paragraph (a)(1) of this section prior to the date of publication of the notice of the proposed prohibition. OFP will publish this finding in
The Federal Register along with the notice of the proposed prohibition.

(c) Technical capability. (1) In the case of electing and certifying powerplants, OFP will consider “technical capability” on a case-by-case basis in order to make the required finding. In the case of a certifying powerplant, the powerplant should present information to support the certification relevant to the considerations set forth below. OFP will consider the ability of the unit, from the point of fuel intake to physically sustain combustion of a given fuel and to maintain heat transfer.

(2) OFP considers that a unit “had” the technical capability to use an alternate fuel if the unit was once able to burn that fuel (regardless of whether the unit was expressly designed to burn that fuel or whether it ever actually did burn it), but is no longer able to do so at the present due to temporary or permanent alterations to the unit itself.

(3) A unit “has” the technical capability to use an alternate fuel, notwithstanding the fact that adjustments must be made to the unit beforehand or that pollution control equipment may be required to meet air quality requirements.

2OFP will not ordinarily consider the nature or absence of appurtenances outside the unit. For example, OFP will examine the furnace configuration and ash removal capability but will not normally consider the need to install pollution control equipment as a measure of technical capability. Furthermore, OFP will not normally conclude that the absence of fuel handling equipment, such as conveyor belts, pulverizers, or unloading facilities, bears on the issue of a unit’s “technical capability” to burn an alternate fuel.

3For example, a unit which at one time burned solid coal but which could no longer do so because its coal firing ports and sluicing channels had been cemented over, would be classified as having “had” the technical capability to use coal. (The question of whether it again “could have” such capability without “substantial physical modification” is a separate and additional question.)

4A unit designed to burn natural gas shall be presumed to have the technical capability to burn a synthetic fuel such as medium Btu gas from coal (assuming such gas is available unless convincing evidence to the contrary is submitted in rebuttal). Also a unit designed to burn oil may, depending upon the chemical characteristics, be a unit that “has” the technical capability to burn liquefied coal. The fact that certain adjustments may be necessary does not render this a “hypothetical” as opposed to a “real” capability. Even an oil fired unit converting from the use of #2 distillate to #6 residual oil may be required to adjust or replace burner nozzles and add soot blowers.

General. Modification of a unit to burn coal or an alternate fuel will be considered insubstantial if significant alterations to the boiler, such as a change to the furnace configuration or a complete respACING of the tubes, are not required. Minor alterations such as replacement of burners or additions of soot blowers, and additions or alterations outside the boiler, shall not cause the modification to be substantial.

(d) Substantial physical modification. In the case of electing and certifying powerplants, OFP will make its determination on whether a physical modification to a unit is “substantial” on a case-by-case basis. In the case of certifying powerplants, OFP will consider the factors set forth below for the purpose of concurrence in the certification. OFP will consider physical modifications made to the unit as “substantial” where warranted by the magnitude and complexity of the engineering task or where the modification would impact severely upon operations at the site. OFP will not, however, assess physical modification on the basis of cost.

(1) OFP regards a unit’s derating of 25 percent or more, as a result of converting a unit from oil or gas to an alternate fuel, as substantial.

(2) OFP will presume that a derating of less than 10 percent, as a result of converting a unit from oil or gas to an alternate fuel, is not substantial unless...
§ 504.7

convincing evidence to the contrary is submitted in rebuttal.6

(3) OFP will assess units for which a derating is claimed of 10 percent or more, but less than 25 percent, on a case-by-case.

(4) In assessing whether a unit’s derating is not substantial, OFP will consider the impact of a reduction in rated capacity of the unit taking into consideration all necessary appurtenances such as air pollution control equipment required to burn an alternate fuel in compliance with environmental requirements expected to be applicable at the date the prohibitions contained in the final prohibition order become effective. However, the potential order recipient may raise in rebuttal the impact of derating on the site at which the unit is located and on the system as well as on the unit itself, if under paragraph (e)(2), or case-by-case, if under paragraph (e)(3) of this section.

(f) Financial feasibility. In the case of certifying and electing powerplants, OFP will make this finding based on the following considerations. A certifying powerplant should present information to support its certification relevant to these considerations in order for OFP to make its review for conformance. Conversion of a unit to burn coal or an alternate fuel shall be deemed financially feasible if the firm has the actual ability to obtain sufficient capital to finance the conversion, including all necessary land, coal and ash handling equipment, pollution control equipment, and all other necessary expenditures, without violating legal restrictions on its ability to raise debt or equity capital, unreasonably diluting shareholder equity, or unreasonably adversely affecting its credit rating. OFP will consider any economic or financial factors presented by the proposed order recipient in determining the firm’s ability or inability to finance the conversion including, but not limited to, the following:

(1) The required coverage ratios on the firm’s debt and preferred stock;
(2) The firm’s investment program; and
(3) The financial impact of the conversion, including other conversions which are or may be undertaken voluntarily by the proposed order recipient or imposed upon the recipient’s system by the Act, and including pending or planned construction or reconstruction of alternate-fuel-fired plants and plants exempt from FUA prohibitions.7

Where helpful in clarifying the long-term financial feasibility of a conversion, DOE may analyze the economic benefits anticipated from operation of the converted unit or units using coal or other alternate fuel relative to those from continued operation using petroleum or natural gas.

(Approved by the Office of Management and Budget under control number 1903–0077)

(6) For example, units that are the subject of a prohibition order will not have installed any operating air pollution control equipment sufficient to burn coal in compliance with applicable environmental equipments. The installation and use of air pollution control equipment alone can, in many cases, produce a derating. Moreover, the shift to coal itself will, because of differences in energy density and fuel flow characteristics, typically involve some derating.

(7) OFP will not require the proposed order recipient to cancel or defer construction or reconstruction of any alternate-fuel-fired facility, or any facility exempt from the prohibitions of the Act, for which a decision to finance such facility has been made by the appropriate company official before the publication of the prohibition order. The proposed order recipient may choose to cancel or defer any such facility.

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petroleum or natural gas, or both, in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency of the mixture.

(b) In making the technical feasibility finding required by former section 301(b) and (c) of the Act and paragraph (a) of this section, OFP may weigh “physical modification” or “detrating of the unit,” but these considerations, by themselves, will not control the technical feasibility finding. A technical feasibility finding might be made notwithstanding the need for substantial physical modification. The economic consequences of a substantial physical modification are taken into account in determining financial feasibility.


§ 504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.

(a) In the case of certifying powerplants, OFP may prohibit the use of petroleum or natural gas in such powerplant in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining the reasonable fuel efficiency of the mixture. This authority is contained in section 301(c) of the Act, as amended. The owner or operator of the powerplant may certify at any time to OFP that it is technically capable and financially feasible for the unit to use a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source. In assessing whether the unit is technically capable of using a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source, for purposes of this section, the extent of any physical modification necessary to convert the unit and any concomitant reduction in rated capacity are not relevant factors. So long as a unit as proposed to be modified would be technically capable of using the mixture as a primary energy source under §504.6(c), this certification requirement shall be deemed met. The criteria for certification of financial feasibility are found at §504.6(f). In addition, the powerplant’s owner or operator must submit a prohibition compliance schedule, which meets the requirements of §504.5(d).

(b) If OFP concurs with the certification, a prohibition order against the unit’s excessive use of petroleum or natural gas in the mixture will be issued following the procedure outlined in §501.52 of these regulations.

(c) The petitioner may seek to amend its certification in order to take into account changes in relevant facts and circumstances by following the procedure contained in §501.52(d).

NOTE: The authority of OFP implemented under this section should not be confused with the other two fuel mixture provisions of these regulations. One is the general requirement that petitioners for permanent exemptions demonstrate that the use of a mixture of natural gas or petroleum and an alternate fuel is not economically or technically feasible (See §504.15). The second is the permanent fuel mixtures exemption itself (See §504.56).

(Approved by the Office of Management and Budget under control number 1903-0077)


§ 504.9 Environmental requirements for certifying powerplants.

Under §§501.52, 504.5 and 504.6 of these regulations, OFP may prohibit, in accordance with section 301 and section 303 (a) or (b) of FUA, as amended, the use of natural gas or petroleum, or both, as a primary energy source in any certifying powerplant. Under sections 301(c) and 303(a) of FUA, as amended, and §§501.52, 504.6, and 504.8 of
these regulations, OFP may prohibit the excessive use of natural gas or petroleum in a mixture with an alternate fuel as a primary energy source in a certifying powerplant.

(a) NEPA compliance. Except as provided in paragraph (c) of this section, where the owner or operator of a powerplant seeks to obtain an OFP prohibition order through the certification procedure, and did not hold either a proposed prohibition order under former section 301 of FUA or pending order under section 2 of ESCEA, it will be responsible for the costs of preparing any necessary Environmental Assessment (EA) or Environmental Impact Statement (EIS) arising from OFP’s obligation to comply with NEPA. The powerplant owner or operator shall enter into a contract with an independent party selected by OFP, who is qualified to conduct an environmental review and prepare an EA or EIS, as appropriate, and who does not have a financial or other interest in the outcome of the proceedings, under the supervision of OFP. The NEPA process must be completed and approved before OFP will issue a final prohibition order based on the certification.

(b) Environmental review procedure. Except as provided in paragraph (c) of this section, environmental documents, including the EA and EIS, where necessary, will be prepared utilizing the process set forth above. OFP, the powerplant owner or operator and the independent third party shall enter into an agreement for the owner or operator to engage and pay directly for the services of the qualified third party to prepare the necessary documents. The third party will execute an OFP prepared disclosure document stating that he does not have any conflict of interest, financial or otherwise, in the outcome of either the environmental process or the prohibition order proceeding. The agreement shall outline the responsibilities of each party and his relationship to the other two parties regarding the work to be done or supervised. OFP shall approve the information to be developed and supervise the gathering, analysis and presentation of the information. In addition, OFP will have the authority to approve and modify any statement, analysis, and conclusion contained in the third party prepared environmental documents.

(c) Financial hardship. Whenever the bona fide estimate of the costs associated with NEPA compliance, if borne by the powerplant owner or operator, would make the conversion financially infeasible, OFP may waive the requirement set forth in paragraphs (a) and (b) of this section and perform the necessary environmental review.

(Approved by the Office of Management and Budget under control number 1903–0077)

(47 FR 17046, Apr. 21, 1982)

APPENDIX I TO PART 504—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL

(a) The firm’s real after-tax weighted average marginal cost of capital (K) is computed with equation 1.

\[ K = 1 \left(1 - t_d \right) \left[ \frac{\hat{r}_d}{1 - \hat{t}_d} - \text{INF} \right] + \left[ \frac{\hat{r}_p}{1 - \hat{t}_p} - \text{INF} \right] + \left[ \frac{\hat{r}_e}{1 - \hat{f}_e} - \text{INF} \right] \]
Department of Energy

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The terms in equation 1 are defined as follows:

\( W_d \) = Fraction of existing capital structure which is debt.

\( W_p \) = Fraction of existing capital structure which is preferred equity.

\( W_e \) = Fraction of existing capital structure which is common equity and retained earnings.

\( \hat{R}_d \) = Predicted nominal cost of long term debt expressed as a fraction.

\( \hat{R}_p \) = Predicted nominal cost of preferred stock expressed as a fraction.

\( \hat{R}_e \) = Predicted nominal cost of common stock expressed as a fraction.

\( \Delta = \) Percentage change in the GNP implicit price deflator over the past 12 months expressed as a fraction.

\( f_d \) = Flotation cost of debt expressed as a fraction.

\( f_p \) = Flotation cost of preferred stock expressed as a fraction.

\( t \) = Marginal federal income tax rate for the current year.

(b) Information on parameters used in Equation 1. (1) The parameters used in equation 1 will be the best practicable estimates. They will be obtained from the firm, accepted rating services (e.g., Standard & Poors, Moody’s), government publications, accepted financial publications, annual financial reports and statements of firms, and investment bankers.

(2) The predicted nominal cost of debt \( (\hat{R}_d) \) may be estimated by determining the current average yield on newly issued bonds—industrial or utility as appropriate—which have the same rating as the firm’s most recent debt issue.

(3) The predicted nominal cost of preferred stock \( (\hat{R}_p) \) may be estimated by determining the current average yield on newly issued preferred stock—industrial or utility as appropriate—which has the same rating as the firm’s most recent preferred stock issue.

(4)\( \hat{A} \) The predicted nominal cost of common stock \( (\hat{R}_e) \) is computed with equation 2.

\[ \hat{R}_e = R_e + \hat{B}_e R_m \]

where:

\( R_e \) = The risk free interest rate—representing the average of the most recent auction rates of U.S. Government 13-week Treasury Bills, \( \beta \) = The “beta” coefficient—the relationship between the excess return on common stock and the excess return on the S&P 500 composite index, and

\( R_m \) = The mean excess return on the S&P 500 composite index—the mean of the difference between the return on the S&P 500 composite index and the risk free interest rate for the years 1926–1976 as computed by Ibbotson and Sinquefield(1) — 9.2%.

(B) The “beta” coefficient is computed with regression analysis techniques. The regression equation is Equation 3.

\[ \hat{R}_e^t = \hat{A} + \hat{B}(R_m^t - R_f^t) + \hat{e}^t \]

where

\( R_e^t \) \( \text{The risk free interest rate in month } t \text{—the average of the yields on 13-week treasury bills auctioned in month } t. \)

\( \hat{A} \) \( A \text{ constant which should not be significantly different than zero.} \)

\( \hat{B} \) \( \text{The mean excess return on the S&P 500 composite index, and} \)

\( e^t \) \( \text{The error in month } t \text{.} \)

\( V_{PRCC} \) \( \text{Closing market prices of the firm’s common stock at the end of month } t \text{ fully adjusted for splits and stock dividends.} \)

\( V_{DIVRATE} \) \( \text{The sum of the dividends paid in the fiscal year which contain month } t \text{.} \)

\( V_{SP} \) \( \text{The market value of “one share” of the S&P 500 composite index at the end of month } t \text{.} \)

\( D_{SP} \) \( \text{The estimated monthly income received from holding “one share” of the S&P 500 in month } t \text{.} \)

The regression analysis is done with sixty months of data. The first month \( (t=1) \) is sixty months before the month in which the firm’s current fiscal year started. The last month \( (t=60) \) is the last month of the past fiscal year.

(5) Where the parameters specified above are not obtainable, alternate parameters that closely correspond to those above may be used. This may include substituting a bond yield for nominal cost of preferred stock where the former is not available.

Where the capital structure does not consist of any debt, preferred equity, or common equity, an alternate methodology to predict the firm’s real after-tax marginal cost of capital may be used.

Example of using alternate parameters that closely correspond to those above are:

(A) In the case of industrials, who do not typically issue preferred stock, the predicted nominal cost of preferred stock \( (\hat{R}_p) \) can be estimated by determining the current average yield on newly issued industrial bonds which have the same rating as the firm’s most recent debt issue.

(B) If necessary, the following assumptions can be made to determine the nominal cost of debt or preferred stock and their flotation costs.

(i) Where a company issued privately placed debt that was not rated, the rating,
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applied to preferred stock could be used to determine the cost of debt and its flotation cost.

(ii) Where a company issued privately placed preferred stock that was not rated, the rating applied to debt could be used to determine the cost of preferred stock and its flotation costs.

(iii) In the case where all issues were privately placed, the current average yield on all newly issued debt or preferred could be used to determine the cost of debt or preferred respectively, and an average flotation cost, for debt or preferred, could be used.

(C) Evidence Requirements. Copies of this calculation with notations as to the source of the data must be submitted.

FOOTNOTES


(2) As an option, Rf t can be developed with the following equation:

\[ R_f^t = \frac{365D^t}{360 - ND^t} \times \frac{1}{12} \]

where:

- D = The average annual yield on three month U.S. Treasury bills reported in the Survey of Current Business auctioned in month t—which is reported using the bank discount method.
- N = Number of days to maturity.


APPENDIX II TO PART 504—FUEL PRICE COMPUTATION

(a) Introduction. This appendix provides the equations and parameters needed to specify the price of the delivered fuels to be used in the cost calculations associated with parts 503 and 504 of these regulations. The delivered price of the fuel to be used to calculate delivered fuel expenses must reflect (1) the price of each fuel at the time of the petition, and (2) the effects of future real price increases for each fuel. The delivered price of an alternate fuel used to calculate delivered fuel expenses must reflect the petitioner’s delivered price of the alternate fuel and the effects of real increases in the price of that alternate fuel. Paragraphs (b), (c) and (d) below provide the procedure to: (1) Calculate fuel price and inflation indices; (2) account for projected real increases in fuel prices when planning to burn one or more than one fuel; and (3) account for projected real increases in the price of the alternate fuel. Table II-1 of this appendix (See paragraph (b)) contains example fuel price and inflation indices based on the latest data appearing in the Energy Information Administration’s (EIA) Annual Energy Outlook (AEO).

The fuel price and inflation indices will change yearly with the publication of the AEO. Revisions shall become effective after final publication. However, the relevant set of parameters for a specific petition for exemption will be the set in effect at the time the petition is filed. The methodology for determining the fuel price and inflation indices used to rebase the inflation indices must be fully documented. The petitioner is to use the Base Case fuel price projections in the petition. However, if the petitioner uses his own price index, the source or the derivation of the index must be fully documented and contained in the evidentiary summary.

Eq II-2 is:

\[ PX_1 = \frac{P_1}{P_o} \]

where:

- PX = The fuel price index for each fuel in year 1.
- P = Price of fuel in year 1.
- P = Price of fuel in base year.

Eq II-2 is:

\[ IX_1 = \frac{G_1}{G_o} \]

where:

- IX = The inflation index in year 1.
- G = The NIPA GNP price deflator for year 1.
- G = The NIPA GNP price deflator for the base year.

(2) The parameters to be used in Eq II-1 are the Base Case fuel price projections found in EIA’s current AEO.

(3) When computing annual inflation indices, the petitioner is to use the Base Case National Macroeconomic Indicators (NIPA GNP Price Deflator) contained in EIA’s current AEO. If necessary, the petitioner must rebase the projection to the same year used for the fuel price projections. For example, in 1989 AEO projects the price deflator in 1982 dollars; this must be rebased to the year in which the petition is filed. The methodology used to rebased the inflation indices must follow standard statistical procedures and must be fully documented within the petition.

This index will remain frozen at the last year of the AEO’s projection for the remainder of the unit’s useful life.
(d) Table II–1 is provided as an example of the application of equations II–1 and II–2. This table contains annual fuel price indices for distillate oil, residual oil, natural gas, and coal. It also contains annual inflation indices. These values were computed from information contained in Table A3 and Table A11 of EIA’s AEO, 1989.

TABLE II–1: PRICE AND INFLATION INDICES FOR USE IN THE COST CALCULATIONS

<table>
<thead>
<tr>
<th>Year</th>
<th>Distillate (DPX)</th>
<th>Residual (RPX)</th>
<th>Natural gas (GPX)</th>
<th>Coal (CPX)</th>
<th>Inflation (IX)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>1.0000</td>
<td>1.0000</td>
<td>1.0000</td>
<td>1.0000</td>
<td>1.0000</td>
</tr>
<tr>
<td>1987</td>
<td>0.9810</td>
<td>1.2134</td>
<td>0.9507</td>
<td>0.9231</td>
<td>1.0334</td>
</tr>
<tr>
<td>1988</td>
<td>0.9429</td>
<td>0.9407</td>
<td>0.8934</td>
<td>0.8876</td>
<td>1.0658</td>
</tr>
<tr>
<td>1989</td>
<td>0.8929</td>
<td>1.1344</td>
<td>0.9205</td>
<td>0.9231</td>
<td>1.2836</td>
</tr>
<tr>
<td>1990</td>
<td>1.0381</td>
<td>1.0751</td>
<td>0.9344</td>
<td>0.9172</td>
<td>1.2204</td>
</tr>
<tr>
<td>1991</td>
<td>1.0929</td>
<td>1.1344</td>
<td>1.0205</td>
<td>0.9527</td>
<td>1.4960</td>
</tr>
<tr>
<td>1992</td>
<td>1.1595</td>
<td>1.2292</td>
<td>1.1148</td>
<td>0.9704</td>
<td>1.7410</td>
</tr>
<tr>
<td>1993</td>
<td>1.2286</td>
<td>1.3241</td>
<td>1.1844</td>
<td>0.9763</td>
<td>1.5768</td>
</tr>
<tr>
<td>1994</td>
<td>1.4000</td>
<td>1.5415</td>
<td>1.4016</td>
<td>0.9467</td>
<td>1.8235</td>
</tr>
<tr>
<td>1995</td>
<td>1.4000</td>
<td>1.6403</td>
<td>1.4918</td>
<td>0.9586</td>
<td>1.9025</td>
</tr>
<tr>
<td>1996</td>
<td>1.4000</td>
<td>1.7273</td>
<td>1.5615</td>
<td>0.9763</td>
<td>1.9025</td>
</tr>
<tr>
<td>1997</td>
<td>1.4000</td>
<td>1.7905</td>
<td>1.6475</td>
<td>0.9882</td>
<td>1.9025</td>
</tr>
<tr>
<td>1998</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>1999</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2000</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2001</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2002</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2003</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2004</td>
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<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2005</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2006</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2007</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2008</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2009</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
<tr>
<td>2010</td>
<td>1.4000</td>
<td>1.8340</td>
<td>1.7049</td>
<td>0.9941</td>
<td>1.9025</td>
</tr>
</tbody>
</table>

(C) Fuel Price Computation. 
(1) The delivered price of the proposed fuel to be burned (FPB), must reflect the real escalation rate of the proposed fuel, and must be computed with Equation EQ II–3. 
EQ–II–3 is: \[ \text{FPB} = \text{MPB} \times \text{PX} \]
where:
\[ \text{FPB} = \text{Price of the proposed fuel (distillate oil, residual oil, or natural gas) in year } i. \]
\[ \text{MPB} = \text{The current delivered market price of the proposed fuel.} \]
\[ \text{PX} = \text{The fuel price index value in year } i, \text{ computed with Equation II–1.} \]
or:
(2) When planning to use more than one fuel in the proposed unit(s), the petitioner must use Equation II–1 and Equation II–3 to calculate the annual fuel price of each fuel to be used. The petitioner then must estimate the proportion of each fuel to be burned annually over the useful life of the unit(s). With these proportions and the respective annual fuel prices for each fuel, the petitioner must compute an annual weighted average fuel price. The methodology used to calculate the weighted average fuel price must follow standard statistical procedures and be fully documented within the petition.

(d) Fuel Price Computation—Alternate Fuel. 
The delivered price of alternate fuel (PFA), must reflect the real escalation rate of alternate fuel and must be computed with Equation II–4. 
Equation II–4 is: 
\[ \text{PFA} = \text{APF} \times \text{APX} \]
where:
\[ \text{PFA} = \text{The price of the alternate fuel in year } i. \]
\[ \text{APF} = \text{The current market price of the alternate fuel f.o.b. the facility.} \]
\[ \text{APX} = \text{The alternate fuel price index value for year } i, \text{ computed with Equation II–1.} \]

In most cases the alternate fuel will be coal. The petitioner must use Equation II–1 (paragraph (b)) to compute the escalation rate (APX). If an alternate fuel other than coal is proposed the source or the derivation of the index must be fully documented and be contained in the evidential summary.

[54 FR 52896, Dec. 22, 1989]
§ 580.01 Purpose.
The purpose of this part is to implement the authority granted to the Secretary of Energy in section 401 of the Natural Gas Policy Act of 1978, Public Law 95–621, 92 Stat. 3394–3395 (1978).

§ 580.02 Definitions.
(a) Terms defined in section 2 of the Natural Gas Policy Act of 1978 shall have the same meaning, as applicable, for purposes of this part, unless further defined in paragraph (b) of this section.

(b) The following definitions are applicable to this part:

(1) **Commercial establishment** means any establishment, (including institutions and local, state and federal government agencies) engaged primarily in the sale of goods or services, where natural gas is used for purposes other than those involving manufacturing or electric power generation.

(2) **Essential agricultural use** means any use of natural gas:

(i) For agricultural production, natural fiber production, food processing, food quality maintenance, irrigation pumping, crop drying; or

(ii) As a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food which the Secretary of Agriculture determines is necessary for full food and fiber production.

(3) **Essential agricultural user** means any person who uses natural gas for an essential agricultural use as defined in paragraph (b)(2) of this section.

(4) **Hospital** means a facility whose primary function is delivering medical care to patients who remain at the facility, including nursing and convalescent homes. Outpatient clinics or doctors’ offices are not included in this definition.

(5) **High-priority use** means any use of natural gas by a high-priority user as defined in paragraph (a)(6) of this section.

(6) **High-priority user** means, in no specific order, any person who uses natural gas:

(i) In a residence, or

(ii) In a commercial establishment in amounts of less than 50 Mcf on a peak day; or

(iii) In any school or hospital; or

(iv) For minimum plant protection when operations are shut down, for police protection, for fire protection, in a sanitation facility, in a correctional facility, or for emergency situations pursuant to 18 CFR 2.78(a)(4).

(7) **Interstate pipeline** means any person engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act.

(8) **Residence** means a dwelling using natural gas predominately for residential purposes such as space heating, air conditioning, hot water heating, cooking, clothes drying, and other residential uses, and includes apartment buildings and other multi-unit residential buildings.

(9) **School** means a facility, the primary function of which is to deliver instruction to regularly enrolled students in attendance at such facility. Facilities used for both educational and non-educational activities are not included under this definition unless the latter are merely incidental to the delivery of instruction.
§ 580.03 Curtailment priorities.

(a) Notwithstanding any provision of law other than section 401(b) of the Natural Gas Policy Act of 1978, or any other rule, regulation, or order of the Department of Energy, the Federal Energy Regulatory Commission or their predecessor agencies, and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless:

(1) Such curtailment does not reduce the quantity of natural gas delivered for such use below the use requirement certified by the Secretary of Agriculture under section 401(c) of the Natural Gas Policy Act of 1978 in order to meet the requirements of full food and fiber production; or

(2) Such curtailment is necessary in order to meet the requirements of high-priority users; or

(3) The Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines, by rule or order issued pursuant to section 401(b) of the Natural Gas Policy Act of 1978, that the use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for such essential agricultural use.

(b) Any essential agricultural user who also qualifies as a high-priority user shall be a high-priority user for purposes of paragraph (a) of this section.

(c) The specific relative order of priority for all uses and users of natural gas, including high-priority and essential agricultural uses and users, shall remain as reflected in effective curtailment plans of interstate pipelines filed with the Federal Energy Regulatory Commission to the extent that the relative order of priorities does not conflict with paragraph (a) of this section.

(d) Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority users or essential agricultural uses.

§ 580.04 Administrative procedures.

[Reserved]
§ 590.100  OMB Control Numbers.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under Control No. 1903-0081.

§ 590.101  Purpose and scope.

The purpose of this part is to establish the rules and procedures required to be followed by persons to obtain authorizations from DOE to import or export natural gas under the Natural Gas Act and by all other persons interested in participating in a natural gas import or export proceeding before the agency. This part establishes the procedural rules necessary to implement the authorities vested in the Secretary by sections 301(b) and 402(f) of the DOE Act, which have been delegated to the Assistant Secretary.

§ 590.102  Definitions.

As used in this part:
(a) Assistant Secretary means the Assistant Secretary for Fossil Energy or any employee of the DOE who has been delegated final decisional authority.
(b) Contested proceeding means a proceeding:
(1) Where a protest or a motion to intervene, or a notice of intervention, in opposition to an application or other requested action has been filed, or
(2) Where a party otherwise notifies the Assistant Secretary and the other parties to a proceeding in writing that it opposes an application or other requested action.
(c) Decisional employee means the Assistant Secretary, presiding officials at conferences, oral presentations or trial-type hearings, and any other employee of the DOE, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, including advising the Assistant Secretary on the resolution of issues involved in a proceeding. The term includes those employees of the DOE assisting in the conduct of trial-type hearings by performing functions on behalf of the Assistant Secretary or presiding official.
(d) DOE means the Department of Energy, of which FE is a part.
(f) FE means the Office of The Assistant Secretary for Fossil Energy.
(g) FERC means the Federal Energy Regulatory Commission.
(h) Interested person means a person, other than a decisional employee, whose interest in a proceeding goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, and other individuals and organizations, including non-profit and public interest organizations, and state, local, and other public officials, with a proprietary, financial or other special interest in the outcome of a proceeding. The term does not include other federal agencies or foreign governments and their representatives, unless the agency, foreign government, or representative of a foreign government is a party to the proceeding.
(i) Natural gas means natural gas and mixtures of natural gas and synthetic natural gas, regardless of physical form or phase, including liquefied natural gas and gels primarily composed of natural gas.
(k) Off-the-record communication means a written or oral communication not on the record which is relevant to the merits of a proceeding, and about which the parties have not been given reasonable prior notice of.
§ 590.103 General requirements for filing documents with FE.

(a) Any document, including but not limited to an application, amendment of an application, request, petition, motion, answer, comment, protest, complaint, and any exhibit submitted in connection with such documents, shall be filed with FE under this part. Such document shall be considered officially filed with FE when it has been received and stamped with the time and date of receipt by the Office of Fuels Programs, FE. Documents transmitted to FE must be addressed as provided in §590.104. All documents and exhibits become part of the record in the official FE docket file and will not be returned. An original and fifteen (15) copies of all applications, filings and submittals shall be provided to FE. No specific format is required. Applicants required to file quarterly reports as a condition to an authorization need only file an original and four (4) copies.

(b) Upon receipt by FE, each application or other initial request for action shall be assigned a docket number. Any petition, motion, answer, request, comment, protest, complaint or other document filed subsequently in a docketed proceeding with FE shall refer to the assigned docket number. All documents shall be signed either by the person upon whose behalf the document is filed or by an authorized representative of any of the foregoing. Documents signed by an authorized representative shall contain a certified statement that the representative is a duly authorized representative unless the representative has a certified statement already on file in the FE docket of the proceeding. Documents signed by an authorized representative shall contain a certified statement that the representative is a duly authorized representative of the firm having knowledge of the facts alleged. Each document filed

the nature and purpose of the communication and an opportunity to be present during such communication or, in the case of a written communication, an opportunity to respond to the communication. It does not include communications concerned solely with procedures which are not relevant to the merits of a proceeding. It also does not include general background discussions about an entire industry or natural gas markets or communications of a general nature made in the course of developing agency policy for future general application, even though these discussions may relate to the merits of a particular proceeding.

(l) Party means an applicant, any person who has filed a motion for and been granted intervenor status or whose motion to intervene is pending, and any state commission which has intervened by notice pursuant to §590.303(a).

(m) Person means any individual, firm, estate, trust, partnership, association, company, joint-venture, corporation, United States local, state and federal governmental unit or instrumentality thereof, charitable, educational or other institution, and others, including any officer, director, owner, employee, or duly authorized representative of any of the foregoing.

(n) Presiding official means any employee of the DOE who has been designated by the Assistant Secretary to conduct any stage of a proceeding, which may include presiding at a conference, oral presentation, or trial-type hearing, and who has been delegated the authority of the Assistant Secretary to make rulings and issue orders in the conduct of such proceeding, other than final opinions and orders, orders to show cause, emergency interim orders, or conditional decisions under subpart D and orders on rehearing under subpart E.

(o) Proceeding means the process and activity, and any part thereof, instituted by FE either in response to an application, petition, motion or other filing under this part, or on its own initiative, by which FE develops and considers the relevant facts, policy and applicable law concerning the importation or exportation of natural gas and which may lead to the issuance of an order by the Assistant Secretary under subparts D and E.

(p) State commission means the regulatory body of a state or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the state or municipality, or having any regulatory jurisdiction over parties involved in the import or export arrangement.
with FE shall contain a certification that a copy has been served as required by §590.107 and indicate the date of service. Service of each document must be made not later than the date of the filing of the document.

(c) A person who files an application shall state whether, to the best knowledge of that person, the same or a related matter is being considered by any other part of the DOE, including the FERC, or any other Federal agency or department and, if so, shall identify the matter and the agency or department.

§590.104 Address for filing documents.

All documents filed under this part shall be addressed to: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Docket Room 3F–056, FE–50, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585. All hand delivered documents shall be filed with the Office of Fuels Programs at the above address between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

§590.105 Computation of time.

(a) In computing any period of time prescribed or allowed by these regulations, the day of the act or event from which the designated period of time begins to run is not included. The period of time begins to run the next day after the day of the act or event. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal Federal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, or legal Federal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, or legal Federal holiday.

(b) When the parties are not known, such as during the initial comment period following publication of the notice of application, service requirements under paragraph (a) of this section may be met by serving a copy of all documents filed with FE upon parties unless otherwise provided in this part. The copy of a document served upon parties shall be a true copy of the document filed with FE, but does not have to be a copy stamped with the time and date of receipt by FE. The FE shall maintain an official service list for each proceeding which shall be provided upon request.

(c) All documents required to be served under this part may be served by hand, certified mail, registered mail, or regular mail. It shall be the responsibility of the serving party to ensure that service is effected in a timely manner. Service is deemed complete upon delivery or upon mailing, whichever occurs first.

(d) Service upon a person’s duly authorized representatives on the official service list shall constitute service upon that person.

§590.106 Dockets.

The FE shall maintain a docket file of each proceeding under this part, which shall contain the official record upon which all orders provided for in subparts D and E shall be based. The official record in a particular proceeding shall include the official service list, all documents filed under §590.103, the official transcripts of any procedures held under subpart C, and opinions and orders issued by FE under subparts D and E, and reports of contract amendments under §590.407. All dockets shall be available for inspection and copying by the public during regular business hours between 8 a.m. and 4:30 p.m. Dockets are located in the Office of Fuels Programs, FE, Docket Room 3F–056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585.

§590.107 Service.

(a) An applicant, any other party to a proceeding, or a person filing a protest shall serve a copy of all documents filed with FE upon all parties unless otherwise provided in this part. The copy of a document served upon parties shall be a true copy of the document filed with FE, but does not have to be a copy stamped with the time and date of receipt by FE. The FE shall maintain an official service list for each proceeding which shall be provided upon request.

(c) All documents required to be served under this part may be served by hand, certified mail, registered mail, or regular mail. It shall be the responsibility of the serving party to ensure that service is effected in a timely manner. Service is deemed complete upon delivery or upon mailing, whichever occurs first.

(d) Service upon a person’s duly authorized representatives on the official service list shall constitute service upon that person.
(e) All FE orders, notices, or other FE documents shall be served on the parties by FE either by hand, registered mail, certified mail, or regular mail, except as otherwise provided in this part.

§ 590.108 Off-the-record communications.

(a) In any contested proceeding under this part:

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral off-the-record communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) Within forty-eight (48) hours of the off-the-record communication, a copy of all written off-the-record communications or memoranda prepared in compliance with paragraph (a)(3) of this section shall be delivered by the decisional employee to the Assistant Secretary and to the Deputy Assistant Secretary for Fuels Programs. The materials will then be made available for public inspection by placing them in the docket associated with the proceeding.

(5) Requests by a party for an opportunity to rebut, on the record, any facts or contentions in an off-the-record communication may be filed in writing with the Assistant Secretary. The Assistant Secretary shall grant such requests only for good cause.

(6) Upon being notified of an off-the-record communication made by a party in violation of this section, the Assistant Secretary may, to the extent consistent with the interests of justice and the policies of the NGA and the DOE Act, require the party to show cause why the party’s claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(b) The prohibitions of paragraph (a) of the section shall apply only to contested proceedings and begin at the time either a protest or a motion to intervene or notice of intervention in opposition to the application or other requested action is filed with FE, or a party otherwise specifically notifies the Assistant Secretary and the other parties in writing of its opposition to the application or other requested action, whichever occurs first.

§ 590.109 FE investigations.

The Assistant Secretary or the Assistant Secretary’s delegate may investigate any facts, conditions, practices, or other matters within the scope of this part in order to determine whether any person has violated or is about to violate any provision of the NGA or other statute or any rule, regulation, or order within the Assistant Secretary’s jurisdiction. In conducting such investigations, the Assistant Secretary or the Assistant Secretary’s delegate may, among other things, subpoena witnesses to testify, subpoena or otherwise require the submission of documents, and order testimony to be taken by deposition.

Subpart B—Applications for Authorization to Import or Export Natural Gas

§ 590.201 General.

(a) Any person seeking authorization to import or export natural gas into or from the United States, to amend an existing import or export authorization, or seeking any other requested action, shall file an application with the FE under the provisions of this part.

(b) Applications shall be filed at least ninety (90) days in advance of the proposed import or export or other requested action, unless a later date is permitted for good cause shown.

[54 FR 53331, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.202 Contents of applications.

(a) Each application filed under § 590.201 shall contain the exact legal
§ 590.203 Deficient applications.

If an application is incomplete or otherwise deemed deficient, the Assistant Secretary or the Assistant Secretary’s delegate may require the applicant to submit additional information or exhibits to remedy the deficiency. If the applicant does not remedy the deficiency within the time specified by the Assistant Secretary or the Assistant Secretary’s delegate, the application may be dismissed without prejudice to refiling at another time.

§ 590.204 Amendment or withdrawal of applications.

(a) The applicant may amend or supplement the application at any time
prior to issuance of the Assistant Secretary’s final opinion and order resolv-
ing the application, and shall amend or supplement the application whenever there are changes in material facts or conditions upon which the proposal is based.

(b) The Assistant Secretary may for good cause shown by motion of a party or upon the Assistant Secretary’s own initiative decline to act on, in whole or in part, an amendment or supplement requested by an applicant under paragraph (a) of this section.

(c) After written notice to FE and service upon the parties of that notice an applicant may withdraw an application. Such withdrawal shall be effective thirty (30) days after notice to FE if the Assistant Secretary does not issue an order to the contrary within that time period.

§ 590.205 Notice of applications.

(a) Upon receipt of an application, the FE shall publish a notice of application in the FEDERAL REGISTER. The notice shall summarize the proposal. Except in emergency circumstances, generally the notice shall provide a time limit of not less than thirty (30) days from the notice’s date of publication in the FEDERAL REGISTER for persons to file protests, comments, or a motion to intervene or notice of intervention, as applicable. The notice may also request comments on specific issues or matters of fact, law, or policy raised by the application. 

(b) The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures should the Assistant Secretary decide to grant the application and authorize the import or export by issuing a final opinion and order in accordance with §590.316.

(c) Where negotiations between the DOE, including FE, and a foreign government have resulted in a formal policy agreement or statement affecting a particular import or export proceeding, FE shall include in the notice of application a description of the terms or policy positions of that agreement or statement to the extent they apply to the proceeding, and invite comment. A formal policy agreement or statement affecting a particular import or export proceeding that is arrived at after publication of the notice of application shall be placed on the record in that proceeding and the parties given an opportunity to comment thereon.

§ 590.206 Notice of procedures.

In all proceedings where, following a notice of application and the time specified in the notice for the filing of responses thereto, the Assistant Secretary determines to have additional procedures, which may consist of the filing of supplemental written comments, written interrogatories or other discovery procedures, a conference, oral presentation, or trial-type hearing, the Assistant Secretary shall provide the parties with notice of the procedures the Assistant Secretary has determined to follow in the proceeding and advise the parties of their right to request any additional procedures in accordance with the provisions of §590.310. The notice of procedures may identify and request comments on specific issues of fact, law, or policy relevant to the proceeding and may establish a time limit for requesting additional procedures.

§ 590.207 Filing fees.

A non-refundable filing fee of fifty dollars ($50) shall accompany each application filed under §590.201. Checks shall be made payable to “Treasury of the United States.”

§ 590.208 Small volume exports.

Any person may export up to 100,000 cubic feet of natural gas (14.73 pounds per square inch at 60 degrees Fahrenheit) or the liquefied or compressed equivalent thereof, in a single shipment for scientific, experimental, or other non-utility gas use without prior authorization of the Assistant Secretary.
§ 590.209 Exchanges by displacement.

Any importer of natural gas may enter into an exchange by displacement agreement without the prior authorization of the Assistant Secretary when the net effect of the exchange is no different than under the importer’s existing authorization. An exchange by displacement is an arrangement whereby authorized imported volumes are displaced by other gas for purposes of storage or flexibility. The term of the exchange agreement may not exceed five (5) years, the volumes imported may not exceed the importer’s existing import authorization, and no actual natural gas may flow across the United States border under the terms of the exchange agreement. Any importer who enters into an exchange agreement pursuant to this section shall file with FE within fifteen (15) days after the start up of the exchange, a written description of the transaction, the exact volume of natural gas to be displaced, the name of the purchaser, and the import authorization under which the exchange is being carried out.

Subpart C—Procedures

§ 590.301 General.

The procedures of this subpart are applicable to proceedings conducted on all applications or other requested actions filed under this part. The Assistant Secretary may conduct all aspects of the procedures of this subpart or may designate a presiding official pursuant to §590.314.

§ 590.302 Motions and answers.

(a) Motions for any procedural or interlocutory ruling shall set forth the ruling or relief requested and state the grounds and the statutory or other authority relied upon. All written motions shall comply with the filing requirements of §590.103. Motions made during conferences, oral presentations or trial-type hearings may be stated orally upon the record, unless the Assistant Secretary or the presiding official determines otherwise.

(b) Any party may file an answer to any written motion within fifteen (15) days after the motion is filed, unless another period of time is established by the Assistant Secretary or the presiding official. Answers shall be in writing and shall detail each material allegation of the motion being answered. Answers shall state clearly and concisely the facts and legal authorities relied upon.

(c) Any motion, except for motions seeking intervention or requesting that a conference, oral presentation or trial-type hearing be held, shall be deemed to have been denied, unless the Assistant Secretary or presiding official acts within thirty (30) days after the motion is filed.

§ 590.303 Interventions and answers.

(a) A state commission may intervene in a proceeding under this part as a matter of right and become a party to the proceeding by filing a notice of intervention no later than the date fixed for filing motions to intervene in the applicable FE notice or order. If the period for filing the notice has expired, a state commission may be permitted to intervene by complying with the filing and other requirements applicable to any other person seeking to become a party to the proceeding as provided in this section.

(b) Any other person who seeks to become a party to a proceeding shall file a motion to intervene, which sets out clearly and concisely the facts upon which the petitioner’s claim of interest is based.

(c) A motion to intervene shall state, to the extent known, the position taken by the movant and the factual and legal basis for such positions in order to advise the parties and the Assistant Secretary as to the specific issues of policy, fact, or law to be raised or controverted.

(d) Motions to intervene may be filed at any time following the filing of an application, but no later than the date fixed for filing such motions or notices in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown and after considering the impact of granting the late motion of the proceeding. Each motion or notice shall list the names, titles, and mailing addresses of a maximum of two persons for the official service list.
(e) Any party may file an answer to a motion to intervene, but such answer shall be made within fifteen (15) days after the motion to intervene was filed, unless a later date is permitted by the Assistant Secretary for good cause shown. Answers shall be in writing. Answers shall detail each material allegation of the motion to intervene being answered and state clearly and concisely the facts and legal authorities relied upon. Failure to answer is deemed a waiver of any objection to the intervention. This paragraph does not prevent the Assistant Secretary from ruling on a motion to intervene and issuing a final opinion and order in accordance with §590.316 prior to the expiration of the fifteen (15) days in which a party has to answer a motion to intervene.

(f) If an answer in opposition to a motion to intervene is timely filed or if the motion to intervene is not timely filed, then the movant becomes a party only after the motion to intervene is expressly granted.

(g) If no answer in opposition to a motion to intervene is filed within the period of time prescribed in paragraph (e) of this section, the motion to intervene shall be deemed to be granted, unless the Assistant Secretary denies the motion in whole or in part or otherwise limits the intervention prior to the expiration of the time allowed in paragraph (e) for filing an answer to the motion to intervene. Where the motion to intervene is deemed granted, the participation of the intervenor shall be limited to matters affecting asserted rights and interests specifically set forth in the motion to intervene, and the admission of such intervenor to party status shall not be construed as recognition by FE that the intervenor might be aggrieved because of any order issued.

(h) In the event that a motion for late intervention is granted, an intervenor shall accept the record of the proceeding as it was developed prior to the intervention.

§ 590.306 Subpoenas.

(a) Subpoenas for the attendance of witnesses at a trial-type hearing or for the production of documents may be served in accordance with the procedures set forth in §30.43 of this title or §1415 of the Federal Rules of Civil Procedure, as applicable.
§ 590.307  Depositions.

(a) Upon motion filed by a party, the Assistant Secretary or presiding official may authorize the taking of testimony of any witness by deposition. Unless otherwise directed in the authorization issued, a witness being deposed may be examined regarding any matter which is relevant to the issues involved in the pending proceeding.

(b) Parties authorized to take a deposition shall provide written notice to the witness and all other parties at least ten (10) days in advance of the deposition unless such advance notice is waived by mutual agreement of the parties.

(c) The requesting motion and notice shall state the name and mailing address of the witness, delineate the subject matters on which the witness is expected to testify, state the reason why the deposition should be taken, indicate the time and place of the deposition, and provide the name and mailing address of the person taking the deposition.

(d) A witness whose testimony is taken by deposition shall be sworn in or shall affirm concerning the matter about which the witness has been called to testify before any questions are asked or testimony given. A witness deposed shall be entitled to witness fees as provided in §590.315(c).

(e) The moving party shall file the entire deposition with FE after it has been subscribed and certified. No portion of the deposition shall constitute a part of the record in the proceedings unless received in evidence, in whole or in part, by the Assistant Secretary or presiding official.

§ 590.308  Admissions of facts.

(a) At any time prior to the end of a trial-type hearing, or, if there is no trial-type hearing, prior to the issuance of a final opinion and order under §590.404, any party, the Assistant Secretary, or the presiding official may serve on any party a written request for admission of the truth of any matters at issue in the proceeding that relate to statements or opinions of fact or of the application of law to fact.

(b) A matter shall be considered admitted and conclusively established for the purposes of any proceeding in which a request for admission is served unless, within fifteen (15) days of such time limit established by the Assistant Secretary or presiding official, the party to whom the request is directed answers or objects to the request. Any answer shall specifically admit or deny the matter, or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the answering party states that, after reasonable inquiry, the answering party has been unable to obtain sufficient information to admit or deny. If an objection is made, the answering party shall state the reasons for the objection.

(c) If the Assistant Secretary or presiding official determines that an answer to a request for admission does not comply with the requirements of this section, the Assistant Secretary or
§ 590.312 Oral presentations.

(a) Any party may file a motion requesting an opportunity to make an oral presentation of views, arguments, including arguments of counsel, and data on any aspect of the proceeding. The motion shall identify the substantial question of fact, law or policy at issue and demonstrate that it is material and relevant to the merits of the proceeding. The party may submit material supporting the existence of substantial issues. The Assistant Secretary or presiding official ordinarily will grant a party’s motion for an oral presentation, if the Assistant Secretary or presiding official determines that a substantial question of fact, law, or policy is at issue in the proceeding and illumination of that question will be aided materially by such an oral presentation.

(b) The Assistant Secretary or presiding official may require parties making oral presentations to file briefs during a proceeding, the Assistant Secretary or presiding official may on his or her own initiative determine to provide additional procedures.

[54 FR 53331, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.311 Conferences.

(a) Upon motion by a party, a conference of the parties may be convened to adjust or settle the proceedings, set schedules, delineate issues, stipulate certain issues of fact or law, set procedures, and consider other relevant matters where it appears that a conference will materially advance the proceeding. The Assistant Secretary or presiding official may delineate the issues which are to be considered and may place appropriate limitations on the number of intervenors who may participate, if two or more intervenors have substantially like interests.

(b) A motion by a party for a conference shall include a specific showing why a conference will materially advance the proceeding.

(c) Conferences shall be recorded, unless otherwise ordered by the Assistant Secretary or presiding official, and the transcript shall be made a part of the official record of the proceeding and available to the public.

§ 590.310 Opportunity for additional procedures.

Any party may file a motion requesting additional procedures, including the opportunity to file written comments, request written interrogatories or other discovery procedures, or request that a conference, oral presentation or trial-type hearing be held. The motion shall describe what type of procedure is requested and include the information required by §§ 590.311, 590.312 and 590.313, as appropriate. Failure to request additional procedures within the time specified in the notice of application or in the notice of procedure, if applicable, shall constitute a waiver of that right unless the Assistant Secretary for good cause shown grants additional time for requesting additional procedures. If no time limit is specified in the notice or order, additional procedures may be requested at any time prior to the issuance of a final opinion and order. At any time during a proceeding, the Assistant Secretary or presiding official may order that the matter is admitted or that an amended answer be served.

(d) A copy of all requests for admission and answers thereto shall be filed with FE in accordance with § 590.103. Copies of any documents referenced in the request shall be served with the request unless they are known to be in the possession of the other parties.

(e) The Assistant Secretary or presiding official may limit the number of requests for admission of facts in order to expedite a proceeding through elimination of duplicative requests.

§ 590.309 Settlements.

The parties may conduct settlement negotiations. If settlement negotiations are conducted during a conference, at the request of one of the parties, the Assistant Secretary or presiding official may order that the discussions be off-the-record with no transcript of such settlement negotiations being prepared for inclusion in the official record of the proceeding. No offer of settlement, comment or discussion by the parties with respect to an offer of settlement shall be subject to discovery or admissible into evidence against any parties who object to its admission.

§ 590.312 Oral presentations.

(a) Any party may file a motion requesting an opportunity to make an oral presentation of views, arguments, including arguments of counsel, and data on any aspect of the proceeding. The motion shall identify the substantial question of fact, law or policy at issue and demonstrate that it is material and relevant to the merits of the proceeding. The party may submit material supporting the existence of substantial issues. The Assistant Secretary or presiding official ordinarily will grant a party’s motion for an oral presentation, if the Assistant Secretary or presiding official determines that a substantial question of fact, law, or policy is at issue in the proceeding and illumination of that question will be aided materially by such an oral presentation.

(b) The Assistant Secretary or presiding official may require parties making oral presentations to file briefs
or other documents prior to the oral presentation. The Assistant Secretary or presiding official also may delineate the issues that are to be considered at the oral presentation and place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests. 

(c) Oral presentations shall be conducted in an informal manner with the Assistant Secretary or the presiding official and other decisional employees presiding as a panel. The panel may question those parties making an oral presentation. Cross-examination by the parties and other more formal procedures used in trial-type hearings will not be available in oral presentations. The oral presentation may be, but need not be, made by legal counsel.

(d) Oral presentations shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.313 Trial-type hearings.

(a) Any party may file a motion for a trial-type hearing for the purpose of taking evidence on relevant and material issues of fact genuinely in dispute in the proceeding. The motion shall identify the factual issues in dispute and the evidence that will be presented. The party must demonstrate that the issues are genuinely in dispute, relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. The Assistant Secretary or presiding official shall grant a party’s motion for a trial-type hearing, if the Assistant Secretary or presiding official determines that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.

(b) In trial-type hearings, the parties shall have the right to be represented by counsel, to request discovery, to present the direct and rebuttal testimony of witnesses, to cross-examine witnesses under oath, and to present documentary evidence.

(c) The Assistant Secretary or presiding official upon his or her own initiative or upon the motion of any party may consolidate any proceedings involving common questions of fact in whole or in part for a trial-type hearing. The Assistant Secretary or presiding official may also place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(d) The Assistant Secretary or presiding official may make such rulings for trial-type hearings, including delineation of the issues and limitation of cross-examination of a witness, as are necessary to obtain a full and true disclosure of the facts and to limit irrelevant, immaterial, or unduly repetitious evidence.

(e) At trial-type hearings, the Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may call witnesses for testimony or presenting exhibits that directly relate to a particular issue of fact to be considered at the hearing. The Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may also question witnesses offered by the parties concerning their testimony.

(f) Trial-type hearings shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.314 Presiding officials.

(a) The Assistant Secretary may designate a presiding official to conduct any stage of the proceeding, including officiating at a conference, oral presentation, or trial-type hearing. The presiding official shall have the full authority of the Assistant Secretary during such proceedings.

(b) A presiding official at a conference, oral presentation, or trial-type hearing shall have the authority to regulate the conduct of the proceeding including, but not limited to, determination of the issues to be raised during the course of the conference, oral presentation, or trial-type hearing, administering oaths or affirmations, directing discovery, ruling on objections to the presentation of testimony or exhibits, receiving relevant and material
evidence, requiring the advance submission of written testimony and exhibits, ruling on motions, determining the format, directing that briefs be filed with respect to issues raised or to be raised during the course of the conference, oral presentation or trial-type hearing, questioning witnesses, taking reasonable measures to exclude duplicative material, and placing limitations on the number of witnesses to be called by a party.

§ 590.315 Witnesses.

(a) The Assistant Secretary or presiding official may require that the direct testimony of witnesses in trial-type hearings be submitted in advance of the hearing and be under oath, and in written form.

(b) Witnesses who testify in trial-type hearings shall be under oath or affirmation before being allowed to testify.

(c) Witnesses subpoenaed pursuant to §590.306 shall be paid the same fees and mileage as paid for like services in the District Courts of the United States.

(d) Witnesses subpoenaed pursuant to §590.307 shall be paid the same fees and mileage as paid for like services in the District Court of the United States.

§ 590.316 Shortened proceedings.

In any proceeding where, in response to a notice of application or notice of procedures, if applicable, no party files a motion requesting additional procedures, including the right to file written comments, or the holding of a conference, oral presentation, or trial-type hearing, or where the Assistant Secretary determines that such requested additional procedures are not required pursuant to §§590.310, 590.311, 590.312 and 590.313, the Assistant Secretary may issue a final opinion and order on the basis of the official record, including the application and all other filings. In any proceeding in which the Assistant Secretary intends to deny the application or grant the application with the attachment of material conditions unknown to, or likely to be opposed by, the applicant, solely on the basis of the application and responses to the notice of application or notice of procedures, if applicable, without additional procedures, the Assistant Secretary shall advise the parties in writing generally of the issues of concern to the Assistant Secretary upon which the denial or material conditions would be based and provide them with an opportunity to request additional procedures pursuant to §§590.310, 590.311, 590.312 and 590.313.

§ 590.317 Complaints.

(a) Any person may file a complaint objecting to the actions by any other person under any statute, rule, order or authorization applicable to an existing import or export authorization over which FE has jurisdiction. No particular form is required. The complaint must be filed with FE in writing and must contain the name and address of the complainant and the respondent and state the facts forming the basis of the complaint.

(b) A complaint concerning an existing import or export authorization shall be served on all parties to the original import or export authorization proceeding either by the complainant or by FE if the complainant has made a good faith effort but has been unable to effect service.

(c) The Assistant Secretary may issue an order to show cause under §590.401, or may provide opportunity for additional procedures pursuant to §§590.310, 590.311, 590.312, or §590.313, in order to determine what action should be taken in response to the complaint.

Subpart D—Opinions and Orders

§ 590.401 Orders to show cause.

A proceeding under this part may commence upon the initiative of the Assistant Secretary or in response to an application by any person requesting FE action against any other person alleged to be in contravention or violation of any authorization, statute, rule, order, or law administered by FE applicable to the import or export of natural gas, or for any other alleged wrong involving importation or exportation of natural gas over which FE has jurisdiction. Any show cause order issued shall identify the matters of interest or the matters complained of
§ 590.402 Conditional orders.
The Assistant Secretary may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.

§ 590.403 Emergency interim orders.
Where consistent with the public interest, the Assistant Secretary may waive further procedures and issue an emergency interim order authorizing the import or export of natural gas. After issuance of the emergency interim order, the proceeding shall be continued until the record is complete, at which time a final opinion and order shall be issued. The Assistant Secretary may attach necessary or appropriate terms and conditions to the emergency interim order to ensure that the authorized action will be consistent with the public interest.

§ 590.404 Final opinions and orders.
The Assistant Secretary shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.

§ 590.405 Transferability.
Authorizations by the Assistant Secretary to import or export natural gas shall not be transferable or assignable, unless specifically authorized by the Assistant Secretary.

§ 590.406 Compliance with orders.
Any person required or authorized to take any action by a final opinion and order of the Assistant Secretary shall file with FE, within thirty (30) days after the requirement or authorization becomes effective, a notice, under oath, that such requirement has been complied with or such authorization accepted or otherwise acted upon, unless otherwise specified in the order.

§ 590.407 Reports of changes.
Any person authorized to import or export natural gas has a continuing obligation to give the Assistant Secretary written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based, including, but not limited to, changes to: The parties involved in the import or export arrangement, the terms and conditions of any applicable contracts, the place of entry or exit, the transporters, the volumes accepted or offered, or the import or export price. Any notification filed under this section shall contain the FE docket number(s) to which it relates. Compliance with this section does not relieve an importer or exporter from responsibility to file the appropriate application to amend a previous import or export authorization under this part whenever such changes are contrary to or otherwise not permitted by the existing authorization.

Subpart E—Applications for Rehearing

§ 590.501 Filing.
(a) An application for rehearing of a final opinion and order, conditional order, or emergency interim order may be filed by any party aggrieved by the issuance of such opinion and order within thirty (30) days after issuance. The application shall be served on all parties.
(b) The application shall state concisely the alleged errors in the final opinion and order, conditional order, or emergency interim order and must set forth specifically the grounds upon which the application is

§ 590.502 that the Assistant Secretary is inquiring about, and shall be deemed to be tentative and for the purpose of framing issues for consideration and decision. The respondent named in the order shall respond orally or in writing, or both, as required by the order. A show cause order is not a final opinion and order.
based. If an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of the final opinion and order, conditional order, or emergency interim order, the matters relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of §590.103.

§ 590.502 Application is not a stay.

The filing of an application for rehearing does not operate as a stay of the Assistant Secretary’s order, unless specifically ordered by the Assistant Secretary.

§ 590.503 Opinion and order on rehearing.

Upon application for rehearing, the Assistant Secretary may grant or deny rehearing or may abrogate or modify the final opinion and order, conditional order, or emergency interim order with or without further proceedings.

§ 590.504 Denial by operation of law.

Unless the Assistant Secretary acts upon the application for rehearing within thirty (30) days after it is filed, it is deemed to be denied. Such denial shall constitute final agency action for the purpose of judicial review.

§ 590.505 Answers to applications for rehearing.

No answers to applications for rehearing shall be entertained. Prior to the issuance of any final opinion and order on rehearing, however, the Assistant Secretary may afford the parties an opportunity to file briefs or answers and may order that a conference, oral presentation, or trial-type hearing be held on some or all of the issues presented by an application for rehearing.
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PART 600—FINANCIAL ASSISTANCE RULES

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APPENDIX A TO PART 600—GENERALLY APPLICABLE REQUIREMENTS

APPENDIX B TO PART 600—AUDIT REPORT DISTRIBUTEES


Subpart A—General

SOURCE: 61 FR 7166, Feb. 26, 1996, unless otherwise noted.

§ 600.1 Purpose.

This part implements the Federal Grant and Cooperative Agreement Act, Pub. L. 95–224, as amended by Pub. L. 97–258 (31 U.S.C. 6301–6308), and establishes uniform policies and procedures for the award and administration of DOE grants and cooperative agreements. This subpart (Subpart A) sets forth the policies and procedures applicable to the award and administration of grants and cooperative agreements.

§ 600.2 Applicability.

(a) Except as otherwise provided by Federal statute or program rule, this part applies to applications, solicitations, and new, continuation, and renewal awards (and any subsequent subawards).

(b) Any new, continuation, or renewal award (and any subsequent subaward) shall comply with any applicable Federal statute, Federal rule, Office of Management and Budget (OMB) Circular and Governmentwide guidance in effect as of the date of such award.
§ 600.3  
(c) Financial assistance to foreign entities is governed, to the extent appropriate, by this part and by the administrative requirements and cost principles applicable to their respective recipient type, e.g., governmental, non-profit, commercial.

§ 600.3 Definitions.

Amendment means the written document executed by a DOE contracting officer that changes one or more terms or conditions of an existing financial assistance award.

Award means the written document executed by a DOE Contracting Officer, after an application is approved, which contains the terms and conditions for providing financial assistance to the recipient.

Budget period means the interval of time, specified in the award, into which a project is divided for budgeting and funding purposes.

Continuation award means an award for a succeeding or subsequent budget period after the initial budget period of either an approved project period or renewal thereof.

Contract means a written procurement contract executed by a recipient or subrecipient for the acquisition of property or services under a financial assistance award.

Contracting Officer means the DOE official authorized to execute awards on behalf of DOE and who is responsible for the business management and non-program aspects of the financial assistance process.

DOE Patent Counsel means the Department of Energy Patent Counsel assisting the Contracting Officer in the review and coordination of patents and data related items.

Financial assistance means the transfer of money or property to a recipient or subrecipient to accomplish a public purpose of support or stimulation authorized by Federal statute. For purposes of this part, financial assistance instruments are grants and cooperative agreements and subawards.

Head of Contracting Activity or HCA means a DOE official with senior management authority for the award and administration of financial assistance instruments within one or more DOE organizational elements.

Merit review means a thorough, consistent, and objective examination of applications based on pre-established criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

Nonprofit organization means any corporation, trust, foundation, or institution which is entitled to exemption under section 501(c)(3) of the Internal Revenue Code, or which is not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual (except that the definition of "nonprofit organization" at 48 CFR 27.301 shall apply to the use of the patent clause at Section 600.27).

Program rule means a rule issued by a DOE program office for the award and administration of financial assistance which may describe the program's purpose or objectives, eligibility requirements for applicants, types of program activities or areas to be supported, evaluation and selection process, cost sharing requirements, etc. These rules usually supplement the generic policies and procedures for financial assistance contained in this part.

Project means the set of activities described in an application, State plan, or other document that is approved by DOE for financial assistance (whether such financial assistance represents all or only a portion of the support necessary to carry out those activities.)

Project period means the total period of time indicated in an award during which DOE expects to provide financial assistance. A project period may consist of one or more budget periods and may be extended by DOE.

Recipient means the organization, individual, or other entity that receives an award from DOE and is financially accountable for the use of any DOE funds or property provided for the performance of the project, and is legally responsible for carrying out the terms and conditions of the award.

Renewal award means an award which adds one or more additional budget periods to an existing project period.

Research and development means all research activities, both basic and applied, and all development activities.
that are supported at universities, colleges, and other non-profit institutions and commercial organizations. “Research” is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. “Development” is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

§ 600.5 Selection of award instrument.
(a) If DOE has administrative discretion in the selection of the award instrument, the DOE decision as to whether the relationship is principally one of procurement or financial assistance shall be made pursuant to the Federal Grant and Cooperative Agreement Act as codified at 31 U.S.C. 6301-
§ 600.6 Eligibility.

(a) General. DOE shall solicit applications for financial assistance in a manner which provides for the maximum amount of competition feasible.

(b) Restricted eligibility. If DOE restricts eligibility, an explanation of why the restriction of eligibility is considered necessary shall be included in the solicitation, program rule, or published notice. Except when authorized by statute or program rule, if the aggregate amount of DOE funds available for award under a solicitation or published notice is $1,000,000 or more, such restriction of eligibility shall be supported by a written determination initiated by the program office and approved by an official no less than two levels above the initiating program official and concurred in by the Contracting Officer and legal counsel. Where the amount of DOE funds is less than $1,000,000, the cognizant HCA and the Contracting Officer may approve the determination.

(c) Noncompetitive financial assistance. DOE may award a grant or cooperative agreement on a noncompetitive basis only if the application satisfies one or more of the following selection criteria:

(1) The activity to be funded is necessary to the satisfactory completion of, or is a continuation or renewal of, an activity presently being funded by DOE or another Federal agency, and for which competition for support would have a significant adverse effect on continuity or completion of the activity.

(2) The activity is being or would be conducted by the applicant using its own resources or those donated or provided by third parties; however, DOE support of that activity would enhance the public benefits to be derived and DOE knows of no other entity which is conducting or is planning to conduct such an activity.

(3) The applicant is a unit of government and the activity to be supported is related to performance of a governmental function within the subject jurisdiction, thereby precluding DOE provision of support to another entity.

(4) The applicant has exclusive domestic capability to perform the activity successfully, based upon unique
§ 600.8 Solicitation.

(a) General. A solicitation for financial assistance applications shall be in the form of a program rule or other publicly available document which invites the submission of applications by a common due date or within a prescribed period of time.

(1) A Program Assistant Secretary (or official of equivalent authority) may annually issue a program notice describing research areas in which financial assistance is being made available. Such notice shall also state whether the research areas covered by the notice are to be added to those listed in a previously issued program rule. If they are to be included, then applications received as a result of the notice may be treated as having been in response to that previously published program rule. If they are not to be included, then applications received in response to the notice are to be treated as unsolicited applications. Solicitations may be issued by a DOE Contracting Officer or program office with prior concurrence of the contracting office.

(2) DOE shall publish either a copy or a notice of the availability of a financial assistance solicitation in the Federal Register. DOE shall publish solicitations or notices in the Commerce
§ 600.8  In accordance with the provisions of the applicable statute and program rules, if a DOE financial assistance program involves the award of financial assistance by a recipient to a subrecipient, the recipient shall provide sufficient advance notice so that potential subrecipients may prepare timely applications and secure prerequisite reviews and approvals.

(c) Contents of solicitation. Each solicitation shall provide information as may be necessary to allow potential applicants to decide whether to submit an application, to understand how applications will be evaluated, and to know what the obligations of a recipient would be. At a minimum, each solicitation must include:

1. A control number assigned by the issuing DOE office;
2. The amount of money available for award and, if appropriate, the expected size of individual awards broken down by areas of priority or emphasis, and the expected number of awards;
3. The type of award instrument or instruments to be used;
4. The Catalog of Federal Domestic Assistance number for the program;
5. Who is eligible to apply;
6. The expected duration of DOE support or the period of performance;
7. An application form or the format to be used, location for application submission, and number of copies required;
8. The name of the responsible DOE Contracting Officer (or, for program notices or solicitations issued by the program office, the program office contact) to contact for additional information, and, as appropriate, an address where application forms may be obtained;
9. Whether loans are available under the DOE Minority Economic Impact (MEI) loan program, 10 CFR part 800, to finance the cost of preparing a financial assistance application, and, if MEI loans are available, a general description of the eligibility requirements for such a loan, a reference to Catalog of Federal Domestic Assistance Number 81.063, and the name and address of the DOE office from which additional information and loan application forms can be obtained;
10. Appropriate periods or due dates for submission of applications and a statement describing the consequences of late submission. If programs have established a series of due dates to allow for the comparison of applications against each other, these dates shall be indicated in the solicitation;
11. The types of projects or activities eligible for support;
12. Evaluation criteria and the weight or relative importance of each, which may include one or more of the following or other criteria, as appropriate:
   (i) Qualifications of the applicant’s personnel who will be working on the project;
   (ii) Adequacy of the applicant’s facilities and resources;
   (iii) Cost-effectiveness of the project;
   (iv) Adequacy of the project plan or methodology;
   (v) Management capability of the applicant;
   (vi) Sources of financing available to the project. Any requirement concerning cost sharing shall be clearly stated (See also § 600.30, Cost Sharing). Cost sharing is generally encouraged. However, unless cost sharing is required by the solicitation, it shall not be considered in the evaluation process and shall be considered only at the time the award is negotiated.
   (vii) Relationship of the proposed project to the objectives of the solicitation;
13. A listing of program policy factors, if any, indicating the relative importance of each, if appropriate. Examples of program policy factors are:
   (i) Geographic distribution;
   (ii) Diverse types and sizes of applicant entities;
   (iii) A diversity of methods, approaches, or kinds of work; and
   (iv) Projects which are complementary to other DOE programs or projects;
14. References to or copies of:
   (i) Statutory authority for the program;
   (ii) Applicable rules, including the appropriate subparts of this part;
§ 600.10 Form and content of applications.

(a) General. Applications shall be required for all financial assistance projects or programs.

(b) Forms. Applications shall be on the form and in the number of copies specified in a program rule, the solicitation, or these regulations. (See also §§600.112 and 600.210.) For unsolicited applications, a guide for preparation and submission is available from U.S. Department of Energy, Federal Energy Technology Center, Attn: Unsolicited Proposal Manager, Post Office Box 10940, Pittsburgh, PA, 15236-0940.

(c) Contents of an application. In general, a financial assistance application shall include:

(1) A facesheet containing basic identifying information. The facesheet shall be the Standard Form (SF) 424 or other approved DOE application form;

(2) A detailed narrative description of the proposed project, including the objectives of the project and the applicant’s plan for carrying it out;

(3) A budget with supporting justification; and

(4) Any required preaward assurances.

(d) Incomplete applications. DOE may return an application that:

(1) Is not signed, either in writing or electronically, by an official authorized to bind the applicant; or

(2) omits any information or documentation required by statute, program rule, or the solicitation, if the nature of the omission precludes review of the application.

(e) Supplemental information. During the review of a complete application,
§ 600.11

DOE may request the submission of additional information only if the information is essential to evaluate the application.


§ 600.11 Intergovernmental review.

Intergovernmental review of DOE financial assistance shall be conducted in accordance with 10 CFR part 1005.

§ 600.12 Generally applicable requirements.

(a) Except as expressly exempted by Federal statute or program rule, recipients and subrecipients of DOE financial assistance shall comply with all generally applicable requirements to which they are subject. Generally applicable requirements include, but are not limited to, the requirements of this part, Federal statutes, the OMB Circulars and other Governmentwide guidance implemented by this part, Executive Orders, and the requirements identified in appendix A of this part.

(b) Provisions shall be made to design and construct all buildings, in which DOE funds are used, to meet appropriate seismic design and construction standards. Seismic codes and standards meeting or exceeding the provisions of each of the model codes listed in this paragraph are considered to be appropriate for purposes of this part. These codes provide a level of seismic safety that is substantially equivalent to or exceed the then current or immediately preceding edition of the NEHRP Recommended Provisions for the Development of Seismic Regulations for New Buildings, 1988 Edition (Federal Emergency Management Administration 222 and 223). Revisions of these model codes that are substantially equivalent to or exceed the then current or immediately preceding edition of the NEHRP Recommended Provisions (which are updated triennially) shall be considered to be appropriate standards. The model codes are as follows:


§ 600.13 Merit review.

(a) It is the policy of DOE that discretionary financial assistance be awarded through a merit-based selection process. A merit review means a thorough, consistent, and objective examination of applications based on pre-established criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

(b) Each program office must establish a merit review system covering the financial assistance programs it administers. Merit review of financial assistance applications is intended to be advisory and is not intended to replace the authority of the project/program official with responsibility for deciding whether an award will be made.

[64 FR 56420, Oct. 20, 1999]

§ 600.15 Authorized uses of information.

(a) General. Information contained in applications shall be used only for evaluation purposes unless such information is generally available to the public or is already the property of the Government. The Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure by Federal employees of trade secret and confidential business information.

(b) Treatment of application information. (1) An application may include technical data and other data, including trade secrets and/or privileged or confidential commercial or financial information, which the applicant does not want disclosed to the public or used by the Government for any purpose other than application evaluation. To protect such data, the applicant should specifically identify each page including each line or paragraph thereof containing the data to be protected and mark the cover sheet of the application with the following Notice as well as referring to the Notice on each page to which the Notice applies:
Notice of Restriction on Disclosure and Use of Data

The data contained in pages of this application have been submitted in confidence and contain trade secrets or proprietary information, and such data shall be used or disclosed only for evaluation purposes, provided that if this applicant receives an award as a result of or in connection with the submission of this application, DOE shall have the right to use or disclose the data herein to the extent provided in the award. This restriction does not limit the Government’s right to use or disclose data obtained without restriction from any source, including the applicant.

(2) Unless a solicitation specifies otherwise, DOE shall not refuse to consider an application solely on the basis that the application is restrictively marked.

(3) Data (or abstracts of data) marked with the Notice under paragraph (b)(1) of this section shall be retained in confidence and used by DOE or its designated representatives as specified in §600.13 solely for the purpose of evaluating the proposal. The data so marked shall not be disclosed or used for any other purpose except to the extent provided in any resulting award, or to the extent required by law, including the Freedom of Information Act (5 U.S.C. 552) (10 CFR part 1004). The Government shall not be liable for disclosure or use of unmarked data and may use or disclose such data for any purpose.

(4) The Government shall obtain unlimited rights in the technical data contained in any application which results in an award except those portions of the technical data which the applicant asserts and properly marks as proprietary data, or which are not directly related to or will not be utilized in the project and are deleted from the application with the concurrence of DOE.

(5) The clause at 48 CFR 52.227-23, which applies only to technical data and not to other data such as privileged or confidential commercial or financial information shall apply to every award.

§600.16 Legal authority and effect of an award.

(a) A DOE financial assistance award is valid only if it is in writing and is signed, either in writing or electronically, by a DOE Contracting Officer.

(b) DOE funds awarded under a grant or cooperative agreement shall be obligated as of the date the DOE Contracting Officer signs the award; however, the recipient is not authorized to incur costs under an award prior to the beginning date of the budget period shown in the award except as may be authorized in accordance with §§600.125(e) or 600.230 of this part. The duration of the DOE financial obligation shall not extend beyond the expiration date of the budget period shown in the award unless authorized by a DOE Contracting Officer by means of a continuation or renewal award or other extension of the budget period.

§600.17 Contents of award.

Each financial assistance award shall be made on a Notice of Financial Assistance Award (DOE F 4600.1) which contains basic identifying and funding information together with attachments including a budget, any special terms and conditions, and any other provisions necessary to establish the respective right, duties, obligation, and responsibilities of DOE and the recipient, consistent with the requirements of this part.

§600.18 Recipient acknowledgement of award.

(a) After signature by the DOE Contracting Officer, the award shall be sent to the recipient. The recipient shall acknowledge acceptance by returning a copy signed either in writing or electronically. No DOE funds shall be disbursed until the award document signed by the recipient is received by DOE.

(b) In the event a recipient declines an award, DOE shall deobligate the funds obligated by the award after providing the applicant with at least two weeks written notice of DOE’s intention to deobligate.

(c) After the recipient acknowledges the award, the terms and conditions of the award may be amended only upon the written request or with the written concurrence of the recipient unless the amendment is one which DOE may make unilaterally in accordance with a program rule or this part.
§ 600.19 Notification to unsuccessful applicants.

DOE shall promptly notify in writing each applicant whose application has not been selected for award or whose application cannot be funded because of the unavailability of appropriated funds. If the application was not selected, the written notice shall briefly explain why the application was not selected and, if for grounds other than unavailability of funds, shall offer the unsuccessful applicant the opportunity for a more detailed explanation upon request.

§ 600.20 Maximum DOE obligation.

(a) The maximum DOE obligation to the recipient is—

(1) For monetary awards, the amount shown in the award as the amount of DOE funds obligated, and

(2) Any designated property.

(b) DOE shall not be obligated to make any additional, supplemental, continuation, renewal, or other award for the same or any other purpose.

§ 600.21 Access to records.

(a) In addition to recipient and subrecipient responsibilities relative to access to records specified in §§600.153 and 600.242, for any negotiated contract or subcontract in excess of $10,000 under a grant or cooperative agreement, DOE, the Comptroller General of the United States, the recipient and the subrecipient (if the contract was awarded under a financial assistance subaward), or any of their authorized representatives shall have the right of access to any books, documents, papers, or other records of the contractor or subcontractor which are pertinent to that contract or subcontract, in order to make audit, examination, excerpts, and copies.

(b) The right of access may be exercised for as long as the applicable records are retained by the recipient, subrecipient, contractor, or subcontractor.

§ 600.22 Disputes and appeals.

(a) Informal dispute resolution. Whenever practicable, DOE shall attempt to resolve informally any dispute over the award or administration of financial assistance. Informal resolution, including resolution through an alternative dispute resolution mechanism, shall be preferred over formal procedures available in 10 CFR Part 1024, to the extent practicable.

(b) Alternative dispute resolution (ADR). Before issuing a final determination in any dispute in which informal resolution has not been achieved, the Contracting Officer shall suggest that the other party consider the use of voluntary consensual methods of dispute resolution, such as mediation. The DOE dispute resolution specialist is available to provide assistance for such disputes, as are trained mediators of other federal agencies. ADR may be used at any stage of a dispute.

(c) Final determination. Whenever a dispute is not resolved informally or through an alternative dispute resolution process, DOE shall mail (by certified mail) a brief written determination signed by a Contracting Officer, setting forth DOE’s final disposition of such dispute. Such determination shall contain the following information:

(1) A summary of the dispute, including a statement of the issues and of the positions taken by the Department and the party or parties to the dispute; and

(2) The factual, legal and, if appropriate, policy reasons for DOE’s disposition of the dispute.

(d) Right of appeal. (1) Except as provided in paragraph (f)(1) of this section, the final determination under paragraph (c) of this section may be appealed to the Financial Assistance Appeals Board (the Board) in accordance with the procedures set forth in 10 CFR part 1024.

(2) If the final determination under paragraph (c) of this section involves a dispute over which the Board has jurisdiction as provided in paragraph (f)(2) of this section, the Contracting Officer’s determination shall state that, with respect to such dispute, the determination shall be the final decision of the Department unless, within 60 days, a written notice of appeal is filed.

(3) If the final determination under paragraph (c) of this section involves a dispute over which the Board has no jurisdiction as provided in paragraph (f)(1) of this section, the Contracting Officer’s determination shall state that, effective immediately or on a
later date specified therein, the determination shall, with respect to such dispute, be the final decision of the Department.

(e) Effect of appeal. The filing of an appeal with the Board shall not stay any determination or action taken by DOE which is the subject of the appeal. Consistent with its obligation to protect the interests of the Federal Government, DOE may take such authorized actions as may be necessary to preserve the status quo pending decision by the Board, or to preserve its ability to provide relief in the event the Board decides in favor of the appellant.

(f) Review on appeal. (1) The Board shall have no jurisdiction to review:

(i) Any preaward dispute (except as provided in paragraph (f)(2)(ii) of this section), including use of any special restrictive condition pursuant to §§600.114 or 600.212;

(ii) DOE denial of a request for a deviation under §§600.4, 600.103, or 600.205 of this part;

(iii) DOE denial of a request for a budget revision or other change in the approved project under §§600.125, 600.127, 600.222, or 600.230 of this part or under another term or condition of the award;

(iv) Any DOE action authorized under §§600.162(a)(1), (2), (3) or (5); or §§600.243(a)(2), (a)(3) for suspensions only; or §§600.162(a)(4) or §§600.243(a)(4) for actions disapproving renewal applications or other requests for extension of time or additional funding for the same project when related to recipient noncompliance, or such actions authorized by program rule;

(v) Any DOE decision about an action requiring prior DOE approval under §600.144, or §600.236 of this part or under another term or condition of the award;

(vi) A DOE decision not to make a continuation award, which decision is based on the insufficiency of available appropriations;

(vii) Any matter which is under the jurisdiction of the Patent Compensation Board (10 CFR 780.3);

(viii) Any matter which may be heard by the Invention Licensing Appeals Board (10 CFR 781.55 and 781.66); and

(ix) Any other dispute not described in paragraph (f)(2) of this section.

(2) In addition to any right of appeal established by program rule, or by the terms and conditions (not inconsistent with paragraph (f)(1) of this section) of an award, the Board shall have jurisdiction to review:

(i) A DOE determination that the recipient has failed to comply with the applicable requirements of this part, the program statute or rules, or other terms and conditions of the award;

(ii) A DOE decision not to make a continuation award based on any of the determinations described in paragraph (f)(2)(i) of this section;

(iii) Termination of an award for cause, in whole or in part, by DOE;

(iv) A DOE determination that an award is void or invalid;

(v) The application by DOE of an indirect cost rate; and

(vi) DOE disallowance of costs.

(3) In reviewing disputes authorized under paragraph (f)(2) of this section, the Board shall be bound by the applicable law, statutes, and rules, including the requirements of this part, and by the terms and conditions of the award.

(4) The decision of the Board shall be the final decision of the Department.

§ 600.23 Debarment and suspension.

Applicants, recipients, subrecipients, and contractors under financial assistance awards may be debarred and suspended for the causes and in accordance with the procedures set forth in 10 CFR part 1036.

§ 600.24 Noncompliance.

(a) Except for noncompliance with nondiscrimination requirements under 10 CFR part 1049, whenever DOE determines that a recipient has not complied with the applicable requirements of this part, with the requirements of any applicable program statute or rule, or with any other term or condition of the award, a DOE Contracting Officer shall provide to the recipient (by certified mail, return receipt requested) a written notice setting forth:

(1) The factual and legal bases for the determination of noncompliance;

(2) The corrective actions and the date (not less than 30 days after the
§ 600.25 Suspension and termination.

(a) Suspension and termination for cause. DOE may suspend or terminate an award for cause on the basis of:

1. A noncompliance determination under §§ 600.24, 600.122(n), 600.162(a), or § 600.243(a); or

2. An suspension or debarment of the awardee under § 600.23.

(b) Notification requirements. Except as provided in § 600.24, 600.162(a), or § 600.243(a) before suspending or terminating a award for cause, DOE shall mail to the awardee (by certified mail, return receipt requested) a separate written notice in addition to the notice required by §§ 600.24(a), 600.162(a), or § 600.243(a) at least ten days prior to the effective date of the suspension or termination. Such notice shall include, as appropriate:

1. The factual and legal bases for the suspension or termination;

2. The effective date or dates of the DOE action;

3. If the action does not apply to the entire award, a description of the activities affected by the action;

4. Instructions concerning which costs shall be allowable during the period of suspension, or instructions concerning allowable termination costs, including in either case, instructions concerning any subgrants or contracts;

5. Instructions concerning required final reports and other closeout actions for terminated awards (see §§ 600.170 through 600.173 and §§ 600.250 through 600.252);

6. A statement of the awardee’s right to appeal a termination for cause pursuant to § 600.22; and

7. The dated signature of a DOE Contracting Officer.

(c) Suspension. (1) Unless DOE and the awardee agree otherwise, no period of suspension shall exceed 90 days.

(2) DOE may cancel the suspension at any time, up to and including the date of expiration of the period of suspension, if the awardee takes satisfactory corrective action before the expiration date of the suspension or gives DOE satisfactory evidence that such corrective action will be taken.

(3) If the suspension has not been cancelled by the expiration date of the period of suspension, the awardee shall resume the suspended activities or project unless, prior to the expiration date, DOE notifies the awardee in writing that the period of suspension shall be extended consistent with paragraph (c)(1) of this section or that the award shall be terminated.

(4) As of the effective date of the suspension, DOE shall withhold further payments and shall allow new obligations incurred by the awardee during the period of suspension only if such costs were authorized in the notice of suspension or in a subsequent letter.

(5) If the suspension is cancelled or expires and the award is not terminated, DOE shall reimburse the awardee for any authorized allowable costs incurred during the suspension and, if necessary, may amend the award to extend the period of performance.

(d) Termination by mutual agreement. In addition to any situation where a termination for cause pursuant to §§ 600.24, 600.160 through 600.162 or §§ 600.243 through 600.244 is appropriate, either DOE or the awardee may initiate a termination of an award (or portion thereof) as described in this...
§ 600.26 Funding.

(a) General. The project period during which DOE expects to provide award support for an approved project shall be specified on the Notice of Financial Assistance Award (DOE Form 4600.1).

(b) Budget period and continuation awards. If the project period is 12 months or less, the budget period and the project period shall be coextensive. Multiyear awards, including formula awards, shall generally be funded annually within the approved project period. Funding for each budget period within the project period shall be contingent on DOE approval of a continuation application submitted in accordance with a schedule specified by DOE. A continuation application shall include:

(1) A statement of technical progress or status of the project to date;

(2) A detailed description of the awardee’s plans for the conduct of the project during the coming year; and

(3) A detailed budget for the upcoming budget period, including an estimate of unobligated balances. A detailed budget need not be submitted if the new or renewal application contained future-year budgets sufficiently detailed to allow DOE to review and approve the categories and elements of cost. Should the award have a change in scope or significant change in the budget, DOE may request a detailed budget.

(4) DOE shall review a continuation application for the adequacy of the awardee’s progress and planned conduct of the project in the subsequent budget period. DOE shall not require a continuation application to compete against any other application. The amount and award of continuation funding is subject to the availability of appropriations.

(c) Renewal awards. Discretionary renewal awards may be made either on the basis of a solicitation or on a non-competitive basis. If DOE proposes to restrict eligibility for a discretionary renewal award to the incumbent grantee, the noncompetitive award must be justified in accordance with §600.6(b)(2). Renewal applications must be submitted no later than 6 months prior to the scheduled expiration of the project period unless a program rule or other published instruction establishes a different application deadline.

(d) Extensions. Unless otherwise specified in the award terms and conditions, recipients of financial assistance awards, except recipients of SBIR awards (See §600.181), may extend the expiration date of the final budget period of the project (thereby extending the project period) if additional time beyond the established expiration date is needed to assure adequate completion of the original scope of work within the funds already made available. A single extension, which shall not exceed twelve (12) months, may be made for this purpose, and must be made prior to the originally established expiration date. The recipient must notify the cognizant DOE Contracting Officer in the awarding office in writing within ten (10) days of making the extension.
§ 600.27 Patent and data provisions.

(a) General. Financial assistance shall be awarded and administered by DOE in compliance with the patent and data provisions of this section (See also §§ 600.136 and 600.234.) To the extent not otherwise provided in this part, the policies, procedures and clauses referenced for contracts in 48 CFR part 927 and 41 CFR part 9–9 shall normally be applicable to the award and administration of Departmental grants and cooperative agreements. Copies of 41 CFR part 9–9 are available by contacting the DOE Patent Counsel.

(b) Required clauses. In all solicitations and awards both for the support of research, development, and demonstration and for other efforts, the DOE Contracting Officer shall consult the DOE Patent Counsel for applicable patent and data clauses from those listed below and/or for modifications thereto. In reading each 48 CFR part 27 and 48 CFR part 927 patent and data clause selected for inclusion in a solicitation or award, the term “contract” when referring to a prime contract shall be read as “award.” The term “contractor” shall be read as referring to the “awardee.” The term “subcontract” shall be read as “subaward or a procurement contract under an award or subaward and/or a procurement subcontract under an awardee’s or subawardee’s contract.” The term “Acquisition” with respect to the Long Form Patent Rights Clause shall be read as “Retention.” The terms “offerees” and “quoters” shall be read as “applicants,” and “proposals” and “quotations” shall be read as “applications.”

(1) Patent clauses—(i) (Short Form Patent Clause). Incorporate the clause at 48 CFR 952.227–11 for awards to a domestic small business firm or nonprofit organization as defined at 48 CFR 27.301. In accordance with 35 U.S.C. 202(a)(1), the DOE may issue an exceptional circumstances determination. To implement any exceptional circumstances determination, DOE will modify 48 CFR 952.227–11 to retain greater rights in subject inventions. Such modifications will be only to the extent necessary to implement the exceptional circumstances determination.

(ii) (Long Form Patent Clause). For awards to a large business firm or other organization, other than a domestic small business firm or nonprofit organization as set forth in 48 CFR 27.301, incorporate the clause at 48 CFR 952.227–13.

(iii) The notice of Right to Request Patent Waiver at 48 CFR 952.227–84 shall also be inserted in all solicitations to advise applicants of their rights to request in advance of, or within 30 days after the award is signed, a waiver of all or any part of the rights of the United States with respect to subject inventions. For unsolicited applications, DOE shall provide this notice to the applicant prior to award.

(2) Data clauses (includes copyright provisions)—(i) Rights in data—General. (A) Incorporate 48 CFR 52.227–14 with its Alternate V and with the definitional paragraph (a) and paragraph (d)(3) of 48 CFR 927.409(a)(1). Solicitations shall also include the Representation of Limited Rights Data and Restricted Computer Software provision at 48 CFR 52.227–15. Contracting officers shall treat rights in data matters in accordance with 48 CFR 927.4.

(B) In awards for grants and cooperative agreements with institutions of higher education, hospitals, and other non-profit organizations, the clause referred to in paragraph (b)(2)(i)(A) of this section shall be revised by deleting paragraph (d)(3) and inserting the following paragraph (c) in lieu of paragraph (c) of that clause:

(c) Copyright. (1) Data first produced in the performance of the award. Except as otherwise specifically provided in this award, the recipient may establish claim to copyright subsisting in any data first produced in the performance of this award. When claim to copyright is made, the Recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including award number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The recipient grants to the Government a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so. The right to publish includes the right to publicly distribute. The right to use the work for Federal purposes

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includes the right to prepare derivative works.

(C) If programmatic needs on a particular award require the delivery to the Government of limited rights data or restricted computer software, Alternates II or III of 48 CFR 52.227-14 shall also be added.

(ii) Restriction on disclosure and use of data. Insert the Notice at §600.15(b)(1) in all solicitations.

(iii) Rights to application data. As discussed at §600.15(b)(5), incorporate 48 CFR 52.227-23.

(iv) Additional data requirements. Incorporate 48 CFR 52.227-16. In the event all technical data requirements are known in advance of and are set forth in the agreement or, the award is for the performance of basic or applied research and is to be performed solely by a university or college, 48 CFR 52.227-16 does not need to be incorporated.

(3) Authorization and consent. Incorporate 48 CFR 52.227-1 or Alternates I or II, as appropriate, in accordance with the guidance in 48 CFR 927.201-1 and 48 CFR 27.201.


(5) Filing of patent applications—Classified subject matter. Incorporate the following paragraphs in any solicitation or award which covers, or is likely to cover, classified subject matter:

Classified Inventions

(a) The recipient shall not file or cause to be filed on any invention or discovery conceived or first actually reduced to practice in the course of or under this award in any country other than the United States, an application or registration for a patent without first obtaining written approval of the Contracting Officer.

(b) When filing a patent application in the United States on any invention or discovery conceived of or first actually reduced to practice in the course of or under this award, the subject matter of which is classified for reasons of security, the awardee shall observe all applicable security regulations covering the transmission of classified subject matter. When transmitting the patent application to the United States Patent and Trademark Office, the awardee shall, by separate letter, identify by agency and agreement number the award(s) which require security classification markings to be placed on the application.

(6) Notice and assistance regarding patent and copyright infringement. Incorporate the clause at 48 CFR 52.227-2, in accordance with the guidance in 48 CFR 27.202, in all awards in excess of $100,000 for construction, research, development, and demonstration work which is to be performed within the United States, its possessions, or Puerto Rico.


(8) Refund of royalties. As discussed in 48 CFR 927.206, incorporate the clause at 48 CFR 952.227-9 in solicitations and awards where the Contracting Officer believes royalties will have to be paid by the awardee or subawardee or contractor at any tier.

(9) Subawards and contracts under award. The recipient shall include the applicable clauses of this section in any subaward or contract awarded under the award and assure that the applicable clauses are also included by subrecipients in contracts.

§600.28 Restrictions on lobbying.

Procedures regarding restrictions on lobbying activities of applicants and recipients are contained in 10 CFR 601.110.

§600.29 Fixed obligation awards.

(a) General. This section contains provisions applicable to the award of financial assistance instruments on a fixed amount basis. Under a fixed obligation award, funds are issued in support of a project without a requirement for Federal monitoring of actual costs subsequently incurred.

(b) Provisions applicable to fixed obligation awards. Financial assistance awards may be made on a fixed obligation basis subject to the following requirements:

(1) Each fixed obligation award may neither exceed $100,000 nor exceed one year in length.

(2) Programs which require mandatory cost sharing are not eligible.
§ 600.30 Cost sharing.

In addition to the requirements of §600.123 or §600.224, the following requirements apply to research, development, and demonstration projects:

(a) When DOE awards financial assistance for research, development, and demonstration projects where the primary purpose of the project is the ultimate commercialization and utilization of technology by the private sector and when there are reasonable expectations that the recipient will receive significant present or future economic benefits beyond the instant award as a result of the performance of the project, cost sharing shall be required. Unless the cost sharing is required by statute, a waiver of the requirement on a single-case or class basis may be approved by the cognizant Program Assistant Secretary or designee.

(b) Except as provided in section 3002 of the Energy Policy Act of 1992, 42 U.S.C. 13542, or program rule, DOE will decide, on a case-by-case basis, the amount of cost sharing required for a particular project.

(c) Factors in addition to those specified in §600.123 or §600.224, which may be considered when negotiating cost sharing for research, development, and demonstration projects include the potential benefits to a recipient resulting from the project and the length of time before a project is likely to be commercially successful.

Subpart B—Uniform Administrative Requirements for Grants and Cooperative Agreements With Institutions of Higher Education, Hospitals, Other Non-Profit Organizations and Commercial Organizations

SOURCE: 59 FR 53266, Oct. 21, 1994, unless otherwise noted.

GENERAL

§ 600.100 Purpose.

This subpart implements OMB Circular A-110 and establishes uniform administrative requirements for grants and agreements awarded to institutions of higher education, hospitals, and other non-profit and commercial organizations. It also establishes rules governing subawards to institutions of higher education, hospitals, and non-profit and commercial organizations (including grants and cooperative agreements administered by State, local and Indian Tribal governments).

§ 600.101 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

(1) Earnings during a given period from services performed by the recipient, and goods and other tangible property delivered to purchasers, and
(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient’s regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by DOE to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient’s cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which DOE determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DOE.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient’s or subrecipient’s contract.

Cost sharing or matching means that portion of project or program costs not borne by DOE.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which DOE sponsorship ends.

Disallowed costs means those charges to an award that the DOE determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal awarding agency means the Federal agency that provides an award to the recipient.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property’s acquisition costs and any improvement expenditures paid with Federal funds.

Funding period or budget period means the period of time when DOE funding is available for obligation by the recipient.
§ 600.101  Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by a contracting officer evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §§600.124 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of DOE funds is not program income. Except as otherwise provided in this subpart, program regulations, or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which DOE sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving financial assistance directly from DOE to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term shall include commercial organizations which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities
that are supported at universities, colleges, and other non-profit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small award means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" above.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations).

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

Suspension means an action by DOE that temporarily withdraws DOE sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DOE. Suspension of an award is a separate action from suspension under DOE regulations implementing E.O.'s 12549 and 12689, "Debarment and Suspension" (see 10 CFR part 1036).

Termination means the cancellation of DOE sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by DOE that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 600.102 Effect on other issuances.

For awards subject to this subpart, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of this subpart shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in §600.4.
§ 600.103 Deviations.

The deviation provisions of § 600.4 apply to this subpart.

§ 600.104 Subawards.

Unless sections of this subpart specifically exclude subrecipients from coverage, all DOE recipients, including State, local and Indian tribal governments, shall apply the provisions of this subpart to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, other non-profit organizations or commercial organizations. Thus, this subpart is applicable to those types of organizations regardless of the type of recipient receiving the primary award. State and local government subrecipients are subject to the provisions of 10 CFR part 600, subpart C, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.”

PRE-AWARD REQUIREMENTS

§ 600.110 Purpose.

Sections 600.111 through 600.117 prescribe forms and instructions and other pre-award matters to be used in applying for DOE awards.

§ 600.111 Pre-award policies.

(a) Use of Grants and Cooperative Agreements, and Contracts. In each instance, the DOE shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, “substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) Public Notice and Priority Setting. DOE will, whenever practical, notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 600.112 Forms for applying for Federal assistance.

(a) General. An application for an award shall be on the form or in the format specified in a program rule, in the solicitation, or in these regulations (see § 600.10). When the SF-424 form is not used, DOE shall indicate whether the application is subject to review by the State under E.O. 12372. DOE may also require applicants to complete—

(1) The Notice of Energy RD&D Project (DOE Form 538) if the application is for a research, development, or demonstration project; or

(2) The Federal Assistance Management Summary Report (DOE F 4600.5) or the Federal Assistance Milestone Plan (DOE F 4600.3) as a baseline plan in accordance with the terms and conditions of award if required by program rule or the solicitation. If a solicitation other than a program rule requires the use of one or both of these forms, the solicitation shall contain an explanation of how the information to be provided relates to the objectives of the program.

(b) Budgetary information. DOE may request and the applicant shall submit the minimum budgetary information necessary to evaluate the costs of the proposed project.

(c) Continuation and renewal applications. DOE may, subsequent to receipt of an application, request additional information from an applicant when necessary for clarification or to make informed preaward determinations.

(d) Continuation and renewal applications. DOE may require that an application for a continuation or renewal award (see § 600.26 (b) and (c)) be made...
§ 600.113 Debarment and suspension.

Recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.’s 12549 and 12689, “Debarment and Suspension,” 10 CFR part 1036. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 600.114 Special award conditions.

(a) If an applicant or recipient has a history of poor performance, is not financially stable, has a management system that does not meet the standards prescribed in this subpart, has not conformed to the terms and conditions of a previous award, or is not otherwise responsible, DOE may impose additional requirements as needed, without regard to the deviation provisions of § 600.4. Such applicant or recipient will be notified in writing as to the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, and the time allowed for completing the corrective actions. Reconsideration of the additional requirements may be requested at any time. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(b) A recipient may place a special restrictive condition, as specified in paragraph (a) of this section, in a subaward. In any such case, the recipient must notify DOE in writing within 15 days of the subaward. DOE shall decide whether to notify OMB and other interested parties.

§ 600.115 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency’s procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. DOE will follow the provisions of E.O. 12770, “Metric Usage in Federal Government Programs.”


Under the Act (Pub. L. 94–580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 600.117 Certifications and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients’ compliance with the pertinent requirements.
§ 600.120  Purpose of financial and program management.

Sections 600.121 through 600.128 prescribe standards for financial management systems, methods for making payments and rules for satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 600.121  Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical. For awards that support research, it should be noted that it is generally not appropriate to develop unit cost information.

(b) Except for the provisions of § 600.121(f) and 600.181, recipients’ financial management systems shall provide for the following:

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 600.152. If a DOE award requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data. As discussed in paragraph (a) of this section, unit cost data is generally not appropriate for awards that support research.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, “Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.”

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Contracting Officer, at his or her discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Contracting Officer may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government’s interest.

(e) Where bonds are required in the situations described in §§ 600.121 (c) and (d), the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, “Surety Companies Doing Business with the United States.”

(f) Individuals whose financial management systems do not meet the minimum standards of § 600.121 (b) shall maintain a separate bank account for deposit of award or subaward funds.
Disbursements by the recipient or sub-recipient from this account shall be supported by source documentation such as canceled checks, paid bills, receipts, payrolls, etc.

§ 600.122 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients will be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(1) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(2) Financial management systems that meet the standards for fund control and accountability as established in § 600.121. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by DOE to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients may submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF 270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special DOE instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. DOE may also use this method on any construction project, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, DOE shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit requests for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and DOE has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, DOE may provide cash on a working capital advance basis. Under this procedure, DOE advances cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, DOE reimburses the recipient for its actual cash disbursements. The working capital advance method of payment will not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, DOE will not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h)(1) or (h)(2) of this section apply.
§ 600.122  

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or DOE reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States. Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated. Before withholding any payment, DOE shall notify the recipient that payments shall not be made for obligations incurred after a specified date, which shall ordinarily be no sooner than 30 days from the date of the notice, until the recipient corrects the noncompliance or pays the indebtedness to the Federal government.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, DOE shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k) (1), (2) or (3) of this section apply.

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check. The address is the Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this subpart, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF–270, Request for Advance or Reimbursement. Each Federal awarding agency shall adopt the SF–270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF–271, “Outlay Report and Request for Reimbursement for Construction Programs.”

(2) SF–271, Outlay Report and Request for Reimbursement for Construction Programs. Each Federal awarding agency shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF–270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.
§ 600.123 Cost sharing or matching.

(a) All cost sharing or matching contributions, including cash and third party in-kind, shall meet all of the following criteria.

1. Are verifiable from the recipient’s records.

2. Are not included as contributions for any other federally-assisted project or program.

3. Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

4. Are allowable under the applicable cost principles.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If DOE authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of either paragraph (c)(1) or (2) of this section.

1. The certified value of the remaining life of the property recorded in the recipient’s accounting records at the time of donation.

2. The current fair market value. However, when there is sufficient justification, DOE may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient’s organization. Rates for volunteer services shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee’s regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead...
costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if either paragraph (g)(1) or (2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that DOE has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient’s supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

(j) DOE shall specify in the solicitation or in the program rule, if any, any cost sharing requirement. The award document shall be specific as to whether the cost sharing is based on a minimum amount for the recipient or on a percentage of total costs.

(k) If DOE requires that a recipient provide cost sharing which is not required by statute or which exceeds a statutory minimum, DOE shall state in the program rule or solicitation the reasons for requiring such cost sharing, recommended or required levels of cost sharing, and the circumstances under which the requirement for cost sharing may be waived or adjusted during any negotiation.

(1) Whenever DOE negotiates the amount of cost sharing, DOE may take into account such factors as the use of program income (see §600.124), patent rights, and rights in data. Foregone fee or profit shall not be considered in establishing the extent of cost sharing.

§ 600.124 Program income.

(a) The standards set forth in this section shall be used to account for program income related to projects financed in whole or in part with DOE funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with program regulations or the terms and conditions of the award, shall be used in one or more of the following ways.

(1) Added to funds committed to the project and used to further eligible project objectives.

(2) Used to finance the non-DOE share of the project.
§ 600.125 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It includes the sum of the Federal and non-Federal share when there are cost sharing requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from the DOE for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) If required by program regulations, the transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.


(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an...
§ 600.125  

award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved in accordance with §600.4.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, program regulations may waive cost-related and administrative prior written approvals required by this subpart and its Appendices. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award without prior approval or more than 90 calendar days with the prior approval of DOE. All pre-award costs are incurred at the recipient’s risk (i.e., DOE is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the final budget period of the project of up to 12 months unless one or more of the following conditions apply.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(iv) The extension is being exercised merely for the purpose of using un obligated balances. For one-time extensions, the recipient must notify the DOE in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the terms and conditions of award provide otherwise, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in §600.125(e)(2) applies.

(5) For continuation awards within a multiple year project in support of research, prior to receipt of continuation funding, preaward expenditures by recipients are not subject to the limitation or approval requirements of §600.125(e)(1). Nevertheless, incurrence by the recipient does not impose any obligation on DOE if a continuation award is not subsequently made, or if an award is made for a lesser amount than the recipient expected.

(f) Program regulations may restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which DOE’s share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by DOE. However, no program regulation shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the Contracting Officer for budget revisions whenever paragraph (h)(1), (2) or (3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in §600.127.

(i) Except in accordance with the deviation procedures in 600.4 or as may be provided for in program regulations, no other prior approval requirements for specific items will be imposed by DOE.

(j) When DOE makes an award that provides support for both construction and nonconstruction work, DOE may require the recipient to request prior approval from DOE before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall
§ 600.127 Allowable costs.

(a) General. For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, “Cost Principles for State and Local Governments.” The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, “Cost Principles for Non-Profit Organizations.” The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, “Cost Principles for Educational Institutions.” The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, “Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.” The allowability of costs incurred by

§ 600.126 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.”

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.”

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A-133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) The Contracting Officer may audit, or cause to be audited, awards to commercial organizations whenever and in the degree of detail he/she deems necessary. The Contracting Officer shall rely on available audit reports in determining the need for and scope of such audits. The commercial organization has similar authority in auditing subrecipients.

(e) The Contracting Officer may audit, or cause to be audited, awards to individuals whenever and in the degree of detail he/she deems necessary. The Contracting Officer shall rely on available audit reports in determining the need for and scope of such audits.

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§ 600.128 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by DOE.

Property Standards

§ 600.130 Purpose of property standards.

Sections 600.131 through 600.137 set forth uniform standards governing management and disposition of property furnished by the Federal Government or whose cost was charged to a project supported by a Federal award. Recipients shall observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute or program regulations. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 600.131 through 600.137.

§ 600.131 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with DOE funds as provided to commercial organizations and those non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

(b) Indirect costs. Unless restricted by Federal statute or program rule, DOE shall provide for the reimbursement of appropriate indirect costs.

(1) DOE shall include an amount for indirect costs in an award only if the applicant requests reimbursement of such costs and—

(i) Submits evidence that a cognizant Federal agency has been assigned to establish indirect cost rates for the applicant and indicates or provides evidence that—

(A) A current agreement containing an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding has been established; or

(B) An indirect cost proposal has been submitted to the cognizant agency in order to establish an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding; or

(C) An indirect cost proposal covering all or part of the budget period and applicable to the activities for which DOE may provide funding will be submitted to the cognizant agency for approval no later than three months after the beginning date of the initial budget period of the DOE award or, for subsequent budget periods, in accordance with any schedule established by the cognizant agency; or

(ii) If not assigned to a cognizant agency, the applicant includes, in the application, data that is current, complete, accurate, and sufficient to allow the Contracting Officer to determine a rate(s) for indirect costs. If the total approved budget will not exceed $100,000 or if the amount requested for indirect costs does not exceed $5,000, DOE may waive the requirement for negotiation of a rate and, in lieu thereof, provide a reasonable allowance for such costs.

(2) Indirect cost proposals shall be prepared and submitted in accordance with the applicable Federal cost principles and instructions from the cognizant agency or from DOE, as appropriate.

(3) If a subaward under an award or subaward provides for the payment of indirect costs, the recipient or subrecipient shall be responsible for negotiating appropriate indirect costs, using the cost principles applicable to the subrecipient or contractor, unless the subrecipient or contractor has negotiated an applicable rate directly with DOE or another Federal department or agency. DOE may review and audit the procedures a recipient or subrecipient uses in conducting indirect cost negotiations.

(c) Fee or profit. No increment above cost may be paid to a recipient or subrecipient under a DOE award or subaward, except for SBIR recipients as provided in § 600.181(d)(3). A fee or profit may be paid to a contractor providing goods or services under a contract with a recipient or subrecipient.
§ 600.132 Real property.

Unless otherwise provided by statute or program regulations, the requirements concerning the use and disposition of real property acquired in whole or in part under awards are as follows.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of DOE.

(b) The recipient shall obtain written approval by DOE for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by DOE.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from DOE or its successor Federal awarding agency. DOE will give one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by DOE and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 600.133 Federally-owned and exempt property.

(a) Federally-owned property.

(1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to DOE. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to DOE for further Federal agency utilization.

(2) If DOE has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless DOE has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (l)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, “Improving Mathematics and Science Education in Support of the National Education Goals.”) Appropriate instructions shall be issued to the recipient by DOE.

(b) Exempt property. When statutory authority exists, DOE may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions DOE considers appropriate. For example, under 31 U.S.C. 6306, DOE may so vest title to tangible personal property under a grant or cooperative agreement for basic or applied research in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research. Such property is “exempt property.” Program regulations or the terms and conditions of award may establish provisions for vesting title to exempt property. Should such conditions not
§ 600.134 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of DOE. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by DOE, then
(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by DOE that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by DOE. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of DOE.

(f) The recipient’s property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.
(ii) Manufacturer’s serial number, model number, Federal stock number, national stock number, or other identification number.
(iii) Source of the equipment, including the award number.
(iv) Whether title vests in the recipient or the Federal Government.
(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.
(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).
(vii) Location and condition of the equipment and the date the information was reported.
(viii) Unit acquisition cost.
(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates DOE for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient...
§ 600.135 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5000 in total aggregate

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient’s request, the recipient shall sell the equipment and reimburse DOE an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient’s selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall reimburse the Federal Government by an amount which is computed by applying the percentage of the recipient’s participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by DOE for such costs incurred in its disposition.

(h) DOE reserves the right, at the end of a project, to transfer the title to the Federal Government or to a third party named by DOE when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) DOE shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with award funds and federally-owned equipment. If DOE fails to issue disposition instructions within the 120 calendar day period, the provisions of § 600.134(g)(1) apply.

(3) When DOE exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.
§ 600.136 Intangible property.

(a) Recipients that are institutions of higher education, hospitals, and other non-profit organizations may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DOE reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish or otherwise use the work for Federal purposes and to authorize others to do so.

(b) In addition to this section, recipients must follow the requirements set forth at 10 CFR 600.27.

(c) The DOE has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, DOE shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the DOE obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) Research data is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This “recorded” material excludes physical objects (e.g., laboratory samples). Research data also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) Published is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) Used by the Federal Government in developing an agency action that has the force and effect of law is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(3) This paragraph (d) applies only to recipients that are institutions of higher education, hospitals, and other non-profit organizations.

(e) For recipients that are institutions of higher education, hospitals, and other non-profit organizations, title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in
the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of DOE. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of §600.134(g).

§ 600.137 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Recipients shall record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

§ 600.140 Purpose of procurement standards.

Sections 600.141 through 600.148 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by DOE upon recipients, unless specifically required by Federal statute or executive order or in accordance with the deviation procedures of §600.4.

§ 600.141 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to DOE regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 600.142 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 600.143 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall
§ 600.144 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (2) and (3) of this section apply.

1. Recipients avoid purchasing unnecessary items.

2. Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement.

3. Solicitations for goods and services provide for all of the following.

   i. A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

   ii. Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

   iii. A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

   iv. The specific features of “brand name or equal” descriptions that bidders are required to meet when such items are included in the solicitation.

   v. The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

   vi. Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women’s business enterprises, whenever possible. Recipients of DOE awards shall take all of the following steps to further this goal.

1. Ensure that small businesses, minority-owned firms, and women’s business enterprises are used to the fullest extent practicable.

2. Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises.

3. Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women’s business enterprises.

4. Encourage contracting with consortiums of small businesses, minority-owned firms and women’s business enterprises when a contract is too large for one of these firms to handle individually.

5. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce’s Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women’s business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The “cost-plus-a-percentage-of-cost” or “percentage of construction cost” methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to
other necessary resources. In certain circumstances, contracts with certain parties are restricted by DOE’s implementation, in 10 CFR part 1036, of E.O.’s 12549 and 12689, “Debarment and Suspension.”

(e) Recipients shall, on request, make available for DOE, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient’s procurement procedures or operation fails to comply with the procurement standards in this subpart.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a “brand name” product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

(f) By agreement of the recipient or subrecipient and the contractor, if consistent with the recipient’s or subrecipient’s usual business practices and applicable state and local law, any contract to which this section applies may provide for the payment of interest penalties on amounts overdue under such contract except that—

(1) In no case shall any obligation to pay such interest penalties be construed to be an obligation of the Federal government, and

(2) Any payment of such interest penalties may not be made from DOE funds nor be counted toward meeting a cost sharing requirement of a DOE award.

§ 600.145 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 600.146 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection,

(b) Justification for lack of competition when competitive bids or offers are not obtained, and

(c) Basis for award cost or price.

§ 600.147 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 600.148 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may
be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, DOE may accept the bonding policy and requirements of the recipient, provided the DOE has made a determination that the Federal Government’s interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, “Surety Companies Doing Business with the United States.”

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, DOE, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to their program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this subpart, as applicable.

§ 600.149 Resource Conservation and Recovery Act (RCRA).

Recipients’ procurements shall comply with applicable requirements of RCRA, as described at §600.116 of this subpart.

Reports and Records

§ 600.150 Purpose of reports and records.

Sections 600.151 through 600.153 set forth the procedures for monitoring and reporting on the recipient’s financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 600.151 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in §600.126.

(b) The terms and conditions of the award will prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the award year; quarterly or semi-annual reports shall be due 30 days after the reporting period. DOE may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days
after the expiration or termination of
the award.
(c) If inappropriate, a final technical
or performance report shall not be re-
quired after completion of the project.
(d) When required, performance re-
ports shall generally contain, for each
award, brief information on each of the
following.
(1) A comparison of actual accom-
plishments with the goals and objec-
tives established for the period, the
findings of the investigator, or both.
Whenever appropriate and the output
of programs or projects can be readily
quantified, such quantitative data
should be related to cost data for com-
putation of unit costs.
(2) Reasons why established goals
were not met, if appropriate.
(3) Other pertinent information in-
cluding, when appropriate, analysis
and explanation of cost overruns or
high unit costs.
DOE may specify in the award that the
recipient provide this information on
the Federal Assistance Program/
Project Status Report (DOE F 4600.6),
the technical reporting formats, or the
Federal Assistance Management Sum-
mary Report. DOE may require that
the Federal Assistance Management
Summary Report be used as a perform-
ance report only when such use is au-
thorized by program rule or the need
for this form is explained in the solic-
tation. The requirements of this sec-
tion concerning reporting frequency
and deadlines shall apply to the Fed-
eral Assistance Management Summary
Report. (See also § 600.112 with regard
to use of this form as part of the award
application.)
(e) Recipients shall not be required to
submit more than the original and two
copies of performance reports.
(f) Recipients shall immediately no-
tify DOE of developments that have a
significant impact on the award-sup-
ported activities. Also, notification
shall be given in the case of problems,
delays, or adverse conditions which
materially impair the ability to meet
the objectives of the award. This notifi-
cation shall include a statement of the
action taken or contemplated, and any
assistance needed to resolve the situa-
tion.
(g) DOE may make site visits, as
needed.
(h) DOE shall comply with applicable
clearance requirements of 5 CFR part
1320 when requesting performance data
from recipients.
(i) Recipients may place performance
reporting requirements on subawards
consistent with the provisions of this
section and shall require interim re-
porting in accordance with § 600.151(f).
§ 600.152 Financial reporting.
(a) The following forms or such other
forms as may be approved by OMB are
authorized for obtaining financial in-
formation from recipients.
(1) SF–269 or SF–269A, Financial Sta-
tus Report.
(i) Recipients shall use the SF–269 or
SF–269A to report the status of funds
for all nonconstruction projects or pro-
grams, except that DOE has the option
of not requiring the SF–269 or SF–269A
when the SF–270, Request for Advance
or Reimbursement, or SF–272, Report
of Federal Cash Transactions, is deter-
mined to provide adequate information
to meet DOE needs. However, a final
SF–269 or SF–269A shall be required at
the completion of the project when the
SF–270 is used only for advances.
(ii) The terms and conditions of
award shall prescribe whether the re-
port shall be on a cash or accrual basis.
DOE may require accrual reporting
only if such reporting is required by
program statute or rule. If the award
requires accrual information and the
recipient’s accounting records are not
normally kept on the accrual basis, the
recipient shall not be required to con-
vert its accounting system, but shall
develop such accrual information
through best estimates based on an
analysis of the documentation on hand.
(iii) DOE shall determine the fre-
quency of the Financial Status Report
for each project or program, consid-
ering the size and complexity of the
particular project or program. How-
ever, the report shall not be required
more frequently than quarterly or less
frequently than annually. A final re-
port shall be required at the comple-
tion of the agreement.
(iv) DOE shall require recipients to
submit the SF–269 or SF–269A (an origi-
nal and no more than two copies) no
§ 600.153 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. DOE shall not impose any other record retention or access requirements upon recipients, unless such requirements are established in program regulations.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by DOE. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) Records are transferred to or maintained by DOE, the 3-year retention requirement is not applicable to the recipient.

(2) When DOE determines that a recipient's accounting system does not meet the standards in § 600.121, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. DOE, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Contracting officers are encouraged to shade out any line item on any report if not necessary.

(4) DOE may accept the identical information from the recipient in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Computer or electronic outputs may be provided to recipients when that expedites or contributes to the accuracy of reporting.
(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in §600.153(g).

(c) Copies of original records may be substituted for the original records if authorized by DOE.

(d) DOE shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, DOE may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DOE, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient’s personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, DOE shall place no restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when DOE can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to DOE.

(g) Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal agency responsible for negotiating the recipient’s indirect cost rate or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the cognizant Federal agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If, by the terms and conditions of the award, the recipient or subrecipient—

(1) Is accountable for program income earned or received after the end of the project period or after the termination of an award or subaward, or

(2) If program income earned during the project period is required to be applied to costs incurred after the end of the project period or after termination of an award or subaward, the record retention period shall start on the last day of the recipient’s or subrecipient’s fiscal year in which such income was earned or received or such costs were incurred. All other program income records shall be retained in accordance with §600.153(b).

Termination and Enforcement

§ 600.161 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2) or (3) of this section apply.

(1) By DOE, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By DOE with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date.
§ 600.162 Enforcement.

(a) Remedies for noncompliance. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, DOE may, in addition to imposing any of the special conditions outlined in §600.114, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by DOE.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) Hearings and appeals. In taking an enforcement action, DOE shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraph (c) (1) and (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to debarment and suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 10 CFR part 1036.

AFTER-THE-AWARD REQUIREMENTS

§ 600.170 Purpose.

Sections 600.171 through 600.173 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 600.171 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. DOE may approve extensions when requested by the recipient.

(b) Unless DOE authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) DOE shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.
(d) The recipient shall promptly re-fund any balances of unobligated cash that DOE has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, DOE shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§600.131 through 600.137.

(g) In the event a final audit has not been performed prior to the closeout of an award, DOE shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 600.172 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of DOE to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in §600.126.

(4) Property management requirements in §§600.131 through 600.137.

(5) Records retention as required in §600.153.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of DOE and the recipient, provided the responsibilities of the recipient referred to in paragraph 600.173(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 600.173 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be enti-
recipient is not required. Prior approval from DOE is required for situations involving sole source or single bid procurements as provided in §600.181(d)(2). Prior approval from DOE is also required for any variation from the requirement under the SBIR program that no more than one-third of Phase I work can be done by sub-contractors or consortium partners;

(4) Pre-award expenditure approval is not required;

(5) Payments are to be made in the same manner as other financial assistance (see §600.122), except that, when determined appropriate by the cognizant program official and contracting officer, a lump sum payment may be made. If a lump sum payment is made, the award must be conditioned to require the recipient to return to DOE amounts remaining unexpended at the end of the project if those amounts exceed $500;

(6) Recipients will certify in writing to the Contracting Officer at the end of the project that the activity was completed or the level of effort was expended. Should the activity or effort not be carried out, the recipient would be expected to make appropriate reimbursements;

(7) Requirements for periodic reports may be established for each award as long as they are consistent with §600.151;

(8) Changes in principal investigator or project leader, scope of effort, or institution, require the prior approval of DOE.

(c) Provision Applicable to Phase II SBIR Awards. Phase II SBIR awards may be made for a single budget period of 24 months.

(d) Provisions Applicable to Phase I and Phase II SBIR Awards.

(1) The prior approval of the cognizant DOE Contracting Officer is required before the final budget period of the project period may be extended without additional funds.

(2) A recipient or subrecipient must receive the prior written approval of the awarding party before entering into any sole source contract or a contract where only one bid or proposal is received when the value of the contract is expected to exceed $25,000 in the aggregate.

(3) A fee or profit may be paid to SBIR recipients.

APPENDIX A TO SUBPART B TO PART 600—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:


2. Copeland “Anti-Kickback” Act (18 U.S.C. 874 and 40 U.S.C. 276c)—All contracts and subgrants in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, “Construction Contracts—Subcontracts and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction”). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination required by the Department of Labor in the contract solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. Contract Work Hours and Safety Standards Act (40 U.S.C. 327–328)—Where applicable, all contracts awarded by recipients in excess of
§ 600.202 Purpose and scope of this subpart.

This subpart establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 600.201 Scope of §§ 600.200 through 600.205.

This section contains general rules pertaining to this part and procedures for control of exceptions from this subpart.

§ 600.202 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for:

1. Goods and other tangible property received;
2. Services performed by employees, contractors, subgrantees, subcontractors, and other...
payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee’s regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from programmatic requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee’s cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for grant and subgrant in this section and except where qualified by Federal) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF-269 “Financial Status Report” (or other equivalent report); (2) for construction grants, the SF-271 “Outlay Report and Request for Reimbursement” (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.
Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees.

For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee’s cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost. For the Department of Energy, this must be signed by a Contracting Officer.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency’s portion of real property, equipment or supplies, means the same percentage as the awarding agency’s portion of the acquiring party’s total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this subpart.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than “equipment” as defined in this subpart.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee, or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations.
implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. Termination does not include: (1) Withdrawal of funds awarded on the basis of the grantee’s underestimate of the unobligated balance in a prior period; (2) withdrawal of the unobligated balance as of the expiration of a grant; (3) refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 600.203 Applicability.

(a) General. Sections 600.400 through 600.432 of this subpart apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the except provision of § 600.405, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States’ Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary’s discretionary grant program) and Titles I–III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV–A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(9)(G); HHS grants for WIN are subject to this subpart);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV–D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV–E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI–AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:
(i) School Lunch (section 4 of the Act),
(ii) Commodity Assistance (section 6 of the Act),
(iii) Special Meal Assistance (section 11 of the Act),
(iv) Summer Food Service for Children (section 13 of the Act), and
(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:
(i) Special Milk (section 3 of the Act), and
(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under sub-section 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(c) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration’s State Home Per Diem Program (38 U.S.C. 641(a)).

(b) Entitlement programs. Entitlement programs enumerated above in §600.403(a) (3) through (8) are subject to subpart E.

§600.204 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this subpart are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §600.205.


§600.205 Additions and exceptions.

(a) For classes of grants and grantees subject to this subpart, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(d) The DOE procedural requirements for requesting additions and exceptions are specified in §600.4.

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

PRE-AWARD REQUIREMENTS

§600.210 Forms for applying for grants.

(a) Scope. (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) Authorized forms and instructions for governmental organizations. (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 54 FR 23960, June 5, 1989]
§ 600.211 State plans.

(a) Scope. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) Requirements. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) Assurances. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) Amendments. A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 600.212 Special grant or subgrant conditions for "high-risk" recipients.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this subpart, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed
and the time allowed for completing the corrective actions and
(4) The method of requesting reconsideration of the conditions/restrictions imposed.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 59 FR 53265, Oct. 21, 1994]

§ 600.220 Standards for financial management systems.

(a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) Cash management. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees’ cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

[53 FR 8045, 8087, Mar. 11, 1988, as amended at 57 FR 5, Jan. 2, 1992]

§ 600.221 Payment.

(a) Scope. This section prescribes the basic standard and the methods under
which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) Basic standard. Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) Advances. Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) Reimbursement. Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency’s payments to the grantee or subgrantee will be based on the grantee’s or subgrantee’s actual rate of disbursement.

(e) Working capital advances. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee’s disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee’s actual cash disbursements.

(f) Effect of program income, refunds, and audit recoveries on payment. (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) Withholding payments. (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §600.243(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) Cash depositories. (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.
§ 600.222 Allowable costs.

(a) Limitation on use of funds. Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) Applicable cost principles. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

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<tr>
<th>For the costs of a—</th>
<th>Use the principles in—</th>
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<tr>
<td>State, local or Indian tribal</td>
<td>OMB Circular A-87.</td>
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<td>government.</td>
<td>OMB Circular A-122.</td>
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<td>Private nonprofit organization other</td>
<td>OMB Circular A-21.</td>
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<td>than an (1) institution of higher</td>
<td>48 CFR part 31. Contract</td>
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<td>education, (2) hospital, or (3)</td>
<td>Cost Principles and Procedures, or</td>
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<td>organization named in OMB Circular</td>
<td>uniform cost accounting standards that</td>
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<td>A-122 as not subject to that</td>
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<td>circular.</td>
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<td>Educational institutions.</td>
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<td>For-profit organization other than</td>
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<td>a hospital and an organization</td>
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<td>subject to that circular.</td>
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<td>Hospitals ................................</td>
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§ 600.224 Matching or cost sharing.

(a) Basic rule: Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) Qualifications and exceptions—(1) Costs borne by other Federal grant agreements. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) General revenue sharing. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) Cost or contributions counted towards other Federal costs-sharing requirements. Neither costs nor the values of third party in-kind contributions may

§ 600.223 Period of availability of funds.

(a) General. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) Liquidation of obligations. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.
count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) Costs financed by program income. Costs financed by program income, as defined in §600.425, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §600.225(g).)

(5) Services or property financed by income earned by contractors. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count towards satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) Records. Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) Special standards for third party in-kind contributions. (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Cost sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this subpart. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) Valuation of donated services—(1) Volunteer services. Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee’s or subgrantee’s organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) Employees of other organizations. When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee’s normal line of work, the services will be valued at the employee’s regular rate of pay exclusive of the employee’s fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) Valuation of third party donated supplies and loaned equipment or space. (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be
valued at the fair rental rate of the equipment or space.

(e) Valuation of third party donated equipment, buildings, and land. If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) Awards for capital expenditures. If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) Other awards. If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §600.222, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property’s market value at the time it was donated.

(f) Valuation of grantee or subgrantee donated real property for construction/acquisition. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) Appraisal of real property. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§600.225 Program income.

(a) General. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) Definition of program income. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. “During the grant period” is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) Cost of generating program income. If authorized by Federal regulations or...
§ 600.226 Non-Federal audit.

(a) Basic rule. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.” The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) Subgrantees. State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor used for the purposes and under the conditions of the grant agreement.

(2) Addition. When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) Income after the award period. There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

has complied with laws and regulations affecting the expenditure of Federal funds;
(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;
(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;
(4) Consider whether subgrantee audits necessitate adjustment of the grantee’s own records; and
(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) Auditor selection. In arranging for audit services, §600.236 shall be followed.


Changes, Property, and Subawards

§ 600.230 Changes.

(a) General. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) Relation to cost principles. The applicable cost principles (see §600.222) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) Budget changes—(1) Nonconstruction projects. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:
(i) Any revision which would result in the need for additional funding.
(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency’s share exceeds $100,000.
(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) Construction projects. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) Combined construction and nonconstruction projects. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) Programmatic changes. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:
(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).
(2) Need to extend the period of availability of funds.
(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §600.236 but
§ 600.231 Real property.

(a) Title. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) Use. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purpose, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) Disposition. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) Retention of title. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency’s percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sale of property. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency’s percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer of title. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee’s percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 600.232 Equipment.

(a) Title. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) States. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.
(c) Use. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 600.225(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) Management requirements. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) Disposition. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) Federal equipment. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) Right to transfer title. The Federal awarding agency may reserve the right
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to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instructions within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 600.232(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.


§ 600.235 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, “Debarment and Suspension.”

§ 600.236 Procurement.

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) Procurement standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The
grantee’s or subgrantee’s officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee’s and subgrantee’s officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and
(ii) Violations of the grantee’s or subgrantee’s protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §600.236. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainee contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed. (1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 600.236(d)(2)(i) apply.
§ 600.236

(i) In order for sealed bidding to be feasible, the following conditions should be present:
(A) A complete, adequate, and realistic specification or purchase description is available;
(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and
(C) The procurement lends itself to a firm fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:
(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;
(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;
(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:
(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
(ii) Proposals will be solicited from an adequate number of qualified sources;
(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;
(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors’ qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:
(A) The item is available only from a single source;
(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
(C) The awarding agency authorizes noncompetitive proposals; or
(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for
§ 600.236 Contracting with small and minority firms, women’s business enterprise and labor surplus area firms.

(e) Contracting with small and minority firms, women’s business enterprise and labor surplus area firms. (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:
   (i) Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;
   (ii) Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;
   (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women’s business enterprises;
   (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women’s business enterprises;
   (v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
   (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) Contract cost and price. (1) Grantee and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor’s investment, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §600.422). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) Awarding agency review. (1) Grantee and subgrantees must make available upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement...
documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee’s or subgrantee’s procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a “brand name” product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency’s right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(b) Bonding requirements. For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency’s interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) Contract provisions. A grantee’s and subgrantee’s contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)
§600.237 Subgrants.

(a) States. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with §600.242 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) All other grantees. All other grantees shall follow the provisions of this subpart which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this subpart;
§ 600.240 Monitoring and reporting program performance.

(a) Monitoring by grantees. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) Nonconstruction performance reports. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) Construction performance reports. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) Significant developments. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.
§ 600.241 Financial reporting.

(a) General. (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(b) Financial Status Report—(1) Form. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §600.241(e)(2)(iii).

(2) Accounting basis. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee’s accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) Frequency. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) Due date. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) Federal Cash Transactions Report—(1) Form. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.
(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) Forecasts of Federal cash requirements. Forecasts of Federal cash requirements may be required in the “Remarks” section of the report.

(3) Cash in hands of subgrantees. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days’ needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) Frequency and due date. Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) Request for advance or reimbursement—(1) Advance payments. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) Reimbursements. Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §600.241(b)(3).

(e) Outlay report and request for reimbursement for construction programs—(1) Grants that support construction activities paid by reimbursement method. (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency may, however, prescribe the Request for Advance or Reimbursement form, specified in §600.241(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §600.241(b)(3).

(ii) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance. (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §600.241(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §600.241(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §600.241(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) Accounting basis. The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §600.241(b)(2).
(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §600.436(i)(10).

(b) Length of retention period. (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) Starting date of retention period—(1) General. When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for the records of each funding period starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) Real property and equipment records. The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) Records for income transactions after grant or subgrant support. In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee’s fiscal year in which the income is earned.

(d) Substitution of microfilm. Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) Access to records—(1) Records of grantees and subgrantees. The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) Expiration of right of access. The rights of access in this section must
not be limited to the required retention period but shall last as long as the records are retained.

(f) Restrictions on public access. The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records unless required by Federal, State, or local law. Grantees and subgrantees are not required to permit public access to their records.

§ 600.243 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee’s or subgrantee’s program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to debarment and suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to “Debarment and Suspension” under E.O. 12549 (see § 600.235).


§ 600.244 Termination for convenience.

Except as provided in § 600.443 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 600.243 or paragraph (a) of this section.

§ 600.250 Closeout.

(a) General. The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) Reports. Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.
(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).
(3) Final request for payment (SF–270) (if applicable).
(4) Invention disclosure (if applicable).
(5) Federally-owned property report: In accordance with §600.232(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) Cost adjustment. The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) Cash adjustments. (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.
(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 600.251 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency’s right to disallow costs and recover funds on the basis of a later audit or other review;
(b) The grantee’s obligation to return any funds due as a result of later refunds, corrections, or other transactions;
(c) Records retention as required in §600.242;
(d) Property management requirements in §§600.231 and 600.232; and
(e) Audit requirements in §600.226.

§ 600.252 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,
(2) Withholding advance payments otherwise due to the grantee, or
(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.
making mandatory pre-award determinations of eligibility for financial assistance under Titles XX through XXIII of that Act.

§ 600.501 Definitions.

The definitions in § 600.3 of this part, including the definition of the term “financial assistance,” are applicable to this subpart. In addition, as used in this subpart:


Company means any business entity other than an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501 (c)(3)).

Covered program means a program under Titles XX through XXIII of the Act. (A list of covered programs, updated periodically as appropriate, is maintained and published by the Department of Energy.)

Parent company means a company that:

(1) Exercises ultimate ownership of the applicant company either directly, by ownership of a majority of that company’s voting securities, or indirectly, by control over a majority of that company’s voting securities through one or more intermediate subsidiary companies or otherwise, and

(2) Is not itself subject to the ultimate ownership control of another company.

United States means the several States, the District of Columbia, and all commonwealths, territories, and possessions of the United States.

United States-owned company means:

(1) A company that has majority ownership by individuals who are citizens of the United States, or

(2) A company organized under the laws of a State that either has no parent company or has a parent company organized under the laws of a State.

Voting security has the meaning given the term in the Public Utility Holding Company Act (15 U.S.C. 15b(17)).

§ 600.502 What must DOE determine.

A company shall be eligible to receive an award of financial assistance under a covered program only if DOE finds that—

(a) Consistent with § 600.503, the company’s participation in a covered program would be in the economic interest of the United States; and

(b) The company is either—

(1) A United States-owned company; or

(2) Incorporated or organized under the laws of any State and has a parent company which is incorporated or organized under the laws of a country which—

(i) Affords to the United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Act;

(ii) Affords to United States-owned companies local investment opportunities comparable to those afforded to any other company; and

(iii) Affords adequate and effective protection for the intellectual property rights of United States-owned companies.

§ 600.503 Determining the economic interest of the United States.

In determining whether participation of an applicant company in a covered program would be in the economic interest of the United States under § 600.502(a), DOE may consider any evidence showing that a financial assistance award would be in the economic interest of the United States including, but not limited to—

(a) Investments by the applicant company and its affiliates in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the United States);

(b) Significant contributions to employment in the United States by the applicant company and its affiliates; and

(c) An agreement by the applicant company, with respect to any technology arising from the financial assistance being sought—

(1) To promote the manufacture within the United States of products resulting from that technology (taking into account the goals of promoting the competitiveness of United States industry); and

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(2) To procure parts and materials from competitive suppliers.

§ 600.504 Information an applicant must submit.

(a) Any applicant for financial assistance under a covered program shall submit with the application for financial assistance, or at such later time as may be specified by DOE, evidence for DOE to consider in making findings required under § 600.502(a) and findings concerning ownership status under § 600.502(b).

(b) If an applicant for financial assistance is submitting evidence relating to future undertakings, such as an agreement under § 600.503(c) to promote manufacture in the United States of products resulting from a technology developed with financial assistance or to procure parts and materials from competitive suppliers, the applicant shall submit a representation affirming acceptance of these undertakings. The applicant should also briefly describe its plans, if any, for any manufacturing of products arising from the program-supported research and development, including the location where such manufacturing is expected to occur.

(c) If an applicant for financial assistance is claiming to be a United States-owned company, the applicant must submit a representation affirming that it falls within the definition of that term provided in § 600.501.

(d) DOE may require submission of additional information deemed necessary to make any portion of the determination required by § 600.502.

§ 600.505 Other information DOE may consider.

In making the determination under § 600.502(b)(2), DOE may—

(a) consider information on the relevant international and domestic law obligations of the country of incorporation of the parent company of an applicant;

(b) consider information relating to the policies and practices of the country of incorporation of the parent company of an applicant with respect to:

(1) The eligibility criteria for, and the experience of United States-owned company participation in, energy-related research and development programs;

(2) Local investment opportunities afforded to United States-owned companies; and

(3) Protection of intellectual property rights of United States-owned companies;

(c) seek and consider advice from other federal agencies, as appropriate; and

(d) consider any publicly available information in addition to the information provided by the applicant.

APPENDIX A TO PART 600—GENERALLY APPLICABLE REQUIREMENTS

Socioeconomic Policy Requirements

Nondiscrimination in Federally Assisted Programs, 10 CFR part 1940 (45 FR 4614, June 13, 1980), as proposed to be amended by 46 FR 49546 (October 6, 1981).


Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended (42 U.S.C. 4581).


Sec. 306, Clean Air Act, as amended (42 U.S.C. 7435).


10 CFR part 1022. "Protection of Wetlands and Floodplains."


Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).


Administrative and Fiscal Policy Requirements


APPENDIX B TO PART 600—AUDIT REPORT DISTRIBUTION


Distribute: Manager, Western Region, Office of Inspector General, U.S. Department of Energy, P.O. Box 5400, Albuquerque, New Mexico 87115.


[50 FR 42361, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

PART 601—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec. 601.100 Conditions on use of funds.
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601.400 Penalties.
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APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING


SOURCE: 55 FR 6737 and 6746, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 5296, Dec. 20, 1989.
§ 601.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 601.105 Definitions.

For purposes of this part:

(a) Agency, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) Covered Federal action means any of the following Federal actions:

(1) The awarding of any Federal contract;
(2) The making of any Federal grant;
(3) The making of any Federal loan;
(4) The entering into of any cooperative agreement; and,
(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) Federal contract means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) Federal cooperative agreement means a cooperative agreement entered into by an agency.

(e) Federal grant means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct...
United States cash assistance to an individual.

(f) **Federal loan** means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) **Indian tribe and tribal organization** have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) **Influencing or attempting to influence** means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) **Loan guarantee and loan insurance** means an agency’s guarantee or insurance of a loan made by a person.

(j) **Local government** means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) **Officer or employee of an agency** includes the following individuals who are employed by an agency:

   (1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

   (2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

   (3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

   (4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

   (l) **Person** means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

   (m) **Reasonable compensation** means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

   (n) **Reasonable payment** means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

   (o) **Recipient** includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

   (p) **Regularly employed** means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

   (q) **State** means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or
§ 601.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

1. Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

2. An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

1. A Federal contract, grant, or cooperative agreement exceeding $100,000; or

2. A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000, unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

1. A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

2. A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

1. A subcontract exceeding $100,000 at any tier under a Federal contract;

2. A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

3. A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or

4. A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement, shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.
§ 601.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in §601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person’s products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person’s products or services for an agency’s use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 601.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly and solely related to the legal aspects of his or her client’s proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the
intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 601.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 601.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §601.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §601.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client’s proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.
§ 601.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $11,000 and not more than $110,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $11,000 and not more than $110,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $11,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $11,000 and $110,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 601.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 601.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 601.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 601.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of
§ 601.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President’s Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency’s covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, grant, loan, or cooperative agreement, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and...
contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $11,000 and not more than $110,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $11,000 and not more than $110,000 for each such failure.

# APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING

## DISCLOSURE OF LOBBYING ACTIVITIES

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352.

### 1. Type of Federal Action:
- [ ] a. contract
- [ ] b. grant
- [ ] c. cooperative agreement
- [ ] d. loan
- [ ] e. loan guarantee
- [ ] f. loan insurance

### 2. Status of Federal Action:
- [ ] a. bid/officer/application
- [ ] b. initial award
- [ ] c. post-award

### 3. Report Type:
- [ ] a. initial filing
- [ ] b. material change

**For Material Change Only:**
- year ___
- quarter ___
- date of last report ___

### 4. Name and Address of Reporting Entity:
- [ ] Prime
- [ ] Subawardee
- Tier ___

**Congressional District, if known:**

### 5. If Reporting Entity in No. 4 is Subawardee: Enter Name and Address of Prime:

**Congressional District, if known:**

### 6. Federal Department/Agency:

### 7. Federal Program Name/Description:

**CFDA Number, if applicable:**

### 8. Federal Action Number, if known:

### 9. Award Amount, if known:

### 10. a. Name and Address of Lobbying Entity:
- If individual, last name, first name, M.D.

### 10. b. Individuals Performing Services (including address if different from No. 10a):
- last name, first name, M.D.

**[Attach Continuation Sheet(s) SF-LPL-A, if necessary]**

### 11. Amount of Payment (check all that apply):
- $ ___
- [ ] actual
- [ ] planned

### 12. Form of Payment (check all that apply):
- [ ] a. cash
- [ ] b. in-kind; specify: nature

**value ___

### 13. Type of Payment (check all that apply):
- [ ] a. retainer
- [ ] b. one-time fee
- [ ] c. commission
- [ ] d. contingent fee
- [ ] e. deferred
- [ ] f. other; specify:

**[Attach Continuation Sheet(s) SF-LPL-A, if necessary]**

### 14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

**[Attach Continuation Sheet(s) SF-LPL-A, if necessary]**

### 15. Continuation Sheet(s) SF-LPL-A attached:
- [ ] Yes
- [ ] No

**Signature:**

**Print Name:**

**Title:**

**Telephone No.:**

**Date:**

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Standard Form - 112
PART 602—EPIDEMIOLOGY AND OTHER HEALTH STUDIES FINANCIAL ASSISTANCE PROGRAM

Sec. 602.1 Purpose and scope.

602.2 Applicability.

602.3 Definitions.

602.4 Derivation.

602.5 Epidemiology and Other Health Studies Financial Assistance Program.

602.6 Eligibility.

602.7 Solicitation.

602.8 Application requirements.
§ 602.1 Purpose and scope.

This part sets forth the policies and procedures applicable to the award and administration of grants and cooperative agreements by DOE (through the Office of Environment, Safety and Health or any office to which its functions are subsequently redelegated) for health related research, education/training, conferences, communication, and related activities.

§ 602.2 Applicability.

(a) This part applies to all grants and cooperative agreements awarded after the effective date of this rule.

(b) Except as otherwise provided by this part, the award and administration of grants and cooperative agreements shall be governed by 10 CFR part 600 (DOE Financial Assistance Rules).

§ 602.3 Definitions.

In addition to the definitions provided in 10 CFR part 600, the following definitions are provided for purposes of this part:

Conference and communication activities means scientific or technical conferences, symposia, workshops, seminars, public meetings, publications, video or slide shows, and other presentations for the purpose of communicating or exchanging information or views pertinent to DOE.

DOE means the United States Department of Energy.

Education/Training means support for education or related activities for an individual or organization that will enhance educational levels and skills, in particular, scientific or technical areas of interest to DOE.

Epidemiology and Other Health Studies means research pertaining to potential health effects resulting from DOE or predecessor agency operations or from any aspect of energy production, transmission, or use (including electromagnetic fields) in the United States and abroad. Related systems or activities to enhance these areas, as well as other program areas that may be described by notice published in the Federal Register, are also included.

Principal investigator means the scientist or other individual designated by the recipient to direct the project.

Research means basic and applied research and that part of development not related to the development of specific systems or products. The primary aim of research is scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or product.

§ 602.4 Deviations.

(a) Single-case deviations from this part may be authorized in writing by the Assistant Secretary for Environment, Safety and Health, the Head of the Contracting Activity, or their designees, upon the written request of DOE staff, an applicant for award, or a recipient. A request from an applicant or a recipient must be submitted to or through the cognizant contracting officer.

(b) Whenever a proposed deviation from this part would be a deviation from 10 CFR part 600, the deviation must also be authorized in accordance with the procedures prescribed in that part.

§ 602.5 Epidemiology and Other Health Studies Financial Assistance Program.

(a) DOE may issue under this part awards for research, education/training, conferences, communication, and related activities in the Office of Environment, Safety and Health program areas set forth in paragraph (b) of this section.

(b) The program areas are:
§ 602.6 Eligibility.

Any individual or entity other than a Federal agency is eligible for a grant or cooperative agreement. An unaffiliated individual is also eligible for a grant or cooperative agreement.

§ 602.7 Solicitation.

(a) The Catalog of Federal Domestic Assistance number for 10 CFR part 602 is 81.108 and its solicitation control number is EOHSFAP 10 CFR part 602.

(b) An application for a new or renewal award under this solicitation may be submitted at any time to DOE at the address specified in paragraph (c) of this section. New or renewal applications shall receive consideration for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE.

(c) Except as otherwise provided in a notice of availability, applicants may obtain application forms, described in 602.8(b) of this part, and additional information from the Office of Epidemiology and Health Surveillance (EH–42), U.S. Department of Energy, Washington, DC 20585, (301) 903–5926, and shall submit applications to the same address.

(d) DOE will publish program notices in the FEDERAL REGISTER regarding the availability of epidemiology and other health studies financial assistance. DOE may also use other means of communication, as appropriate, such as the publication of notices of availability in trade and professional journals and news media.

1. Each notice of availability shall cite this part and shall include:
   (i) The Catalog of Federal Domestic Assistance number and solicitation control number of the program;
   (ii) The amount of money available or estimated to be available for award;
   (iii) The name of the responsible DOE program official to contact for additional information and an address where application forms may be obtained;
   (iv) The address for submission of applications; and
   (v) Any evaluation criteria in addition to those set forth in § 602.9 of this part.

2. The notice of availability may also include any other relevant information helpful to applicants such as:
   (i) Program objectives;
   (ii) A project agenda or potential area of project initiatives;
   (iii) Problem areas requiring additional effort; and
   (iv) Any other information that identifies areas in which grants or cooperative agreements may be made.

(e) DOE is under no obligation to pay for any costs associated with the preparation or submission of applications.

(f) DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted.

(g) To be considered for a renewal award under this part, an incumbent recipient shall submit a continuation or renewal application, as provided in § 602.8 (c) and (h) of this part.

§ 602.8 Application requirements.

(a) An original and seven copies of the application for initial support must be submitted, except that State and local governments and Indian tribal governments shall not be required to submit more than the original and two copies of the application.

(b) Each new or renewal application in response to this part must include:

1. An application face page, DOE Form 4650.2 (approved by OMB under OMB Control No. 1910–1400). However,
the face page of an application submitted by a State or local government or an Indian tribal government shall be the face page of Standard Form 424 (approved by OMB under OMB Control Number 0348–0043).

(2) A detailed description of the proposed project, including its objectives, its relationship to DOE’s program, its impact on the environment, if any, and the applicant’s plan for carrying it out.

(3) Detailed information about the background and experience of the recipients of funds or, as appropriate, the principal investigator(s) (including references to publications), the facilities and experience of the applicant, and the cost-sharing arrangements, if any.

(4) A detailed budget for the entire proposed period of support with written justification sufficient to evaluate the itemized list of costs provided on the entire project. Applicants should note the following when preparing budgets:

(i) Numerical details on items of cost provided by State and local government and Indian tribal government applicants shall be on Standard Form 424A, ‘‘Budget Information for Non-Construction Programs’’ (approved under OMB Control No. 0348–0044). All other applicants shall use budget forms ERF 4620.1 (approved by OMB under Control No. 1910–1400).

(ii) DOE may, subsequent to receipt of an application, request additional budgetary information from an applicant when necessary for clarification or make informed pre-award determinations under 10 CFR part 600.

(5) Any pre-award assurances required pursuant to 10 CFR parts 600 and 602.

(c) Applications for a renewal award must be submitted with an original and seven copies, except that State and local governments and Indian tribal government applicants are required to submit only an original and two copies (Approved by OMB under OMB Control Numbers 0348–0050348–0000.)

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the award, if one is issued, or if unaffiliated, by the individual applicant. (See §602.17(a)(1) for requirements on continuation awards.)

(e) DOE may return an application that does not include all information and documentation required by statute, this part, 10 CFR part 600, or the notice of availability, when the nature of the omission precludes review of the application.

(f) During the review of a complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(g) In addition to including the information described in paragraphs (b), (c), and (d) of this section, an application for a renewal award must be submitted no later than 6 months before the expiration of the project period and must be on the same forms as required for initial applications. The renewal application must outline and justify a program and budget for the proposed project period, showing in detail the estimated cost of the proposed project, together with an indication of the amount of cost sharing, if any. The application shall also describe and explain the reasons for any change in the scope or objectives of the proposed project and shall compare and explain any difference between the estimates in the proposed budget and actual costs experienced as of the date of the application.

(h) DOE is not required to return an application to the applicant.

(i) Renewal applications must include a separate section that describes the results of work accomplished through the date of the renewal application and how such results relate to the activities proposed to be undertaken in the renewal period.

§602.9 Application evaluation and selection.

(a) Applications shall be evaluated for funding generally within 6 months, but in any event no later than 12 months, from the date of receipt by DOE. After DOE has held an application for 6 months, the applicant may, in response to DOE’s request, be required to revalidate the terms of the original application.

(b) DOE shall perform an initial evaluation of all applications to ensure
that the information required by this part is provided, that the proposed effort is technically sound and feasible, and that the effort is consistent with program funding priorities. For applications that pass the initial evaluation, DOE shall review and evaluate each application received based on the criteria set forth below and in accordance with the Office of Environment, Safety and Health Merit Review System developed, as required, under DOE Financial Assistance Regulations, 10 CFR part 600.

(c) DOE shall select evaluators on the basis of their professional qualifications and expertise. To ensure credible and inclusive peer review of applications, every effort will be made to select evaluators apart from DOE employees and contractors. Evaluators shall be required to comply with all applicable DOE rules or directives concerning the use of outside evaluators.

(d) DOE shall evaluate new and renewal applications based on the following criteria that are listed in descending order of importance:

1. The scientific and technical merit of the proposed research;
2. The appropriateness of the proposed method or approach;
3. Competency of research personnel and adequacy of proposed resources;
4. Reasonableness and appropriateness of the proposed budget; and
5. Other appropriate factors consistent with the purpose of this part established and set forth in a Notice of Availability or in a specific solicitation.

(e) DOE shall also consider as part of the evaluation other available advice or information, as well as program policy factors, such as ensuring an appropriate balance among the program areas listed in §602.5 of this part.

(f) In addition to the evaluation criteria set forth in paragraphs (d) and (e) of this section, DOE shall consider the recipient’s performance under the existing award during the evaluation of a renewal application.

(g) Selection of applications for award will be based upon the findings of the technical evaluations (including peer reviews, as specified in the Office of Environment, Safety and Health Merit Review System), the importance and relevance of the proposal to the Office of Environment, Safety and Health’s mission, and the availability of funds. Cost reasonableness and realism will also be considered.

(h) After the selection of an application, DOE may, if necessary, enter into negotiations with an applicant. Such negotiations are not a commitment that DOE will make an award.

§602.10 Additional requirements.

(a) A recipient performing research or related activities involving the use of human subjects must comply with DOE regulations in 10 CFR part 745, “Protection of Human Subjects,” and any additional provisions that may be included in the special terms and conditions of an award.

(b) A recipient performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health’s “Guidelines for Research Involving Recombinant DNA Molecules” (51 FR 16958, May 7, 1986), or such later revision of those guidelines, as may be published in the Federal Register. (The guidelines are available from the Office of Recombinant DNA Activities, National Institutes of Health, Building 31, Room BBB, Bethesda, MD 20892, or from the Office of Epidemiology and Health Surveillance, (EH-42), U.S. Department of Energy, Washington, DC 20585).

(c) A recipient performing research on warm-blooded animals shall comply with the Federal Laboratory Animal Welfare Act of 1966, as amended (7 USC 2131 et seq.), and the regulations promulgated thereunder by the Secretary of Agriculture at 9 CFR chapter I, subchapter A, pertaining to the care, handling, and treatment of warm-blooded animals held or used for research, teaching, or other activities supported by Federal awards. The recipient shall comply with the guidelines described in the Department of Health and Human Services Publication No. (NIH) 86-23, “Guide for the Care and Use of Laboratory Animals,” or succeeding revised editions. (This guide is available from the Office for Protection from Research Risks, Office of the Director, National Institutes of Health,
§ 602.11 Funding.

(a) The project period during which DOE expects to provide support for an approved project under this part shall generally not exceed 3 years and may exceed 5 years only if DOE makes a renewal award or otherwise extends the award. The project period shall be specified on the Notice of Financial Assistance Grant (DOE Form 4600.1).

(b) Each budget period of an award under this part shall generally be 12 months and may be as much as 24 months, as DOE deems appropriate.

§ 602.12 Cost sharing.

Cost sharing is not required, nor will it be considered, as a criterion in the evaluation and selection process unless otherwise provided under §602.9(d)(5).

§ 602.13 Limitation of DOE liability.

Awards made under this part are subject to the requirement that the maximum DOE obligation to the recipient is the amount shown in the Notice of Financial Assistance Award as the amount of DOE funds obligated. DOE shall not be obligated to make any additional, supplemental, continuation, renewal, or other award for the same or any other purpose.

§ 602.14 Fee.

(a) Notwithstanding 10 CFR part 600, a fee may be paid, in appropriate circumstances, to a recipient that is a small business concern, as qualified under the criteria and size standards in 13 CFR part 121, in order to permit the concern to participate in the Epidemiology and Other Health Studies Financial Assistance Program. Whether or not it is appropriate to pay a fee shall be determined by the contracting officer, who shall, at a minimum, apply the following guidelines:

(1) Whether the acceptance of an award will displace other work that the small business is currently engaged in or committed to assume in the near future; or

(2) Whether the acceptance of an award will, in the absence of paying a fee, cause substantial financial distress to the business. In evaluating financial distress, the contracting officer shall balance current displacement against reasonable future benefit to the company. (If the award will result in the beneficial expansion of the existing business base of the company, then no fee would generally be appropriate.) Fees shall not be paid to other entities except as a deviation from 10 CFR part 600, nor shall fees be paid under awards in support of conferences.

(b) To request a fee, a small business concern shall submit with its application a written self-certification that it is a small business concern qualified under the criteria and size standards in 13 CFR part 121. In addition, the application must state the amount of fee requested for the entire project period and the basis for requesting the amount and must also state why payment of a fee by DOE would be appropriate.

(c) If the contracting officer determines that payment of a fee is appropriate under paragraph (a) of this section, the amount of fee shall be that determined to be reasonable by the contracting officer. The contracting officer shall, at a minimum, apply the following guidelines in determining the fee amount:

(1) The fee base shall include the estimated allowable cost of direct salaries and wages and allocable fringe benefits. This fee base shall exclude all other direct and indirect costs.

(2) The fee amount expressed as a percentage of the appropriate fee base, pursuant to paragraph (c)(1) of this section, shall not exceed the percentage rate of fee that would result if a Federal agency contracted for the same amount of salaries, wages, and allocable fringe benefits under a cost reimbursement contract.

(3) Fee amounts, determined pursuant to paragraphs (c)(1) and (c)(2) of this section, shall be appropriately reduced when:

(i) Advance payments are provided; and/or

(ii) Title to property acquired with DOE funds vests in the recipient (10 CFR part 600).
§ 602.15 Indirect cost limitations.

Awards issued under this part for conferences and scientific/technical meetings will not include payment for indirect costs.

§ 602.16 National security.

Activities under the Epidemiology and Other Health Studies Financial Assistance Program are not expected to involve classified information (i.e., Restricted Data, Formerly Restricted Data, National Security Information). However, if in the opinion of the recipient or DOE such involvement becomes expected prior to the closeout of the award, the recipient or DOE shall notify the other in writing immediately. If the recipient believes any information developed or acquired may be classified, the recipient shall not provide the potentially classified information to anyone, including DOE officials with whom the recipient normally communicates, except the Director of Declassification, and shall protect such information as if it were classified until notified by DOE that a determination has been made that it does not require such handling. Correspondence that includes the information in question shall be sent by registered mail to the U.S. Department of Energy, Attn: Director of Declassification, NN-50, Washington, DC 20585. If the information is determined to be classified, the recipient may wish to discontinue the project, in which case the recipient and DOE shall terminate the award by mutual agreement. If the award is to be terminated, all material deemed by DOE to be classified shall be forwarded to DOE in a manner specified by DOE for proper disposition. If the recipient and DOE wish to continue the award, even though classified information is involved, the recipient shall be requested to obtain both personnel and facility security clearances through the Office of Safeguards and Security for Headquarters awards or from the cognizant field office Division of Safeguards and Security for awards obtained through DOE field organizations. Costs associated with handling and protecting any such classified information shall be negotiated at the time that the determination to proceed is made.

§ 602.17 Continuation funding and reporting requirements.

(a) A recipient shall periodically report to DOE on the project’s progress in meeting the project objectives of the award. The following types of reports shall be used:

(1) Progress Reports. After issuance of an initial award, recipients must submit a satisfactory progress report to receive a continuation award for the remainder of the project period. The original and two copies of the required report must be submitted to the Office of Environment, Safety and Health program manager 90 days prior to the anticipated continuation funding date. The report should include results of work to date and emphasize findings and their significance to the field, and any real or anticipated problems. The report also should contain the following information: On the first page, provide the project title, principal investigator/project director name, period of time the report covers, name and address of recipient organization, DOE award number, the amount of unexpended funds, if any, that are anticipated to be left at the end of the current budget period. If the amount exceeds 10 percent of the funds available for the budget period, provide information as to why the excess funds are anticipated to be available and how they will be used in the next budget period. The report should state whether the aims have changed from the original application, and if they have, provide revised aims. A completed budget page must be submitted with the continuation progress report when a change to anticipated future costs will exceed 25 percent of the original recommended future budget.
§ 602.19 Records and data.

(a) In some cases, DOE will require submission of certain project records or data to facilitate mission-related activities. Recipients, therefore, must take adequate steps to ensure proper management, control, and preservation of all project records and data.

(b) Awardees must ensure that all project data is adequately documented. Documentation shall:

(1) Reference software used to compile, manage, and analyze data;
(2) Define all technical characteristics necessary for reading or processing the records;
(3) Define file and record content and codes;
(4) Describe update cycles or conditions and rules for adding or deleting information; and
(5) Detail instrument calibration effects, sampling and analysis, space and time coverage, quality control measures, data algorithms and reduction methods, and other activities relevant to data collection and assembly.

(c) Recipients agree to comply with designated DOE records and data management requirements, including providing electronic data in prescribed formats and retention of specified records and data for eventual transfer to the Comprehensive Epidemiologic Data Resource or to another repository, as directed by DOE. Recipients will provide, as part of the final report, a description of records and data compiled during the project along with a plan for its preservation or disposition.

(d) Recipients agree to make project records and data available as soon as possible when requested by DOE.

APPENDIX A TO PART 602—SCHEDULE OF RENEWAL APPLICATIONS AND REPORTS

<table>
<thead>
<tr>
<th>Type</th>
<th>When due</th>
<th>Number of copies for awarding office</th>
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</thead>
<tbody>
<tr>
<td>1. Summary: 200 words on scope and purpose (Notice of Energy R&amp;D Project).</td>
<td>Immediately after a grant is awarded and with each application for renewal.</td>
<td>3</td>
</tr>
<tr>
<td>2. Renewal period ends.</td>
<td>6 months before the budget</td>
<td>8</td>
</tr>
<tr>
<td>3. Progress Report period (or as part of a renewal application).</td>
<td>90 days prior to the next budget period</td>
<td>3</td>
</tr>
<tr>
<td>4. Other progress reports, brief topical reports, etc. (Designated when significant results develop or when work has direct programmatic impact).</td>
<td>As deemed appropriate by DOE or the recipient</td>
<td>3</td>
</tr>
<tr>
<td>5. Reprints, Conference.</td>
<td>Same as 4. above</td>
<td>3</td>
</tr>
<tr>
<td>6. Final report of the project.</td>
<td>Within 90 days after completion</td>
<td>3</td>
</tr>
<tr>
<td>7. Financial Status Report (FSR).</td>
<td>Within 90 days after completion of the project period; for budget periods exceeding 12 months an FSR is also required within 90 days after the first 12-month period.</td>
<td>3</td>
</tr>
</tbody>
</table>

Note: Report types 5 and 6 require with submission two copies of DOE Form 1332.16, University-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

PART 605—THE OFFICE OF ENERGY RESEARCH FINANCIAL ASSISTANCE PROGRAM

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605.1 Purpose and scope.
605.2 Applicability.
605.3 Definitions.
605.4 Deviations.
605.5 The Office of Energy Research Financial Assistance Program.
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605.20 Dissemination of results.

APPENDIX A TO PART 605—ENERGY RESEARCH PROGRAM OFFICE DESCRIPTIONS


S O U R C E : 57 FR 40383, Sept. 3, 1992, unless otherwise noted.

605.1 Purpose and scope.

This part sets forth the policies and procedures applicable to the award and
administration of grants and cooperative agreements by the DOE Office of Energy Research (ER) and the Science and Technology Advisor (STA) Organization for basic and applied research, educational and/or training activities, conferences and related activities.

§ 605.2 Applicability.
(a) This part applies to all grants and cooperative agreements awarded after the effective date of this amended rule.
(b) Except as otherwise provided by this part, the award and administration of grants and cooperative agreements shall be governed by 10 CFR part 600 (DOE Financial Assistance Rules).

§ 605.3 Definitions.
In addition to the definitions provided in 10 CFR part 600, the following definitions are provided for purposes of this part—

Basic and applied research means basic and applied research and that part of development not related to the development of specific systems or products. The primary aim of research is scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or product.

Educational/Training means support for education or related activities for an individual or organization that will enhance education levels and skills in particular scientific or technical areas of interest to DOE.

Principal investigator means the scientist or other individual designated by the recipient to direct the project.

Recipient obligation means the amounts of orders placed, contracts and subawards issued, services received, and similar transactions during a given period that will require payment by the recipient during the same or a future period.

Related conference means scientific or technical conferences, symposia, workshops or seminars for the purpose of communicating or exchanging information or views pertinent to ER/STA.

Special purpose equipment means equipment which is used only for research, medical, scientific, educational, or other related project activity.

§ 605.4 Deviations.
Single-case deviations from this part may be authorized in writing by the Director or Deputy Director of ER or the Head of a Contracting Activity upon the written request of DOE staff, an applicant for an award, or a recipient. A request from an applicant or a recipient must be submitted to or through the cognizant contracting officer. Whenever a proposed deviation from this part would be a deviation from 10 CFR part 600, the deviation must also be authorized in accordance with the procedures prescribed in that part.

§ 605.5 The Office of Energy Research Financial Assistance Program.
(a) DOE may issue, under the Office of Energy Research Financial Assistance Program, 10 CFR part 605, awards for basic and applied research, educational/training activities, conferences, and other related activities under the ER program areas set forth in paragraph (b) of this section and described in appendix A of this part.
(b) The Program areas are:

(1) Basic Energy Sciences
(2) Field Operations Management
(3) Fusion Energy
(4) Health and Environmental Research
(5) High Energy and Nuclear Physics
(6) Scientific Computing Staff
(7) Superconducting Super Collider
(8) University and Science Education Programs
(9) Program Analysis; and
(10) Other program areas of interest as may be described in a notice of availability published in the FEDERAL REGISTER.

§ 605.6 Eligibility.
Any university or other institution of higher education or other non-profit or for-profit organization, non-Federal agency, or entity is eligible for a grant or cooperative agreement. An unaffiliated individual also is eligible for a grant or cooperative agreement.

§ 605.7 [Reserved]

§ 605.8 Solicitation.
(a) The Catalog of Federal Domestic Assistance number for this program is
§ 605.9 Application requirements.

(a) An original and seven copies of the application for initial support must be submitted except that State governments, local governments, or Indian tribal governments shall not be required to submit more than the original and two copies of the application.

(b) Each new or renewal application in response to this part must include:

(1) An application face page, DOE Form 4650.2 (approved by OMB under OMB Control No. 1910–1400). However, the facesheet of the application for State and local governments and Indian tribal government applicants shall be the facesheet of Standard Form (SF) 424 (approved by OMB under OMB Control Number 0348–0043).

(2) A detailed description of the proposed project, including the objectives of the project, in relationship to DOE’s program and the applicant’s plan for carrying it out;

(3) Detailed information about the background and experience of the principal investigator(s) (including references to publications), the facilities and experience of the applicant, and the cost-sharing arrangements, if any.

(4) A detailed budget for the entire proposed period of support with written justification sufficient to evaluate the itemized list of costs provided on the entire project.

(i) Numerical details on items of cost provided by State and local government and Indian tribal government applicants shall be on Standard Form 424A, Budget Information for Non-Construction Programs (approved under OMB Control No. 0348–0044). All other applicants shall use budget form ERF 4620.1 (approved by OMB under Control No. 1910–1400).

(ii) DOE may, subsequent to receipt of an application, request additional budgetary information from an applicant when necessary for clarification or to make informed preaward determinations under 10 CFR part 600.

(f) DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted.

(g) To be considered for a renewal award under this part, an incumbent recipient shall submit a renewal application as provided in § 605.9(c) and (h).
(5) Any preaward assurances required pursuant to 10 CFR parts 600 and 605.

(c) Applications for a renewal award must be submitted in an original and seven copies, except that State governments, local governments, or Indian tribes are required to submit only an original and two copies. (Approved by OMB under OMB Control Numbers 0348–0005—0348–0009).

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the award, if one is issued, or if unaffiliated, by the individual applicant. (See §605.19(a)(1) for requirements on continuation awards.)

(e) All applications which involve research, development, or demonstration activities when such activities:

1. Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area;


3. Are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public, are subject to the provisions of Executive Order 12372 and 10 CFR part 1005.

Anyone planning to submit such applications should contact ER for further information about compliance requirements.

(f) DOE may return an application which does not include all information and documentation required by statute, this part, 10 CFR part 600 or the notice of availability, when the nature of the omission precludes review of the application.

(g) During the review of the complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(h) In addition to including the information described in paragraphs (b), (c), and (d) of this section, an application for a renewal award must be submitted no later than six months prior to the scheduled expiration of the project period and must be on the same forms and include the same type of information as that required for initial applications. The renewal application must outline and justify a program and budget for the proposed project period, showing in detail the estimated cost of the proposed project, together with an indication of the amount of funds needed and the amount of cost sharing, if any. The application also shall describe and explain the reasons for any change in the scope or objectives of the proposed project, and shall compare and explain any difference between the estimates in the proposed budget and actual costs experienced as of the date of the application.

(i) DOE is not required to return to the applicant an application which is not selected or funded.

(j) Renewal applications must include a separate section that describes the results of work accomplished through the date of the renewal application and how such results relate to the activities proposed to be undertaken in the renewal period.

§605.10 Application evaluation and selection.

(a) Applications shall be evaluated for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE. After DOE has held an application for 6 months, the applicant may, in response to DOE’s request, be required to revalidate the terms of the original application.

(b) DOE staff shall perform an initial evaluation of all applications to ensure that the information required by this part is provided, that the proposed effort is technically sound and feasible, and that the effort is consistent with program funding priorities. For applications which pass the initial evaluation, DOE shall review and evaluate each application received based on the criteria set forth below and in accordance with the Merit Review System developed as required under DOE Financial Assistance Regulations, 10 CFR part 600.
§ 605.11 Additional requirements.

(a) A recipient performing research, development, or related activities involving the use of human subjects must comply with DOE regulations in 10 CFR part 745, “Protection of Human Subjects,” and any additional provisions which may be included in the Special Terms and Conditions of an award.

(b) A recipient performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health “Guidelines for Research Involving Recombinant DNA Molecules” (51 FR 16958, May 7, 1986), or such later revision of those guidelines as may be published in the Federal Register. (The guidelines are available from the Office of Recombinant DNA Activities, National Institutes of Health, Building 31, room 4B11, Bethesda, Maryland 20892.)

(c) Any recipient performing research on warm-blooded animals shall comply with the Federal Laboratory Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 et seq.) and the regulations promulgated thereunder by the Secretary of Agriculture at 9 CFR chapter I, subchapter A, pertaining to the care, handling, and treatment of warm blooded animals held or used for research, teaching, or other activities supported by Federal awards. The recipient shall comply with the guidelines described in DHHS Publication No. [NIH] 86–23, “Guide for the Care and Use of Laboratory Animals,” or succeeding revised editions. (This guide is available from the Office for Protection from Research Risks, Office of the Director, National Institutes of Health, Building 31, room 4B09, Bethesda, Maryland 20205.)

§ 605.12 Funding.

(a) The project period during which DOE expects to provide support for an approved project under this part shall generally not exceed 3 years and may exceed 5 years only if DOE makes a renewal award or otherwise extends the award. The project period shall be specified on the Notice of Financial Assistance Award (DOE Form 4600.1).

(b) Each budget period, of an award under this part, shall generally be 12 months and may be as much as 24 months as determined appropriate by ER.

§ 605.13 Cost sharing.

Cost sharing is not required nor will it be considered as a criterion in the
§ 605.14 Limitation of DOE liability.

Awards under this part are subject to the requirement that the maximum DOE obligation to the recipient is the amount shown in the Notice of Financial Assistance Award as the amount of DOE funds obligated. DOE shall not be obligated to make any additional, supplemental, continuation, renewal or other awards for the same or any other purpose.

§ 605.15 Fee.

(a) Notwithstanding 10 CFR part 600, a fee may be paid, in appropriate circumstances, to a recipient which is a small business concern as qualified under the criteria and size standards of 13 CFR part 121 in order to permit the concern to participate in the ER Financial Assistance Program. Whether or not it is appropriate to pay a fee shall be determined by the Contracting Officer who shall, at a minimum, apply the following guidelines:

(1) Whether the acceptance of an award will displace other work the small business is currently engaged in or committed to assume in the near future; or

(2) Whether the acceptance of an award will, in the absence of paying a fee, cause substantial financial distress to the business. In evaluating financial distress, the Contracting Officer shall balance current displacement against reasonable future benefit to the company. (If the award will result in the beneficial expansion of the existing business base of the company, then no fee would generally be appropriate.) Fees shall not be paid to other entities except as a deviation from 10 CFR part 600, nor shall fees be paid under awards in support of conferences.

(b) To request a fee, a small business concern shall submit with its application a written self certification that it is a small business concern qualified under the criteria and size standards in 13 CFR part 121. In addition, the application must state the amount of fee requested for the entire project period and the basis for requesting the amount, and must also state why payment of a fee by DOE would be appropriate.

(c) If the Contracting Officer determines that payment of a fee is appropriate under paragraph (a) of this section, the amount of fee shall be that determined to be reasonable by the Contracting Officer. The Contracting Officer shall, at a minimum, apply the following guidelines in determining the fee amount:

(1) The fee base shall include the estimated allowable cost of direct salaries and wages and allocable fringe benefits. This fee base shall exclude all other direct and indirect costs.

(2) The fee amount expressed as a percentage of the appropriate fee base pursuant to paragraph (c)(1) of this section, shall not exceed the percentage rate of fee that would result if a Federal agency contracted for the same amount of salaries, wages, and allocable fringe benefits under a cost reimbursement contract.

(3) Fee amounts, determined pursuant to paragraphs (c)(1) and (c)(2) of this section, shall be appropriately reduced when:

(i) Advance payments are provided; and/or

(ii) Title to property acquired with DOE funds vests in the recipient (10 CFR part 600).

(d) Notwithstanding 10 CFR part 600, any fee awarded shall be a fixed fee and shall be payable on an annual basis in proportion to the work completed, as determined by the Contracting Officer, upon satisfactory submission and acceptance by DOE of the progress report. If the project period is shortened due to termination, or the project period is not fully funded, the fee shall be reduced by an appropriate amount.

§ 605.16 Indirect cost limitations.

Awards issued under this part for conferences and scientific/technical meetings will not include payment for indirect costs.

§ 605.17 [Reserved]

§ 605.18 National security.

Activities under ER’s Financial Assistance Program shall not involve classified information (i.e., Restricted
§ 605.19 Continuation funding and reporting requirements.

(a) A recipient shall periodically report to DOE on the project’s progress in meeting the project objectives of the award. The following types of reports shall be used:

(1) Progress reports. After issuance of an initial award and if future support is recommended, recipients must submit a satisfactory progress report in order to receive continuation awards for the remainder of the project period. The original and two copies of the required report (generally not to exceed two pages per project or task) must be submitted to the ER program manager 90 days prior to the anticipated continuation funding date and contain the following information: on the first page, provide the project title, principal investigator/project director name, period of time report covers, name and address of recipient organization, DOE award number, the amount of unexpended funds, if any, that are anticipated to be left at the end of the current budget period, and if the amount exceeds 10 percent of the funds available for the budget period, provide information as to why the excess funds are anticipated to be available and how they will be used in the next budget period. Report shall state whether aims have changed from original application and if they have, provided revised aims. Include results of work to date. Emphasize findings and their significance to the field, and any real or anticipated problems. A completed budget page must be submitted with the continuation progress report when a change to anticipated future costs will exceed 25 percent of the original recommended future budget.

(2) Notice of Energy R&D Project. A Notice of Energy R&D Project, DOE Form 1430.22, which summarizes the purpose and scope of the project, must be submitted in accordance with the Distribution and Schedule of Documents set forth at the end of this section. Copies of the form may be obtained from a DOE Contracting Office.

(3) Special reports. The recipient shall report the following events to DOE as soon after they occur as possible:

(i) Problems, delays, or adverse conditions which will materially affect the ability to attain project objectives, or prevent the meeting of time schedules and goals. The report must describe the remedial action the recipient has taken or plans to take and any action DOE should take to alleviate the problems.

(ii) Favorable developments or events which enable meeting time schedules and goals sooner or at less cost than
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§ 605.20

DISTRIBUTION AND SCHEDULE OF DOCUMENTS—Continued

<table>
<thead>
<tr>
<th>Type</th>
<th>When due</th>
<th>Number of copies to be submitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Other progress reports, brief topical reports, etc. (Designated when significant results develop or when work has direct programmatic impact)</td>
<td>As deemed appropriate by the recipient.</td>
<td></td>
</tr>
<tr>
<td>5. Posters, Conference papers.</td>
<td>Same as 4 above</td>
<td>3</td>
</tr>
<tr>
<td>6. Final Report</td>
<td>Within 90 days after termination of the project.</td>
<td>3</td>
</tr>
<tr>
<td>7. Financial Status Report (FSR).</td>
<td>Within 90 days after completion of the project period; for budget periods exceeding 12 months, an FSR is also required within 90 days after the first 12 months unless waived by the Contracting Officer.</td>
<td>3</td>
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NOTE: Report types 5 and 6 require with submission two copies of DOE Form 1332.16, University-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

§ 605.20 Dissemination of results.

(a) Recipients are encouraged to disseminate project results promptly. DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from awards.

(b) DOE may waive progress reporting requirements set forth in §605.19, if the recipient submits to DOE a copy of its own report which is published or accepted for publication in a recognized scientific or technical journal and which satisfies the information requirements of the program.

(c) Recipients are urged to publish results through normal publication channels in accordance with the applicable provisions of 10 CFR part 600.

(d) The article shall include an acknowledgment that the project was supported, in whole or in part, by a DOE award, and specify the award number, but state that such support does not constitute an endorsement by DOE of the views expressed in the article.
energy resources in an environmentally acceptable fashion.

(d) Engineering Research

This program’s objectives are: (1) To extend the body of knowledge underlying current engineering practice in order to open new ways for enhancing energy savings and production, prolonging useful equipment life, and reducing costs while maintaining output and performance quality; and (2) to broaden the technical and conceptual base for solving future engineering problems in the energy technologies. Long-term research topics of current interest include: foundations of bio-processing of fuels and energy related waste; fracture mechanics and theoretical studies of multiphase flows, intelligent machines, and diagnostics and control for plasma processing of materials.

(e) Materials Sciences

The objective of this program is to increase the understanding of phenomena and properties important to materials behavior that will contribute to meeting the needs of present and future energy technologies. It is comprised of the subfields metallurgy, ceramics, solid state physics, materials chemistry, and related disciplines where the emphasis is on the science of materials.

(f) Advanced Energy Projects

The objective of this program is to support exploratory research on novel concepts related to energy. The concepts may be in any field related to energy but must not fall into an area of programmatic responsibility of an existing ER technical program. The research is usually aimed at establishing scientific feasibility of a concept and, where appropriate, at estimating its economic viability.

2. FIELD OPERATIONS MANAGEMENT

This office administers special purpose support programs that cut across DOE program areas. In conjunction with this activity, it supports related conferences, research, and training initiatives that further these areas of interest.

(a) Laboratory Technology Transfer Program

The ER Laboratory Technology Transfer (LTT) Program has dedicated funding which fulfills the legislative mandate to more effectively transfer research and technology from Energy Research laboratories to industry. By design, this program provides only partial funding for technology research projects and personnel exchanges with industry and universities. Mandatory cost-sharing by industry and other partners ensures that cooperative projects will focus on those that generate real interest in the private sector and facilitate the transfer of technology.
program supports laboratory-industry personnel exchanges; comprehensive program evaluation; and cost-shared technology research, especially CRADAs to advance precompetitive research projects to a point where they can be evaluated for commercial applications. Other activities of the ER Laboratory Technology Transfer Program include coordinating technology transfer operations throughout the ER laboratory system; coordinating technology transfer elements of the institutional planning process; contributing to Departmental technology transfer policy development; and implementing appropriate outreach activities.

3. FUSION ENERGY

The magnetic fusion energy program is an applied research and development program whose goal is to develop the scientific and technological information required to design and construct magnetic fusion energy systems. This goal is pursued by three divisions, whose major functions are listed below.

(A) APPLIED PLASMA PHYSICS (APP)

This Division seeks to develop that body of physics knowledge which permits advancement of the fusion program on a sound basis. APP research programs provide: (1) The theoretical understanding of fusion plasmas necessary for interpreting results from present experiments, and the planning and design of future confinement devices; (2) the data on plasma properties, atomic physics and new diagnostic techniques for operational support of confinement experiments; research and development of Heavy Ion Fusion Accelerator (HIFAR) and reactor studies in support of the development of Inertial Fusion Energy (IFE).

(B) CONFINEMENT SYSTEMS

This Division has as its primary objective the conduct of research efforts to investigate and resolve basic physics issues associated with medium- to large-scale confinement devices. These devices are used to experimentally explore the limits of specific confinement concepts as well as to study associated physical phenomena. Specific areas of interest include: the production of increased plasma densities and temperatures; the understanding of the physical laws governing plasma energy transport and confinement scaling; equilibrium and stability of high plasma pressure; the investigation of plasma interaction with radio-frequency waves; and the study and control of particle transport in the plasma.

(C) DEVELOPMENT AND TECHNOLOGY

This Division supports research and development of the technology necessary for fabrication and operation of present and future plasma and fusion devices. The program also pursues R&D and system studies pertaining to critical feasibility issues of fusion technology and development.

4. HEALTH AND ENVIRONMENTAL RESEARCH

The goals of this research program are as follows: (1) To provide, through basic and applied research, the scientific information required to identify, understand and anticipate the long-term health and environmental consequences of energy use and development; and (2) to utilize the Department’s unique resources to solve major scientific problems in medicine, biology and the environment. The goals of the program are accomplished through the effort of its divisions, which are:

(a) Health Effects and Life Sciences Research

This is a broad program of basic and applied biological research. The objectives are: (1) To develop experimental information from biological systems for estimating or predicting risks of carcinogenesis, mutagenesis, and delayed toxicological effects associated with low level human exposures to energy-related radiations and chemicals; (2) to define mechanisms involved in the induction of biological damage following exposure to low levels of energy-related agents; (3) to develop new technologies for detecting and quantifying latent health effects associated with such agents; (4) to support fundamental research in structural biology user facilities at DOE laboratories; and (5) to create and apply new technologies and resources for characterizing the molecular nature of the human genome.

Increasing emphasis will be placed on: Understanding of mechanisms by which low level exposures to radiation and/or energy-related chemicals produce long-term health impacts; development of new technologies for estimating human health risks from low level exposures; development and application of technologies and approaches for cost-effective characterization of the human genome.

(b) Medical Applications and Biophysical Research

The objectives of this program comprise several areas: (1) To develop new concepts and techniques for detecting and measuring hazardous physical and chemical agents related to energy production; (2) to evaluate chemical and radiation exposures and dosimetry for health protection application; (3) to determine the physical and chemical mechanisms of radiation action in biological systems; and (4) to develop new instrumentation and technology for biological and biomedical research. In addition, Medical Application research is aimed at enhancing the beneficial applications of radiation, and radionuclides, in the diagnosis, study, and treatment of
human diseases. This includes the development of new techniques for radioactive isotope production, labeled pharmaceuticals, imaging devices, and radiation beam applications for the improved diagnosis and therapy of human diseases or the study of human physiological processes. A new area of interest involves the integration of Nuclear Medicine and Molecular Biology. This includes development of radioisotopes and new molecular radiopharmaceutical probes specific to disease-associated targets for improved diagnosis and therapy.

\( \text{(c) Environmental Sciences} \)

The objectives of the program relate to environmental processes affected by energy production and use. For example, the program develops information on the physical, chemical, and biological processes that cycle and transport energy related material and nutrients through the atmosphere, and the ocean margin. Specific emphasis is placed on hydrological transport, mobility, and degradation of energy-related contaminants by microorganisms in subsurface systems.

This program also addresses global environmental change from increases in atmospheric carbon dioxide and other greenhouse gases. The scope of the global change program encompasses the carbon cycle, climate modeling and diagnostics, ecosystem responses, the role of the ocean in global change and experiments to quantify the links between greenhouse gas increases and climate change. A new dimension of this program addresses the role of molecular biology in understanding the ecosystem response to global change.

5. HIGH ENERGY AND NUCLEAR PHYSICS

This program supports 90 percent of the U.S. efforts in high energy and nuclear physics. The objectives of these programs are indicated below:

\( \text{(a) Nuclear Physics (Including Nuclear Data Program)} \)

The primary objectives of this program are an understanding of the interactions and structures of atomic nuclei and nuclear matter at the most elementary level possible, and an understanding of the fundamental forces of nature as manifested in nuclear matter.

\( \text{(b) High Energy Physics} \)

The primary objectives of this program are to understand the nature and relationships among fundamental forces of nature and to understand the ultimate structure of matter in terms of the properties and interrelations of its basic constituents.

6. SCIENTIFIC COMPUTING STAFF

The goal of this program is to advance the understanding of the fundamental concepts of mathematics, statistics, and computer science underlying the complex mathematical models of the key physical processes involved in the research and development programs of DOE. Broad emphasis is given in three major categories: analytical and numerical methods, information analysis techniques, and advanced concepts.

7. SUPERCONDUCTING SUPER COLLIDER (SSC)

The goals of the Superconducting Super Collider are to build a proton-proton collider with an energy of 20 TeV per proton, to construct and operate experimental systems to study the interactions of these protons, to establish the premier international laboratory for high energy physics research, and to create a major resource for science education. The Office of the Superconducting Super Collider administers research grants associated with the SSC Laboratory’s physics, accelerator, and associated technology research and development programs.

8. UNIVERSITY AND SCIENCE EDUCATION

The Office of University and Science Education supports a variety of science, mathematics and engineering education precollege through postgraduate programs aimed at strengthening the Nation’s science education and research infrastructure. DOE’s education mission has been expanded to include increasing emphasis on the precollege and general public literacy areas. Much of the support involves the use of the unique resources (scientists, facilities and equipment) at DOE’s national laboratories and research facilities, and includes research and/or other “hands-on” opportunities for precollege and postsecondary students, teachers, and faculty members. In addition to programs centered in DOE facilities, a number of other educational activities are supported, including:

\( \text{(a) Pre-Freshman Enrichment Program (PREP)} \)

PREP supports projects at colleges and universities aimed at seeking out individuals, typically under-represented in science-based careers, during junior high school and early high school years (sixth through tenth grades) and providing these individuals with pre-freshman enrichment activities to identify, motivate and prepare them for science-based careers. Projects must include concentrated, integrated activities that enhance the student’s understanding of science and mathematics, must have a summer component at least four weeks in length, and may also include a pre-summer or post-summer component.
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(b) Museum Science Education Program

This program funds museum projects that support the development of the media of informal energy-related science education. The media of informal science education include, but are not limited to: interactive exhibits, demonstrations, hands-on activities, teacher-student curriculum and film/video/software productions. Examples of energy-related subjects include, but are not limited to: high energy and nuclear physics, nuclear science and technologies, global warming, waste management, energy efficiency, new materials development, fossil energy resources, renewable technologies, risk assessment, energy/environment and other timely topics. The purpose of the program is the development and use of creative informal science education media which focus on energy-related science and technology.

(c) University Research Instrumentation Program

The University Research Instrumentation Program has been developed as part of an interagency effort under the coordination of the Office of Science and Technology Policy to help alleviate the overall shortage of sophisticated state-of-the-art instruments required for advanced scientific and technical research at universities. The overall program objective is to assist university and college scientists in strengthening their capabilities to conduct long-range experimental/scientific research in specific energy areas of direct interest to DOE through the acquisition of large scientific/technical pieces of equipment. Only those colleges and universities that currently have DOE funded research projects, which require the requested equipment, totalling at least $150,000 in the specific area will be selected (more complete eligibility guidelines and principal research areas of particular DOE interest in any given year are available from the program office). Smaller research instruments (less than $100,000 each) are not eligible for consideration in this program. No specific fraction of cost sharing is required but the level of non-Federal funds to be provided will be considered in final selection of awards under the program.

(d) Experimental Program To Stimulate Competitive Research

The purpose of the DOE Experimental Program to Stimulate Competitive Research is to enhance the capabilities of the eligible designated States to develop science and engineering manpower in energy-related areas and to conduct nationally competitive energy-related research. Planning committees within eligible States may apply for planning, implementation and/or training efforts (list of eligible States and activities to be supported in any given year as well as cost-sharing requirements are available from the program office). Separate applications for planning/implementation and graduate traineeships are required. Planning/implementation applications must contain information that details development of a State-wide improvement plan for energy-related research and human resources, while training grant applications must detail the need for energy-related specific and technical educational disciplines.

(e) Nuclear Engineering Research

The objective of this program is to support research efforts aimed at strengthening University-based nuclear engineering programs. Specific areas of basic and applied research of interest include, but are not limited to: (1) Material behavior in a radiation environment typical of advanced nuclear power plants; (2) real-time instrumentation that identifies and applies innovative measurements technologies in nuclear-related fields; (3) advanced nuclear reactor concepts; (4) applied nuclear sciences that address improvements in the applications of radiation and the understanding of the interaction of radiation with matter; (5) engineering science research applicable to advanced nuclear reactor concepts, industry safety and reliability concerns; (6) neutronics that address improvements in reactor computational methodologies and knowledge of the basic fission processes; and (7) nuclear thermal hydraulics that address improvements of models and analysis of thermal hydraulic behavior in an advanced nuclear reactor system.

(f) Used Energy-Related Laboratory Equipment (ERIE) Program

In accordance with DOE’s responsibility to encourage research and development in the energy area, grants of used energy-related laboratory equipment for use in energy-oriented educational programs in the life, physical and environmental sciences, and engineering are available to universities, colleges and other non-profit educational institutions of higher learning in the United States. An institution is not required to have a current DOE grant or contract in order to participate in this program. The program office should be contacted for specific information on how to access the list of eligible equipment under this program. The cost of care and handling incident to the grant must be borne by the institution.

9. Program Analysis

The Office of Program Analysis conducts assessments to identify research opportunities in specific areas of interest to DOE programs.
SUBCHAPTER I—SALES REGULATION

PART 622—CONTRACTUAL PROVISIONS

§ 622.103 Dispute provisions.

(a) Except as provided in paragraph (b) of this section, all DOE contracts for the sale of personal property to any organization outside the U.S. Government shall include a Disputes clause which provides for:

(1) Binding final decisions by the Contracting Officer, subject to appeal;
(2) Appeal rights pursuant to the Contract Disputes Act of 1978;
(3) Continuation of performance by the contractor at the direction of the contracting officer pending final resolution of the dispute.

(b) Exceptions:

(1) The provisions of this part shall not apply to contracts for sale of electric power by the Power Marketing Administrations;

(2) The Secretary may exempt a contract or class of contracts from this requirement upon determination that it would not be in the public interest in an individual contract or class of contracts with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, to include the Disputes clause, as permitted by section 3 of the Contract Disputes Act of 1978.

(c) The Energy Board of Contract Appeals (EBCA) has cognizance over disputes relating to DOE Sales contracts.

(d) The Disputes clause in § 624.102-4 shall be used in accordance with this § 622.103.


[46 FR 34559, July 2, 1981]

PART 624—CONTRACT CLAUSES

§ 624.102-4 Disputes.

The following clause shall be used in accordance with the provisions of § 622.103:

Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer who shall issue a written decision on the dispute.

(b) Claim means:

(1) A written request submitted to the Contracting Officer;
(2) For payment of money, adjustment of contract terms, or other relief;
(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer’s decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the purchaser shall certify, at the time of submission of a claim, as follows:

I certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable.

(Purchaser’s Name)

(Title)

(d) The Government shall pay the Purchaser interest.

(1) On the amount found due to the purchaser and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Secretary of the Treasury;

(3) From the date the amount is due until the Government makes payment.

(e) The purchaser shall pay the Government interest.

(1) On the amount found due to the Government and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Department of Energy for the payment of interest on past due accounts;

(3) From the date the amount is due until the purchaser makes payment.
Department of Energy

§ 625.3

(f) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.


PART 625—PRICE COMPETITIVE SALE OF STRATEGIC PETROLEUM RESERVE PETROLEUM

§ 625.1 Application and purpose.

This part shall apply to all price competitive sales of SPR petroleum by DOE. This section provides the rules for developing standard contract terms and conditions and financial and performance responsibility measures; notifying potential purchasers of those terms, conditions and measures; choosing applicable terms, conditions and measures for each sale of SPR petroleum; and notifying potential purchasers of which terms, conditions and measures will be applicable to particular sales of SPR petroleum.

§ 625.2 Definitions.

(a) DOE. DOE is the Department of Energy established by Public Law 95–91 (42 U.S.C. 7101 et seq.) and any component thereof including the SPR Office.

(b) Notice of Sale. The Notice of Sale is the document announcing the sale of SPR petroleum, the amount, type and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The Notice of Sale will specify which contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum, and will provide other pertinent information.

(c) Petroleum. Petroleum means crude oil, residual fuel oil or any refined petroleum product (including any natural gas liquid and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities, or in transit to such facilities (including petroleum under contract but not yet delivered to a loading terminal).

(d) Price Competitive Sale. A price competitive sale of SPR petroleum is one in which contract awards are made to those responsive, responsible persons offering the highest prices; sales conducted pursuant to rules adopted under section 161(e) of the Energy Policy and Conservation Act (EPCA), Public Law 94–163 (42 U.S.C. 6201 et seq.), are not price competitive sales.

(e) Purchaser. A purchaser is any person or entity (including a Government agency) which enters into a contract with DOE to purchase SPR petroleum.

(f) SPR. SPR is the Strategic Petroleum Reserve, that program of the Department of Energy established by title I, part B of EPCA.

(g) Standard Sales Provisions. The Standard Sales Provisions are a set of terms and conditions of sale, which may contain or describe financial and performance responsibility measures, for petroleum sold from the SPR under this part.

§ 625.3 Standard sales provisions.

(a) Contents. The Standard Sales Provisions shall contain contract clauses which may be applicable to price competitive sales of SPR petroleum, including terms and conditions of sale, and purchaser financial and performance responsibility measures, or descriptions thereof. At his discretion, the Secretary or his designee may...
§ 625.4 Publication of the Standard Sales Provisions.

(a) Publication. The Standard Sales Provisions shall be published in the Federal Register and in the Code of Federal Regulations as an appendix to this rule.


(c) Notification of applicable clauses. The Notice of Sale will specify, by referencing the Federal Register and the Code of Federal Regulations in which the latest version of the Standard Sales Provisions was published, which contractual terms and conditions and contractor financial and performance responsibility measures contained or described therein are applicable to that particular sale.

§ 625.5 Failure to perform in accordance with SPR Contracts of Sale.

(a) Ineligibility. In addition to any remedies available to the Government under the Contract of Sale, in the event that a purchaser fails to perform in accordance with applicable SPR petroleum sale contractual provisions, and such failure is not excused by those provisions, the Headquarters Senior Procurement Official, at his discretion, may make such purchaser ineligible for future awards of SPR petroleum sales contracts.

(b) Determination of ineligibility. No purchaser shall be made ineligible for the award of any SPR sales contract prior to notice and opportunity to respond in accordance with the requirements of this subsection.

(1) Upon the determination that a purchaser is to be considered for ineligibility, the purchaser shall be sent by certified mail return receipt requested, the following:

(i) Notification that the Headquarters Senior Procurement Official is considering making the purchaser ineligible for future awards;

(ii) Identification of the SPR sales contract which the purchaser failed to comply with, along with a brief description of the events and circumstances relating to such failure;

(iii) Advice that the purchaser may submit in writing for consideration by the Headquarters Senior Procurement Official in determining whether or not to impose ineligibility on the purchaser, any information or argument in opposition to the ineligibility; and

(iv) Advice that such information or argument in opposition to the ineligibility must be submitted within a certain time in order to be considered by the Headquarters Senior Procurement Official, such time to be not less than 21 days.

(2) After elapse of the time period established under paragraph (b)(1) of this section for receipt of the purchaser’s response, the Headquarters Senior Procurement Official, at his discretion, and after consideration of the purchaser’s written response, if any, may make the purchaser ineligible for future awards of SPR petroleum sales contracts. Such ineligibility shall continue for the time period determined
by the Headquarters Senior Procurement Official, as appropriate under the circumstances.

(3) The purchaser shall be notified of the Headquarters Senior Procurement Official’s decision.

(c) Reconsideration. Any purchaser who has been excluded from participating in any SPR sale under paragraph (a) may request that the Headquarters Senior Procurement Official reconsider the purchaser’s ineligibility. The Headquarters Senior Procurement Official, at his discretion, may reinstate any such purchaser to eligibility for future competitive sales.

APPENDIX A TO PART 625—STANDARD SALES PROVISIONS

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A.1 List of Abbreviations

(a) ASO: Apparently Successful Offeror
(b) DLI: Delivery Line Item
(c) DOE: U.S. Department of Energy
(d) MLI: Master Line Item
(e) NA: Notice of Acceptance
(f) NS: Notice of Sale
(g) SOML: Sales Offersors Mailing List
(h) SSPs: Standard Sales Provisions
(i) SPR: Strategic Petroleum Reserve
(j) SPRCODR: SPR Crude Oil Delivery Report (Exhibit H)
(k) SPR/PMO: Strategic Petroleum Reserve Project Management Office

A.2 Definitions

(a) Affiliate. The term “affiliate” means associated business concerns or individuals if, directly or indirectly, (1) either one controls or can control the other, or (2) a third party controls or can control both.
(b) Business Day. The term “business day” means any day except Saturday, Sunday or a U.S. Government holiday.
(c) Contract. The term “contract” means the contract under which DOE sells SPR petroleum. It is composed of the NS, the NA, the successful offer, and the SSPs incorporated by reference.
(d) Contracting Officer. The term “Contracting Officer” means the person executing sales contracts on behalf of the Government, and any other Government employee properly designated as Contracting Officer. The term includes the authorized representative of a Contracting Officer acting within the limits of his or her authority.
(e) Government. The term “Government”, unless otherwise indicated in the text, means the United States Government.
(f) Head of the Contracting Activity. The term “Head of the Contracting Activity” means Project Manager, Strategic Petroleum Reserve Project Management Office.
(g) Notice of Acceptance (NA). The term “Notice of Acceptance” means the document that is sent by DOE to accept the purchaser’s offer to create a contract.
(h) Notification of Apparently Successful Offeror (ANO). The term “notification of apparently successful offeror” means the notice, written or oral, by the Contracting Officer to an offeror that it will be awarded a contract if it is determined to be responsible.

(1) Notice of Sale (NS). The term “Notice of Sale” means the document announcing the sale of SPR petroleum, the amount, characteristics and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The NS will specify what contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum and provide other pertinent information. (See Exhibit B, Sample Notice of Sale) 
(j) Offeror. The term “offeror” means any person or entity (including a government agency) who submits an offer in response to a NS.
(k) Petroleum. The term “petroleum” means crude oil, residual fuel oil, or any refined product (including any natural gas liquid, and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, temporarily stored in other storage facilities, or in transit to such facilities (including petroleum under contract but not yet delivered to a loading terminal).
(l) Project Management Office (SPR/PMO). The term “Project Management Office” means the DOE personnel and DOE contractors located in Louisiana and Texas responsible for the operation of the SPR.
(m) Purchaser. The term “purchaser” means any person or entity (including a government agency) who enters into a contract with DOE to purchase SPR petroleum.
(n) Standard Sales Provisions (SSPs). The term “Standard Sales Provisions” means this set of terms and conditions of sale applicable to price competitive sales of SPR petroleum. These SSPs constitute the “standard sales agreement” referenced in the Strategic Petroleum Reserve “Drawdown” (Distribution) Plan, Amendment No. 4 (December 1, 1982, DOE/EP 0073) to the SPR Plan.
(o) Strategic Petroleum Reserve (SPR). The term “Strategic Petroleum Reserve” means that DOE program established by Title I, Part B, of the Energy Policy and Conservation Act, 42 U.S.C. Section 6201, et seq.
(p) Vessel. The term “vessel” means a tanker, an integrated tug-barge (ITB) system, a self-propelled barge, or other barge.

A.3 Standard Sales Provisions (SSPs)

(a) These SSPs contain pre-sale information, sales solicitation provisions, and sales contract clauses setting forth terms and conditions of sale, including purchaser financial and performance responsibility measures, or descriptions thereof, which may be applicable to price competitive sales of petroleum from the SPR. The rules and regulations promulgated in accordance with the SPR Sales Rule, 10 CFR Part 625. The NS will specify which of these provisions shall apply to a particular sale of such petroleum, and it may specify any revisions therein and any
additional provisions which shall be applicable to that sale. (See Exhibit B, Sample Notice of Sale)

(b) All offerors must, as part of their offers for SPR petroleum in response to a NS, agree without exception to all sales provisions of that NS. Offerors shall indicate their agreement by signing the Sales Offer Form (Exhibit A) or other form generated from electronic media used for submitting offers as specified by DOE in the NS. The Government will not award a contract to an offeror who has failed to so agree.


DOE will review the SSPs periodically and republish them in the FEDERAL REGISTER, with any revisions. When an NS is issued, it will cite the FEDERAL REGISTER and the Code of Federal Regulations (if any) in which the latest version of the SSPs was published. Offerors are cautioned that the Code of Federal Regulations may not contain the latest version of the SSPs published in the FEDERAL REGISTER. Interested persons may obtain a copy of the current SSPs by contacting the SPR/PMO at the address set forth in Provision No. A.5.

A.5 Sales Offerors’ Mailing List (SOML)

(a) The SPR/PMO will maintain a Sales Offerors Mailing List (SOML) of those potential offerors who wish to receive an NS whenever one is issued. In order to assure that prospective offerors will receive the NS or offer forms in a timely fashion, all potential offerors are encouraged to submit the information in (d) of this provision as soon as possible. An NS may be issued with a week or less allowed for the receipt of offers. While DOE will use its best efforts to timely supply copies of the NS to persons not on the list who request the NS at the time an SPR petroleum sale is announced, this may not always be feasible in light of the short amount of time available before offers must be received.

(b) Any firm or individual may request to be on the SOML by providing the information in (d) of this provision by letter, telephone or electronic means to: Sales Offerors Mailing List (SOML), U.S. Department of Energy, Strategic Petroleum Reserve, Project Management Office, Acquisition and Sales Division, Mail Stop FE-4451, 900 Commerce Road East, New Orleans, Louisiana 70123; Telephone Number (504) 734-4294/4201, Facsimile (504) 734-4427. e-mail: soml@spr.doe.gov

Any envelope should be marked “SPR Sales Offerors’ Mailing List.”

(c) Copies of the SSPs and the NS, when one is issued, may also be obtained from this address.

(d) A request to be placed on the SOML should include the following information:

Name of firm
Mailing address (Street and P.O. Box)
City, State, Zip Code
Name of authorized agent and alternate authorized agent
Telephone numbers for agent and alternate including area code
Agent address, if different from firm represented
Internet address
Telephone number for facsimile transmission, including area code
Telephone number for verification of message receipt, including area code

Dun’s number

As DOE may use express mail, which cannot be delivered to a Post Office box, failure to provide a street address could result in untimely receipt of the NS and will be at the offeror’s risk.

A.6 Publicizing the Notice of Sale

(a) The NS will be sent to names on the SOML referenced in Provision No. A.5. Interested persons may send a representative to the address in Provision No. A.5 to obtain a copy of the NS.

(b) In addition to those on the SOML, the NS will also be sent to anyone requesting it when a sale is announced.

(c) A DOE press release, which will include the salient features of the NS, will be made available to all news agencies.

(d) At the option of the Contracting Officer, advertisements may be placed in publications or media (including the Internet) likely to reach interested parties. The advertisements will contain the salient features of the NS and a point of contact at the SPR/PMO for further information.

A.7 Penalty for False Statements in Offers To Buy SPR Petroleum

(a) Making false statements in an offer to buy SPR petroleum may expose an offeror to a penalty under the False Statements Act, 18 U.S.C. Section 1001, which provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Under 18 U.S.C. 3571, the maximum fine to which an individual or organization may be sentenced for violations of 18 U.S.C. (including Section 1001) is set at $250,000 and
500,000 respectively, unless there is a greater amount specified in the statute setting out the offense, or the violation is subject to special factors set out in Section 3571. The United States Sentencing Guidelines also apply to violations of Section 1001, and offenders may be subject to a range of fines under the guidelines up to and including the maximum amounts permitted by law.

SECTION B—Sales Solicitation Provisions

B.1 Requirements for a Valid Offer—Caution to Offerors

A valid offer to purchase SPR petroleum must meet the following conditions:

(a) The offer guarantee (see Provision No. B.1) must be received no later than the time set for the receipt of offers;

(b) The offer must include a completed Sales Offer Form, i.e., SPRPMO Form 338 (Exhibit C) or other form generated by electronic means for submitting offers as specified by DOE in the NS, and signed SPRPMO Form 338 (Exhibit C) or other forms as specified in the NS;

(c) The offer must be received no later than the time set for receipt of offers;

(d) Any amendments to the NS that explicitly require acknowledgment of receipt must be properly acknowledged as provided for on Exhibit C; and

(e) The offeror must agree without exception to all provisions of the SSPs that the NS makes applicable to a particular sale, as well as to all provisions in the NS.

B.2 Price Indexing

The Government, at its discretion, may make use of a price indexing mechanism to effect contract price adjustments based on petroleum market conditions, e.g., crude oil market price changes between the times of offer price submissions and physical deliveries. The NS will set forth the provisions applicable to any such mechanism.

B.3 Certification of Independent Price Determination

(a) The offeror certifies that:

(1) The prices in this offer have been arrived at independently, without, for the purposes of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to: (i) those prices; (ii) the intention to submit an offer; or (iii) the methods or factors used to calculate the prices offered;

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or to any competitor before the time set for receipt of offers, unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory:

(1) Is the person within the offeror’s organization responsible for determining the prices being offered, and that the signatory has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) of this provision; (ii) as their agent does hereby so certify; and (iii) as their agent has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) of this provision.

(c) An offer will not be considered for award where (a)(1), (a)(3), or (b) of this provision has been deleted or modified. If the offeror deletes or modifies (a)(2) of this provision, the offeror must furnish with the offer a signed statement setting forth in detail the circumstances of the disclosure.

B.4 Requirements for Vessels—Caution to Offerors

(a) The “Jones Act”, 46 U.S.C. 883, prohibits the transportation of any merchandise, including SPR petroleum, by water or land and water, on penalty of forfeiture thereof, between points within the United States (including Puerto Rico, but excluding the Virgin Islands) in vessels other than vessels built in and documented under the laws of the United States, and owned by United States citizens, unless the prohibition has been waived by the Secretary of Treasury. Further, certain U.S.-flag vessels built with Construction Differential Subsidies (CDS) are precluded, by Section 506 of the Merchant Marine Act of 1936 (46 U.S.C. 1156) from participating in U.S. coastwise trade, unless such prohibition has been waived by the Secretary of Transportation. The waiver being limited to a maximum of 6 months in any given year. CDS vessels may also receive Operating Differential Subsidies, requiring separate permission from the Secretary of Transportation for domestic operation, under Section 805(a) of the same statute. The NS will advise offerors of any general waivers allowing use of non-coastwise qualified vessels or vessels built with Construction Differential Subsidies for a particular sale of SPR petroleum. If there is no general waiver, purchasers may request waivers in accordance with Provision No. C.7, but remain obligated to complete performance under this contract regardless of the outcome of that waiver process.
(b) The Department of Transportation’s interim rule concerning Reception Facility Requirements for Waste Materials Retained on Board (33 CFR Parts 151 and 158) implements the reception facility requirements of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78). This rule prohibits any oceangoing tankship, required to retain oil or oily mixtures on-board while at sea, from entering any port or terminal unless the port or terminal has a valid Certificate of Adequacy as to its oily waste reception facilities. SPR marine terminals (see Exhibit E, SPR Delivery Point Data) have Certificates of Adequacy and reception facilities for vessel sludge and oily bilge water wastes, all costs for which will be borne by the vessel. The terminals, however, may not have reception facilities for oily ballast. Accordingly, tankships without segregated ballast systems will be required to make arrangements for and be responsible for all costs associated with appropriate disposal of such ballast, or they will be denied permission to load SPR petroleum at terminals that lack reception facilities for oily ballast.

(c) By submission of an offer, the offeror certifies that it will comply with the “Jones Act” and all applicable ballast disposal requirements.

B.5 “Superfund” Tax on SPR Petroleum—Caution to Offerors

(a) Sections 4611 and 4612 of the Internal Revenue Code, which imposed a tax on domestic and imported petroleum to support the Hazardous Substance Response Fund (the “Superfund”), were revised by the Superfund Amendments and Reauthorization Act of 1986, Public Law 99–499; and the Omnibus Budget Reconciliation Act of 1986, Public Law 99–509; the Steel Trade Liberalization Program Implementation Act, Public Law 101–221; and the Omnibus Budget Reconciliation Act of 1989, Public Law 101–239. As amended, these sections impose taxes to finance the Hazardous Substance Superfund and the Oil Spill Liability Trust Fund (“Trust Fund”).

(b) Section 4611 imposes taxes on domestic crude oil and on imported crude oil to support the Superfund and the Trust Fund. The taxes are imposed on (1) crude oil received at a United States refinery and (2) petroleum products (including crude oil) entered into the United States for consumption, use, or warehousing. Section 4612 provides that no tax is imposed if it is established that a prior tax imposed by Section 4611 has already been paid on a barrel of oil. Additionally, as determined by the Secretary of Treasury, the Hazardous Substance Superfund tax and the Oil Spill Liability Trust Fund tax may not be imposed during certain periods when the unobligated balances of the funds reach particular statutorily-prescribed levels.

(c) DOE has already paid the Superfund and Trust Fund taxes on some of the oil imported and stored in the SPR. However, no Superfund or Trust Fund tax has been paid on imported oil stored prior to the effective dates of these Acts or on any domestic oil stored in the SPR. Because domestic and imported crude oil for which no taxes have been paid and crude oils for which Superfund and Trust Fund taxes have been paid have been commingled in the SPR, upon drawdown of the SPR, the NS will advise purchasers of the tax liability.

B.6 Export Limitations and Licensing—Caution to Offerors

(a) Offerors for SPR petroleum are put on notice that export of SPR crude oil is subject to U.S. export control laws implemented by the Department of Commerce Short Supply Controls, codified at 15 CFR part 754, §754.2(b)(iii), and 754.2(g), Reining or exchange of Strategic Petroleum Reserve Oil. These provisions are issued under 42 U.S.C. 6241(i), and implement the authority given to the President to permit the export of oil in the SPR for the purpose of obtaining refined petroleum for the U.S. market. In addition, the President could waive the requirement for an export license all together. The NS will advise of any waivers under this Presidential authority.

(b) By submission of an offer, the offeror certifies that it will comply with any applicable U.S. export control laws.

B.7 Issuance of the Notice of Sale

In the event petroleum is sold from the SPR, DOE will issue a NS containing all the pertinent information necessary for the offeror to prepare a priced offer. A NS may be issued with a week or less allowed for the receipt of offers. Offerors are expected to examine the complete NS document, and to become familiar with the SSPs cited therein. Failure to do so will be at the offeror’s risk.

B.8 Submission of Offers and Modification of Previously Submitted Offers

(a) Unless otherwise provided in the NS, offers must be submitted to the SPR/FMO in New Orleans, Louisiana, by mail, hand-delivery, or electronic means as specified in the NS. Any direct cash deposits as offer guarantors shall be sent by wire or electronic funds transfer in accordance with Provision No. C.23.

(b) Unless otherwise provided in the NS, offers may be modified or withdrawn by hand
delivery, mail, telegram, or electronic means specified in the NS, provided that the hand delivery, mail, telegram, or electronic submission is received at the designated office prior to the time specified for receipt of offers.

(c) Envelopes containing offers and any material related to offers shall be plainly marked on the outside: “RE: NS # FOR SALE OF PETROLEUM FROM STRATEGIC PETROLEUM RESERVE. OFFERS ARE DUE (insert time of opening). LOCAL NEW ORLEANS, LA TIME ON (insert date of opening). MAIL ROOM MUST MARK DATE AND TIME OF RECEIPT ON FACE OF THE ENVELOPE.” Envelopes containing modified offers or any material related to supplements or modifications of offers, shall be plainly marked on the outside: “RE: NS # FOR SALE OF PETROLEUM FROM STRATEGIC PETROLEUM RESERVE. OFFER MODIFICATION. MAIL ROOM MUST MARK DATE AND TIME OF RECEIPT ON FACE OF THE ENVELOPE.”

(d) All envelopes shall be marked with the full name and return address of the offeror.

(e) Offers being sent by mail and modifications submitted by electronic means must contain the required signatures. If requested by the contracting officer, the offeror agrees to promptly submit the complete original signed offer/modification.

(f) If the offeror chooses to transmit an offer/modification by electronic means, the Government will not be responsible for any failure attributable to the transmission or receipt of the offer/modification, including, but not limited to, the following:

1. Receipt of garbled or incomplete offer/modification,
2. Availability or condition of the receiving equipment,
3. Incompatibility between the sending and receiving equipment,
4. Delay in transmission or receipt of the offer/modification,
5. Failure of the offeror to properly identify the offer/modification,
6. Illegibility of offer/modification,
7. Security of the data contained in the offer/modification.

(h) Public opening of offers is not anticipated unless otherwise indicated in the NS. DOE will not release to the general public the identities of the offerors, or their offer quantities and prices, until the Apparently Successful Offerors have been determined. DOE will inform simultaneously all offerors and other interested parties of the successful and unsuccessful offerors and their offer data by means of a public “offer posting.” The offer posting will normally occur within a week of receipt of offers and will provide all interested parties access to offer data as well as any DOE changes in the petroleum quantities or quality to be sold. DOE will announce the date, time, and location of the offer posting as soon as practicable.

B.9 Acknowledgment of Amendments to a Notice of Sale

When an amendment to a NS requires acknowledgment of receipt by an offeror, it must be acknowledged either by (a) signing and returning the amendment; (b) identifying the amendment number and date in the space provided for this purpose on SPRPMO Form 33S (Exhibit C); or (c) letter, telegram, or electronic means as specified in the NS, sent to the address specified in the NS. Such acknowledgment must be received prior to the time specified for receipt of offers.

B.10 Late Offers, Modifications of Offers, and Withdrawal of Offers

(a) Any offer received at the office designated in the NS after the date and time specified for receipt will be considered only if it is received before award is made and only under the following conditions:

1. It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of offers (e.g., an offer submitted in response to a NS requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier); or,

2. It was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, or established commercial express service, not later than the close of business at the place of mailing 2 working days prior to the date specified for receipt of offers. The working days exclude weekends and U.S. Federal holidays; or,

3. It was sent by mail, express mail, telegram or electronic means as specified in the NS, and it is determined by the Contracting Officer that the late receipt was due solely to mishandling by the SPR/PMO after receipt at the address specified in the NS; or

4. It is the only offer received.

(b) Any modification or withdrawal of an offer is subject to the same conditions as in (a) of this provision, except that it shall be mailed not less than the third calendar day prior to the date specified for receipt of offers. An offer may also be withdrawn in person by an offeror or its authorized representative, provided the representative’s identity is made known and the representative signs a receipt for the offer, but only if the withdrawal is made prior to the time set for receipt of offers.
(c) The only acceptable evidence to establish:
(1) The date of mailing of a late offer, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on either (i) the envelope or wrapper, or (ii) the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the offer, modification or withdrawal shall be deemed to have been mailed late. Postmark means a printed, stamped, or otherwise placed impression, exclusive of a postage meter machine impression, that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a hand cancellation “bull’s-eye” postmark on both the receipt and the envelope or wrapper.
(2) The date of mailing of a late offer, modification, or withdrawal sent by Express Mail Next Day Service-Post Office to Addressee or established commercial service is the date entered by the receiving clerk on the “Express Mail Next Day Service-Post Office to Addressee” or other comparable service label and the postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service or commercial service.
(3) The time of receipt at the address specified in the NS is the time/date stamp at such address on the offer’s wrapper or other documentary evidence of receipt maintained at the place of receipt.
(d) Notwithstanding (a) and (b) of this provision, a late modification of an otherwise successful offer that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

B.11 Offer Guarantee

(a) Each offeror must submit an acceptable offer guarantee for each offer submitted. Each offer guarantee must be received at the place specified for receipt of offers no later than the time and date set for receipt of offers.
(b) An offeror’s failure to submit a timely, acceptable guarantee will result in rejection of its offer.
(c) The amount of each offer guarantee is $10 million or percent of the maximum potential contract amount, whichever is less. The maximum potential contract amount is the sum of the products determined by multiplying the offer’s maximum purchase quantity for each master line item, times the highest offer prices that the offeror would have to pay for that master line item if the offer were to be successful. To assist in this calculation, instructions and a worksheet are available at Exhibit J. Submission of the worksheet is not desired.
(d) Each offeror must submit one of the following types of offer guarantees with each offer:
(1) A cash wire deposit or electronic funds transfer to the account of the U.S. Treasury in accordance with Provision No. C.23, all attendant costs to be borne by the offeror; or
(2) A irrevocable standby letter of credit from a U.S. depository institution containing the substantive provisions set out in Exhibit F. Offer Standby Letter of Credit, all letter of credit costs to be borne by the offeror. If the letter or credit contains any provisions at variance with Exhibit F or fails to include any provisions contained in Exhibit F, nonconforming provisions must be deleted and missing substantive provisions must be added or the letter of credit will not be accepted. The depository institution must be located in and authorized to do business in any state of the United States or the District of Columbia, and authorized to issue letters of credit by the banking laws of the United States or any state of the United States or the District of Columbia. The original of the letter of credit must be sent to the Contracting Officer. The issuing bank must provide documentation indicating that the person signing the letter of credit is authorized to do so, in the form of corporate minutes, the Authorized Signature List, or the General Resolution of Signature Authority.
(e) If the offeror elects to make an offer guarantee by cash wire deposit or electronic funds transfer, the Sales Offer Form shall be annotated with the statement “Offer guarantee made by cash wire deposit (or electronic funds transfer).” The amount transferred shall be annotated on the bottom of the first page of the offer form. In addition, the information identified in Exhibit I, Instruction Guide for Return of Offer Guarantees by Electronic Transfer or Treasury Check, shall be provided with the offer.
(f) If the offeror or bank forwards the letter of credit separately from the offer, the envelope shall clearly be marked “Offer Standby Letter of Credit (Name of Company)” and also marked in accordance with Provision No. B.8(c). Offerors are cautioned that if they provide more than one offer Standby Letter of Credit for multiple offers and, due to the absence of clear information from the offeror, the Government is unable to identify which Letter of Credit applies to which offer, the Contracting Officer in his sole discretion may assign the Letters of Credit to specific offers.
(g) The offeror shall be liable for any amount lost by DOE due to the difference between the offer and the resale price, and for any additional resale costs incurred by DOE in the event that the offeror:
(1) Withdraws its offer within 10 days following the time set for receipt of offers;
(2) Withdraws its offer after having agreed to extend its acceptance period; or
(3) Having received a notification of ASO, fails to furnish an acceptable payment and performance letter of credit (see Provision C.21) within the time limit specified by the Contracting Officer.

The offer guarantee shall be used toward offsetting such price difference or additional resale costs. Use of the offer guarantee for such recovery shall not preclude recovery by DOE of damages in excess of the amount of the offer guarantee caused by such failure of the offeror.

(h) Letters of credit furnished as offer guarantees must be valid for at least 60 calendar days after the date set for the receipt of offers.

(i) Offer guarantees (except letters of credit) will be returned to an unsuccessful offeror 5 business days after expiration of the offeror’s acceptance period, and, except as provided in (k) of this provision, to a successful offeror upon receipt of a satisfactory payment and performance letter of credit. Cash offer guarantees will be subsequently returned to unsuccessful offerors via Treasury check or electronic transfer in accordance with the information delineated in Exhibit I. Letters of credit will be returned only upon request.

(j) Where the offer guarantee was a cash wire deposit or electronic funds transfer, a successful offeror may apply it toward the first invoice for delivery under the resultant contract.

(k) If an offeror defaults on its offer, DOE will hold the offer guarantee so that damages can be assessed against it.

B.12 Explanation Requests From Offerors

Offerors may request explanations regarding meaning or interpretation of the NS from the individual at the telephone number indicated in the NS. On complex and/or significant questions, DOE reserves the right to have the offeror put the question in writing; explanation or instructions regarding these questions will be given as an amendment to the NS.

B.13 Currency for Offers

Prices shall be stated and invoices shall be paid in U.S. dollars.

B.14 Language of Offers and Contracts

All offers in response to the NS and all modifications of offers shall be in English. All correspondence between offerors or purchasers and DOE shall be in English.

B.15 Proprietary Data

If any information submitted in connection with a sale is considered proprietary, that information should be so marked, and an explanation provided as to the reason such data should be considered proprietary. Any final decision as to whether the material so marked is proprietary will be made by DOE. DOE’s Freedom of Information Act regulations governing the release of proprietary data shall apply.

B.16 SPR Crude Oil Streams and Delivery Points

(a) The geographical locations of the terminals, pipelines, and docks interconnected with permanent SPR storage locations, the SPR crude oil streams available at each location and the delivery points for those streams are as follows, (See also Exhibit D, SPR Crude Oil Comprehensive Analysis, and Exhibit E, SPR Delivery Point Data):

<table>
<thead>
<tr>
<th>Geographical location</th>
<th>Delivery points</th>
<th>Crude oil stream</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freeport, Texas</td>
<td>Seaway Terminal or Seaway, Pipeline</td>
<td>SPR Bryan Mound Sweet, SPR Bryan Mound Maya</td>
</tr>
<tr>
<td>Texas City, Texas</td>
<td>Seaway Terminal or Seaway, Local Pipelines.</td>
<td>SPR Bryan Mound Sweet, SPR Bryan Mound Maya</td>
</tr>
<tr>
<td>Nederland, Texas</td>
<td>Sun Pipe Line Company, Nederland Terminal.</td>
<td>SPR West Hackberry Sweet, SPR Big Hill Sour</td>
</tr>
<tr>
<td>Lake Charles, Louisiana</td>
<td>Texaco 22-Inch/DOE Lake, Charles Pipeline Connection</td>
<td>SPR West Hackberry Sweet, SPR Big Hill Sour</td>
</tr>
<tr>
<td>St. James, Louisiana</td>
<td>Equilon Sugarland Terminal connected to LOCAP and Capline</td>
<td>SPR Bayou Chocaw Sweet, SPR Bayou Chocaw Sour, SPR Big Hill Sour</td>
</tr>
<tr>
<td>Beaumont, Texas</td>
<td>Unocal Terminal</td>
<td>SPR Big Hill Sweet, SPR Big Hill Sour, SPR Big Hill Sour</td>
</tr>
<tr>
<td>Winnie, Texas</td>
<td>TPLI 20-Inch Meter Station</td>
<td>SPR Big Hill Sweet, SPR Big Hill Sour, SPR Big Hill Sour</td>
</tr>
</tbody>
</table>

(b) The NS may change delivery points and it may also include additional terminals, temporary storage facilities or systems utilized in connection with petroleum in transit to the SPR. Alternatively, DOE may provide for transportation to the purchaser’s facility, for example, when the petroleum is in transit to the SPR at time of sale.

(c) The NS may contain additional information supplementing Exhibit E, SPR Delivery Point Data.
(a) Unless the NS provides otherwise, the possible master line items (MLI) that may be offered are as provided in Exhibit A, SPR Sales Offer Form. Currently, there are nine MLIs in Exhibit A, one for each of the nine crude oil streams that the SPR has in storage. The NS may not offer all the possible MLIs.

(b) Each MLI contains several delivery line items (DLIs), each of which specifies an available delivery method and the nominal delivery period. Offerors are cautioned that the NS may alter the period of time covered by each DLI. This is most likely to occur in the first sales period of a drawdown if the period of sale does not correspond to a calendar month. The NS will specify which DLIs are offered for each MLI.

(1) DLI–A covers petroleum to be transported by pipeline, either common carrier or local. The nominal delivery period is one month.

(2) DLI–B, DLI–C and DLI–D cover petroleum to be transported by tankships: DLI–B, covering tankships to be loaded from the 1st through the 10th of the month; DLI–C, tankships to be loaded from the 11th through the 20th; and DLI–D, tankships to be loaded from the 21st through the last day of the month.

(3) DLI–E, DLI–F and DLI–G cover petroleum to be transported by barges (Caution: These DLIs are currently only applicable to deliveries of West Hackberry and Big Hill Sweet and Sour crude oil streams from Sun Docks); DLI–E, covering barges to be loaded from the 1st through the 10th of the month; DLI–F, barges to be loaded from the 11th through the 20th; and DLI–G, barges to be loaded from the 21st through the last day of the month.

(d) Where the storage site is connected to more than one terminal or pipeline, additional DLIs will be offered. The additional DLIs will include DLI–H, covering petroleum to be transported by pipeline over the period of a month; DLI–I thru DLI–K, covering tankships, etc. The Notice of Sale will specify any additional DLIs which may be applicable.

(c) The NS will state the total estimated number of barrels to be sold on each MLI. An offeror may offer to buy all or part of the petroleum offered on an MLI. In making awards, the Contracting Officer shall attempt to achieve award of the exact quantities offered by the NS, but may sell a quantity of petroleum in excess of the quantity offered for sale on a particular MLI in order to match the DLI offers received. In addition, the Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers, if he determines, in his sole discretion after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable, or that, in light of market conditions after offers are received, a lesser quantity than that offered should be sold.

(d) The NS will specify a minimum contract quantity for each DLI. To be responsive, an offer on a DLI must be for at least that quantity.

(e) The NS will specify the maximum quantity that could be sold on each of the DLIs. The maximum quantity is not an indication of the amount of petroleum that, in fact, will be sold on that DLI. Rather, it represents DOE’s best estimate of the maximum amount of the particular SPR crude oil stream that can be moved by that transportation system over the delivery period. The total DOE estimated DLI maximums may exceed the total number of barrels to be sold on that MLI, as the NS DLI estimates represent estimated transportation capacity, not the amount of petroleum offered for sale.

(f) The NS will not specify what portion of the petroleum that DOE offers on a MLI will, in fact, be sold on any given DLI. Rather, the highest priced offers received on the MLI will determine the DLIs against which the offered petroleum is sold.

(g) DOE will not sell petroleum on a DLI in excess of the DLI maximum; however, DOE reserves the right to revise its estimates at any time and to award or modify contracts in accordance with its revised estimates. Offerors are cautioned that: DOE cannot guarantee that such transportation capacity is available; offerors should undertake their own analyses of available transportation capacity; and each purchaser is wholly responsible for arranging all transportation other than terminal arrangements at the terminals listed in Provision No. B.16, which shall be made in accordance with Provision No. C.5. A purchaser against one DLI cannot change a transportation mode without prior written permission from DOE, although such permission will be given whenever possible, in accordance with Provision No. C.6.

(h) Exhibit D, SPR Crude Oil Comprehensive Analysis, contains nominal characteristics for each SPR crude oil stream. Prospective offerors are cautioned that these data will change with SPR inventory changes. The NS will provide, to the maximum extent practicable, the latest data on each stream offered.

B.18 Line Item Information to be Provided in the Offer

(a) Each offeror, if determined to be an ASO on a DLI, agrees to enter into a contract under the terms of its offer for the purchase of petroleum in the offer and to take delivery of that petroleum (plus or minus 10 percent as provided for in Provision No. C.20)
in accordance with the terms of that contract.

(b) An offeror may submit an offer which is for more than one MLI. However, offerors are cautioned that offers on different MLIs are not permitted. For example, an offeror may offer to purchase 1,000,000 barrels of SPR West Hackberry Sweet and 1,000,000 barrels of SPR West Hackberry Sour, but may not offer to purchase, in the alternative, either 1,000,000 barrels of sweet or 1,000,000 barrels of sour.

(c) An offeror may submit multiple offers. However, separate offer forms and offer guarantees must be submitted and each offer will be evaluated on an individual basis.

(d) The following information will be provided to DOE by the offeror on the form in Exhibit A or other forms as required by the NS:

(1) MLI quantity. ("MAXQ" on the Exhibit A offer form) The offer shall state the maximum quantity of each crude oil stream that the offeror is willing to buy.

(2) DLI quantity. ("DESQ") The offer shall state the number of barrels that the offeror will accept on each DLI, i.e., by the delivery mode and during the delivery period specified. The quantity stated on a single DLI shall not exceed the MAXQ for the MLI. The offeror shall designate a quantity on at least one DLI for the MLI, but may designate quantities on more than one DLI. If the offeror is willing to accept alternate DLIs, the total of its designated DLI quantities would exceed its maximum MLI quantity; otherwise, the total of its designated DLI quantities should equal its maximum MLI quantity.

(3) DLI unit price ("UPS") and total price. The offer shall state the price per barrel for each DLI for which the offeror has designated a desired quantity, as well as the total price (quantity times unit price). Where offers have indicated quantities on more than one DLI with a different price on each, DOE will award the highest priced DLI first. If the offeror has the same price for two or more DLIs, it may indicate its first choice, second choice, etc., for award of those items; if the offeror does not indicate a preference, or indicates the same preference for more than one DLI, DOE may select the DLIs to be awarded at its discretion. Prices may be stated in hundredths of a cent ($0.0001). DOE shall drop from the offer and not consider any numbers of less than one-hundredth of a cent.

(4) Minimum DLI quantity acceptable. ("MINQ") The offeror must choose whether to accept only the stated DLI quantity (DESQ) or, in the alternative, to accept any quantity awarded between the offer’s stated DLI quantity and the minimum contract quantity for the DLI (indicated by the “N” and “Y” blocks respectively under “MINQ” on the offer form). However, DOE will award less than the DESQ only if the quantity available to be awarded is less than the DESQ. If the offer fails to indicate the offeror’s choice, the offer will be evaluated as though the offeror has indicated willingness to accept the minimum contract quantity.

(5) Any other data required by the NS.

B.19 Mistake in Offer

(a) After opening and recording offers, the Contracting Officer shall examine all offers for mistakes. If the Contracting Officer discovers any price discrepancies or quantity discrepancies, he may obtain from the offeror oral or written verification of the offer actually intended, but in any event, he shall proceed with offer evaluation applying the following procedures:

(1) Price discrepancy: An offer for a DLI must contain the unit price per barrel being offered, the desired quantity of barrels to which the unit price applies, and an extension price which is the total of the quantity desired multiplied by the unit price offered. If there is a discrepancy between the unit price and the extension price, the unit price will govern and be recorded as the offer, unless it is clearly apparent on the face of the offer that there has been a clerical error, in which case the Contracting Officer may correct the offer.

(2) Quantity discrepancy: In case of conflict between the maximum MLI quantity and the stated DLI quantities (for example, if a single stated DLI quantity exceeds the corresponding maximum MLI quantity), the lesser quantity will govern in the evaluation of the offer. In the event that the offer fails to specify a maximum MLI quantity, the offer will be evaluated as though the largest stated DLI quantity is the offer’s maximum MLI quantity.

(b) In cases where the Contracting Officer has reason to believe a mistake not covered by the procedures set forth in (a) may have been made, he shall request from the offeror a verification of the offer, calling attention to the suspected mistake. The Contracting Officer may telephone the offeror and confirm the request by electronic means. The Contracting Officer may set a limit of as little as 6 hours for telephone response, with any required written documentation to be received within as little as 2 business days. If no response is received, the Contracting Officer may determine that no error exists and proceed with offer evaluation.

(c) The Head of the Contracting Activity will make administrative determinations described in (1) and (2) of this provision if an offeror alleges a mistake after opening of offers and before award.

(1) The Head of the Contracting Activity may refuse to permit the offeror to withdraw an offer, but permit correction of the offer if clear and convincing evidence establishes...
both the existence of a mistake and the offer actually intended. However, if such correction would result in displacing one or more higher acceptable offers, the Head of the Contracting Activity shall not so determine unless the existence of the mistake and the offer actually intended are ascertainable substantially from the NS and offer itself.

(2) The Head of the Contracting Activity may determine that an offeror shall be permitted to withdraw an offer in whole, or in part if only part of the offer is affected, without penalty under the offer guarantee, where the offeror requests permission to do so and clear and convincing evidence establishes the existence of a mistake, but not the offer actually intended.

(d) In all cases where the offeror is allowed to make verbal corrections to the original offer, confirmation of these corrections must be received in writing within the time set by the Contracting Officer or the original offer will stand as submitted.

B.20 Evaluation of Offers

(a) The Contracting Officer will be the determining official as to whether an offer is responsive to the SSPs and the NS. DOE reserves the right to reject any or all offers and to waive minor informalities or irregularities in offers received.

(b) A minor informality or irregularity in an offer is an inconsequential defect the waiver or correction of which would not be prejudicial to other offerors. Such a defect or variation from the strict requirements of the NS is inconsequential when its significance as to price, quantity, quality or delivery is negligible.

B.21 Procedures for Evaluation of Offers

(a) Award on each DLI will be made to the responsible offerors that submit the highest priced offers responsive to the SSPs and the NS and that have provided the required payment and performance guarantee as required by Provision No. C.21.

(b) DOE will array all offers on an MLI from highest price to lowest price for award evaluation regardless of DLI. However, DOE will award against the DLIs and will not award a greater quantity on a DLI than DOE’s estimate (which is subject to change at any time) of the maximum quantity that can be moved by the delivery method. Selection of the apparently successful offers involves the following steps:

(1) Any offers below the minimum acceptable price, if any minimum price has been established for the sale, will be rejected as nonresponsive.

(2) All offers on each MLI will be arrayed from highest price to lowest price.

(3) The highest priced offers will be reviewed for responsiveness to the NS.

(4) In the event the highest priced offer does not take all the petroleum available on the MLI, sequentially, the next highest priced offer will be selected until all of the petroleum offered on the MLI is awarded or there are no more acceptable offers. In the event that acceptance of an offer against an MLI or a DLI would result in the sale of more petroleum on an MLI than DOE has offered or the sale of more petroleum on a DLI than DOE estimates can be delivered by the specified delivery method, DOE will not award the full amount of the offer, but rather the remaining MLI quantity or DLI capacity, provided such portion exceeds DOE’s minimum contract quantity. In the event that the quantity remaining is less than the offeror is willing to accept, but more than DOE’s minimum contract quantity, the Contracting Officer shall proceed to the next highest priced offer.

(5) In the event of tied offers and an insufficient remaining quantity available on the MLI or insufficient remaining capacity on the DLI to fully award all tied offers, the Contracting Officer shall apply an objective random methodology for allocating the remaining MLI quantity or DLI capacity among the tied offers, taking into consideration the quantity the offeror is willing to accept as indicated in its offer. When making this allocation, the Contracting Officer in his sole discretion may do one or more of the following:

(a) Make an additional quantity or capacity available;

(b) Contact an offeror to determine whether alternative delivery arrangements can be made; or

(c) Not award all or part of the remaining quantity of petroleum.

(d) The Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers if in his sole discretion determined, after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable; or if the Government determines, in light of market conditions after offers are received, to sell less than the overall quantity of SPR petroleum offered for sale.

(7) Determinations of A50 responsibility will be made by the Contracting Officer before each award. All A50s will be notified and advised to provide to the Contracting Officer, within five business days or such other longer time as the Contracting Officer shall determine, a letter of credit (See Exhibit G, Payment and Performance Letter of Credit) as specified in Provision No. C.21, all letter of credit costs to be borne by the purchaser.

(8) Compliance with required payment and performance guarantees will effectively assure a finding of responsibility of offerors,
except where: (i) an offeror is on either DOE's or the Federal Government’s list of debarred, ineligible and suspended bidders; or (ii) evidence, with respect to an offeror, comes to the attention of the Contracting Officer of conduct or activity that represents a violation of law or regulation (including an Executive Order); or (iii) evidence is brought to the attention of the Contracting Officer of past activity or conduct of an offeror that shows a lack of integrity (including actions or the willingness to perform, so as to substan-
inimical to the welfare of the United States) shows a lack of integrity (including actions or the willingness to perform, so as to substan-

tially diminish the Contracting Officer’s confidence in the offeror’s performance under the proposed contract.

B.22 Financial Statements and Other Information

(a) As indicated in Provision No. B.21(b)(8), compliance with the required payment and performance guarantee will in most in-
stances effectively assure a finding of responsibility. Therefore, DOE does not intend to ask for financial information from all offerors. However, after receipt of offers, but prior to making award, DOE reserves the right to ask for the financial statements for an offeror’s most recent fiscal year and unaudited financial statements for any subsequent quarters. These financial statements must include a balance sheet and profil

(b) DOE also reserves the right to require the submission of information from the offeror regarding its plans for use of the petroleum, the status of requests for export licenses, plans for complying with the Jones Act, and any other information relevant to the performance of the contract. The Contracting Officer shall set a deadline for receipt of this information.

(b) In the event that for any reason petroleum that has been awarded or allotted for award becomes available to DOE for resale, the following procedures will apply:

(1) If priced offers remain valid in accordance with Provision No. B.24, the petroleum may go to the next highest ranked offer.

(2) If offers have expired in accordance with Provision No. B.24, the Contracting Off-

icer at his option may offer the petroleum to the highest offeror for that MLI. The per-
tinent offeror may, at its option, accept or re-
ject that petroleum at the price it origi-
nally offered. If that offeror rejects the pe-
troleum, it may be offered to the next high-
est offeror. This process may continue until all the remaining petroleum has been allotted for award.

(3) If the petroleum is not then resold, the Contracting Officer may at his option pro-
ceed to amend the NS to resolicit offers for that petroleum or add the petroleum to the next sales cycle.

B.24 Offeror’s Certification of Acceptance Period

(a) By submission of an offer, the offeror certifies that its priced offer will remain valid for 10 calendar days after the date set for the receipt of offers, and further that the successful line items of its offer will remain valid for an additional 30 calendar days should it receive a notification of ASO either by telephone or in writing during the initial 10-day period.

(b) By mutual agreement of DOE and the offeror, an individual offeror’s acceptance period may be extended for a longer period.

B.25 Notification of Apparently Successful Offeror

The following information concerning its offer will be provided to the apparently suc-

cessful offeror by DOE in the notification of ASO:

(a) Identification of SPR crude oil streams to be awarded;

(b) Total quantity to be awarded on each MLI and on each DLI;

(c) Price in U.S. dollars per barrel for each DLI;

(d) Extended total price offer for each DLI;

(e) Provisional contract number;

(f) Any other data necessary.

B.26 Contract Documents

If an offeror is successful, DOE will make award using an NA signed by the Contracting Officer. The NA will identify the items, quantities, prices and delivery method which DOE is accepting. Attached to the NA will be the NS and the successful offer. Provisions of
the SSPs will be made applicable through incorporation by reference in the NS. The Contracting Officer also shall provide the purchaser with an information copy of the current SSPs as published in the Federal Register. DOE may accept the offeror’s offer by an electronic notice and the contract award shall be effective upon issuance of such notice. Any such notice will be followed by a mailing of full documentation as described in Provision B.25.

B.27 Purchaser’s Representative

As part of its offer, each offeror shall designate an agent as a point of contact for any telephone calls or correspondence from the Contracting Officer. Any such agent shall have a U.S. address and telephone number and must be conversant in English.

B.28 Procedures for Selling to Other U.S. Government Agencies

(a) If a U.S. Government agency submits an offer for petroleum in a price competitive sale, that offer will be arrayed for award consideration in accordance with Provision No. B.21. If a U.S. Government agency is an ASO, award and payment will be made exclusively in accordance with statutory and regulatory requirements governing transactions between agencies, and the U.S. Government agency will be responsible for complying with these requirements within the time limits set by the Contracting Officer.

(b) U.S. Government agencies are exempt from all guarantee requirements, but must make all necessary arrangements to accept delivery of and transport SPR petroleum as set out in Provision No. C.1. Failure by a U.S. Government agency to comply with any of the requirements of these SSPs shall not provide a basis for challenging a contract award to that agency.

Section C—Sales Contract Provisions

C.1 Delivery of SPR Petroleum

(a) The purchaser, at its expense, shall make all necessary arrangements to accept delivery of and transport the SPR petroleum, except for terminal arrangements which shall be coordinated with the SPR/PMO. DOE will deliver and the purchaser will accept the petroleum at delivery points listed in the NS. The purchaser also shall be responsible for meeting any delivery requirements imposed at those points including complying with the rules, regulations, and procedures contained in applicable port/terminal manuals, pipeline tariffs or other applicable documents.

(b) For petroleum in the SPR’s permanent storage sites, DOE shall provide, at no cost to the purchaser, transportation by pipeline from the SPR to the supporting SPR distribution terminal facility specified for the MLI and, for vessel loadings, a safe berth and loading facilities sufficient to deliver petroleum to the vessel’s permanent hose connection. The purchaser agrees to assume responsibility for, to pay for, and to indemnify and hold DOE harmless for any other costs associated with terminal, port, vessel and pipeline services necessary to receive and transport the petroleum, including but not limited to demurrage charges assessed by the terminal, ballast and oily waste reception services other than those provided by DOE or its agent, mooring and line-handling services, tank storage charges and port charges incurred in the delivery of SPR petroleum to the purchaser. The purchaser also agrees to assume responsibility for, to pay for and to indemnify and hold DOE harmless for any liability, including consequential or other damages, incurred or occasioned by the purchaser, its agent, subcontractor at any tier, assignee or any subsequent purchaser, in connection with movement of petroleum sold under a contract incorporating this provision.

C.2 Compliance With the “Jones Act” and the U.S. Export Control Laws

Failure to comply with the “Jones Act,” 46 U.S.C. 883, regarding use of U.S.-flag vessels in the transportation of oil between points within the United States, and with any applicable U.S. export control laws affecting the export of SPR petroleum will be considered to be a failure to comply with the terms of any contract containing these SSPs and may result in termination for default in accordance with Provision No. C.25. Purchasers who have failed to comply with the “Jones Act” or the export control laws in SPR sales may be found to be non-responsive in the evaluation of offers in subsequent sales under Provision No. B.21 of the SSPs. Those purchasers may also be subject to proceedings to make them ineligible for future awards in accordance with 10 CFR Part 625.

C.3 Storage of SPR Petroleum

Continued storage of purchasers’ oil in the SPR facilities after the end of the contract delivery period is not permitted, unless specifically authorized by the Secretary of Energy and provided for in the NS. Allowing petroleum to remain in storage as the result of failure to complete delivery arrangements may result in assessment of liquidated damages under Provision Nos. C.26 through C.27 unless such failure is excused pursuant to those provisions.

C.4 Environmental Compliance

(a) SPR offerors must ensure that vessels used to transport SPR oil comply with all applicable statutes, including the Ports and Waterways Safety Act of 1972; the Port and Tanker Safety of 1972; the Act to Prevent
Pollution from Ships of 1980 (implements Annexes I, II, and V of MARPOL 73/78); and the Oil Pollution Act of 1990. Annex I, II, and V of MARPOL 73/78 prescribe procedures for the prevention of pollution by oil, noxious liquid substances, and garbage, respectively. Offerors must also ensure that vessels used to transport SPR oil comply with all applicable regulations, including the following:

<table>
<thead>
<tr>
<th>CFR citation</th>
<th>Title</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>33 CFR 151</td>
<td>Vessels Carrying Oil, Noxious Liquid Substances, Garbage, Municipal or Commercial Waste, and Ballast Water.</td>
<td>Implements the Act to Prevent Pollution from Ships, as amended and Annexes I, II, and V of the International Convention for the Prevention of Pollution from Ships, as modified by MARPOL 73/78.</td>
</tr>
<tr>
<td>33 CFR 153</td>
<td>Control of Pollution by Oil and Hazardous Substances, Discharge Removal.</td>
<td>Prescribes regulations concerning notification of the discharge of oil and hazardous substances, procedures for removing discharges of oil, and the costs associated with removing discharges of oil.</td>
</tr>
<tr>
<td>33 CFR 155</td>
<td>Oil or Hazardous Material Pollution Prevention Regulations for Vessels.</td>
<td>Establishes regulations concerning vessel equipment and transfer procedures, including personnel, equipment, and records.</td>
</tr>
<tr>
<td>33 CFR 157</td>
<td>Rules for the Protection of the Marine Environment Relating to Tank Vessels Carrying Oil in Bulk.</td>
<td>Establishes regulations governing the design and installation of equipment for vessels and the operation of vessels.</td>
</tr>
<tr>
<td>33 CFR 159</td>
<td>Marine Sanitation Devices</td>
<td>Prescribes regulations governing the design and construction of marine sanitation devices and procedures for certifying that marine sanitation devices are consistent with EPA regulations promulgated under section 312 of FWPCA, to eliminate the discharge of untreated sewage from vessels.</td>
</tr>
<tr>
<td>46 CFR Chapter I, Subchapter D.</td>
<td>Tank Vessels</td>
<td>Sets out design, equipment, and operations requirements relating to pollution prevention from tank vessels.</td>
</tr>
</tbody>
</table>

(b) To transport SPR oil, a purchaser or the purchaser's subcontractors must use only those tankships for which the vessel's owner, operator, or demise charter has made a showing of financial responsibility under 33 CFR part 138, Financial Responsibility for Water Pollution (Vessels).

(c) Failure of the purchaser or the purchaser's subcontractors to comply with all applicable statutes and regulations in the transportation of SPR petroleum will be considered a failure to comply with the terms of any contract containing these SSPs, and may result in termination for default, unless, in accordance with Provision No. C.25, such failure was beyond the control and without the fault or negligence of the purchaser, its affiliates, or subcontractors.

C.5 Delivery and Transportation Scheduling

(a) Unless otherwise instructed in the notification of ASO, each purchaser shall submit a proposed vessel lifting program and/or pipeline delivery schedule to the SPR/PMO by hand-delivery, express mail, or electronic transfer, no later than the fifteenth day prior to the earliest delivery date offered by the NS. The vessel lifting program shall specify the requested three-day loading window for each tanker and the quantity to be lifted. The pipeline schedule will specify the five day shipment ranges (i.e., day 1-5, 6-10, 11-15, etc.) for which deliveries are to be tendered to the pipeline and the quantity to be tendered for each date. In the event conflicting requests are received, preference will be given to such requests in descending order, the highest offered price first. The SPR/PMO will respond to each purchaser no later than the tenth day prior to the start of deliveries, either confirming the schedule as originally submitted or proposing alterations. The purchaser shall be deemed to have agreed to those alterations unless the purchaser requests the SPR/PMO to reconsider within two days after receipt of such alterations. The SPR/PMO will use its best efforts to accommodate such requests, but its decision following any such reconsideration shall be final and binding.

(b) Electronic transfer information, as well as the address to which express mailed and hand-carried proposed schedules should be delivered, will be provided in the notification of ASO.

(c) In order to expedite the scheduling process, at the time of submission of each vessel lifting program or pipeline delivery schedule, each purchaser shall provide the DOE Contracting Officer's Representative with a written notice of the intended destination for each cargo scheduled, if such...
destination is known at that time. For pipeline deliveries, the purchaser shall also include, if known, the name of each pipeline in the routing to the final destination.

(d) Notwithstanding paragraph (a) of this provision, ASOs and purchasers may request early deliveries, i.e., deliveries commencing prior to the contractual delivery period. DOE will use its best efforts to honor such requests, unless unacceptable costs might be incurred or SPR schedules might be adversely affected or other circumstances make it unreasonable to honor such requests. DOE's decision following any such consideration for a change shall be final and binding. Requests accepted by DOE will be handled on a first-come, first-served basis, except that where conflicting requests are received on the same day, the highest-priced offer will be given preference. Requests that include both a change in delivery method and an early delivery date may also be accommodated subject to Provision No. C.6. DOE may not be able to confirm requests for early deliveries until 24 hours prior to the delivery date.

(e) Not withstanding paragraphs (a) and (d) of this provision, in no event will schedules be confirmed prior to award of contracts.

C.6 Contract Modification—Alternate Delivery Line Items

(a) A purchaser may request a change in delivery method after the issuance of the NA. Such requests may be made either orally (to be confirmed in writing within 24 hours) or in writing, but will require written modification of the contract by the Contracting Officer. Such modification shall be permitted by DOE, provided, in the sole judgement of DOE, the change is viewed as reasonable and would not interfere with the delivery plans of other purchasers, and further provided that the purchaser agrees to pay all increased costs incurred by DOE because of such modification. The NS shall establish per barrel rates for such increased costs.

(b) Changes in delivery method will only be considered after the initial confirmation of schedules described in Provision C.5(a).

C.7 Application Procedures for “Jones Act” and Construction Differential Subsidy Waivers

(a) Unless otherwise specified in the Notice of Sale, an ASO or purchaser seeking a waiver of the “Jones Act” shall submit a request by letter, telegram or electronic means to: U.S. Customs Service, Chief, Carrier Rulings Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229, Telephone: (202) 877-2520, Facsimile: (202) 877-1873.

(b) A purchaser seeking a waiver to use a vessel built with a Construction Differential Subsidy (and, if applicable, operated with an Operating Differential Subsidy) should have the vessel owner submit a waiver request by letter, telegram, or electronic means to: Associate Administrator for Ship Financial Assistance and Cargo Preference, Maritime Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, D.C. 20590, Fax: (202) 366-7901.

For speed and brevity, the request may incorporate by reference appropriate contents of any earlier “Jones Act” waiver request by the purchaser. Under 46 U.S.C. App. 1223, a hearing is also required for any intervenor, and a waiver may not be approved if it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service.

(c) Copies of the Jones Act, CDS, or ODS requests should also be sent, as appropriate, to:

1. Associate Administrator for Port, Intermodal and Environmental Activities, Maritime Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, D.C. 20590, Fax: (202) 366-7901.


3. Contracting Officer, FE–4451, Strategic Petroleum Reserve Project Management Office, Acquisition and Sales Division, 900 Commerce Road East, New Orleans, LA 70123, Fax: (504) 784-4947.

(d) In addition to the addresses in paragraph (c) of this provision, copies of the “Jones Act” request should also be sent to: Assistant Secretary of Defense (Acquisition and Logistics), U.S. Department of Defense, Washington, DC 20301–8000.

(e) Any request for waiver should include the following information:

(1) Name, address and telephone number of requestor;

(2) Purpose for which waiver is sought, e.g., to take delivery of so many barrels of SPR crude oil, with reference to the SPR NS number and the provisional or assigned contract number;

(3) Name and flag of registry of vessel for which waiver is sought, if known at the time of waiver request, and either the scheduled 3-day delivery window(s), if available, or 10-day delivery period applicable to the contract;

(4) The intended number of voyages, including the ports for loading and discharging;

(5) Estimated period of time for which vessel will be employed; and

(6) Reason for not using qualified U.S.-flag vessel, including documentary evidence of good faith effort to obtain suitable U.S.-flag vessel and responses received from that effort. Such evidence would include copies of correspondence and telephone conversation summaries. Use of commercial brokers and
the Transportation News Ticker (TNT) is suggested for maximum market coverage. Requests for waivers by electronic transmitters may reference such documentary evidence, with copies to be provided by mail, postmarked no more than one business day after the transmission requesting the waiver.

(f) For waivers to use Construction Differential Subsidies vessels, the request must also contain a specific agreement for Construction Differential Subsidies payback pursuant to Section 506 of the Merchant Marine Act of 1936 and must be signed by an official of the vessel owner authorized to make a payback commitment.

(g) The names of any vessel(s) to be employed under a “Jones Act” vessels available and in a position to meet the loading dates required, no waivers may be approved.

(h) The length of the scheduled loading window shall be 3 days. If the purchaser schedules more than one window, the average quantity to be lifted during any single loading window will be no less than DOE’s minimum contract quantity.

(i) Tankships, ITBs, and self-propelled barges shall be capable of sustaining a minimum average load rate commensurate with receiving an entire full cargo within twenty-four (24) hours pumping time. Barges with a load rate of not less than 4,000 BPH shall be permitted at the Sun Terminal barge docks. With the consent of the SPR/PMO, lower loading rates and the use of barges at the Sun and Phillips’ Terminals’ suitably equipped tankship docks may be permitted if such do not interfere with DOE’s obligations to other parties.

(j) At least 7 days in advance of the beginning of the scheduled loading window, the purchaser shall furnish the SPR/PMO with vessel nominations specifying: (i) Name and size of vessel or advice that the vessel is “To Be Nominated” at a later date (such date to be no later than 3 days before commence ment of the loading window); (ii) estimated date of arrival (to be narrowed to a firm date not later than 72 hours prior to the first day of the vessel’s 3-day window, as provided in paragraph (f) of this provision; (iii) quantity to be loaded and contract number; and (iv) other relevant information requested by the SPR/PMO including but not limited to a copy of the crew list, ship’s specifications, last three ports and cargoes, vessel ownership and flag, any known deficiencies, and on board quantities of cargo and slops. The listing of all required vessel information shall be provided in the Notice of Sale. DOE will advise the purchaser, in writing, of the acceptance or rejection of the nominated vessel within 24 hours of such nomination. If no advice is furnished within 24 hours, the nomination will be firm. Once established, changes in such nomination details may be made only by mutual agreement of the parties, to be confirmed by DOE in writing. The purchaser shall be entitled to substitute another vessel of similar size for any vessel so nominated, subject to DOE’s approval. DOE must be given at least 3 days’ notice prior to the first day of the 3-day loading window of any such substitution. DOE shall make a reasonable effort to accept any nomination for which notice has not been given in strict accordance with this provision.

(k) In the event the purchaser intends to use more than one vessel to take delivery of the contract quantity scheduled to be delivered during a loading window, the information in (d) and (f) of this provision shall be provided for each vessel.

(l) The vessel or purchaser shall notify the SPR/PMO of the expected day of arrival 72 hours before the beginning of his scheduled 3-day loading window. This notice establishes the firm agreed-upon date of arrival which is the 1-day window for the purposes of vessel demurrage (see Provision No. C.9). If the purchaser fails to make notification of the expected day of arrival, the 1-day window will be deemed to be the middle day of the scheduled 3-day window. The vessel shall also notify the SPR/PMO of the expected hour of arrival 72, 48, and 24 hours in advance of arrival, and after the first notice, to advise of any variation of more than 4 hours. With the first notification of the hour of arrival, the Master shall advise the SPR/PMO: (i) quantity of oily bilge wastes or sludge requiring discharge ashore; (ii) cargo loading rate requested; (iii) number, size, and material of vessel’s manifold connections; and (iv) defects in vessel or equipment affecting performance or maneuverability.

(m) Notice of Readiness shall be tendered upon arrival at berth or at customary anchorage which is deemed to be any anchorage within 6 hours vessel time to the SPR dock. The preferred anchorages are identified in Exhibit E. The Notice of Readiness shall be confirmed promptly in writing to the SPR/PMO and the terminal responsible for coordination of crude oil loading operations. Such notice shall be effective only if given during customary port operating hours. If notice is given after customary business hours of the port, it shall be effective as of the beginning of customary business hours on the next business day.
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(b) DOE shall use its best efforts to berth the purchaser’s vessel as soon as possible after receipt of the Notice of Readiness.

(i) Standard hose and fittings (American Standard connections) for loading shall be provided by DOE. Purchasers must arrange for line handling, deballasting, tug boat and pilot services, both for arrival and departure, through the terminal or ship’s agent, and bear all costs associated with such services.

(j) Tankships, ITBs, and self-propelled barges shall be allowed berth time of 36 hours. Barges loading at Sun Terminal barge dock facilities shall be allowed berth time of three (3) hours plus the quotient determined by dividing the cargo size (gross standard volume barrels) by four thousand (4,000). Vessels loading cargo quantities in excess of 500,000 barrels shall be allowed berth time of 36 hours plus 1 hour for each 20,000 barrels to be loaded in excess of 500,000 barrels. Conditions in this provision excepted, however, the vessel shall not remain at berth more than 6 hours after completion of cargo loading unless hampered by tide or weather.

(l) Berth time shall commence with the vessel’s first line ashore and shall continue until loading of the vessel, or vessels in case more than one vessel is loaded, is completed and the last line is off. In addition, allowable berth time will be increased by the amount of any delay occurring subsequent to the commencement of berth time and resulting from causes due to adverse weather, labor disputes, force majeure and the like, decisions made by port authorities affecting loading operations, actions of DOE, its contractors and agents resulting in delay of loading operations (providing this action does not arise through the fault of the purchaser or purchaser’s agent), and customs and immigration clearance. The time required by the vessel to discharge oily wastes or to moor multiple vessels sequentially into berth shall count as used berth time.

(b) If the vessel is tendered for loading on a date earlier than the firm agreed-upon arrival date, established in accordance with Provision No. C.8, and other vessels are loading or have already been scheduled for loading prior to the purchaser’s vessel, the purchaser’s vessel shall await its turn and vessel laytime shall not commence until the vessel moors alongside (all fast), or at 0600 hours local time on the firm agreed-upon date of arrival, whichever occurs first. If the vessel is tendered for loading later than 2400 hours on the firm agreed-upon date of arrival, DOE will use its best efforts to have the vessel loaded as soon as possible in its proper turn with other scheduled vessels, under the circumstances prevailing at the time. In such instances, vessel laytime shall commence when the vessel moors alongside (all fast).

(c) For all hours or any part thereof of vessel laytime that elapse in excess of the allowed vessel laytime for loading provided in this provision, demurrage shall be paid by DOE, for U.S.-flag vessels, at the lesser of the demurrage rate in the tanker voyage or charter party agreement, or the most recently available United States Freight Rate Average (USFRA) for a hypothetical tanker with a deadweight in long tons equal to the weight in long tons of the petroleum loaded, multiplied by the most recent edition of the American Tanker Rate Schedule rate for such hypothetical tanker. For foreign flag vessels, demurrage shall be as determined in this provision, except that the London Tanker Brokers’ Panel Average Freight Rate Assessment (AFRA) shall be the one that is applicable. For all foreign flag vessel loadings that commence during a particular calendar month, the applicable AFRA shall be the one that is determined on the basis of freight assessments for the period ended on the 15th day of the preceding month. The demurrage rate for barges will be the hourly rate contained in the charter of a chartered barge, or if it is not a chartered barge, at a rate determined by DOE as a fair rate under prevailing conditions. If demurrage is incurred because of breakdown of machinery or equipment of the vessel is completed and cargo hoses or loading arms are disconnected. Any delay to the vessel in reaching berth caused by the fault or negligence of the vessel or purchaser, delay due to breakdown or inability of the vessel’s facilities to load, decisions made by vessel owners or operators or by port authorities affecting loading operations, discharge of ballast or slopes, customs and immigration clearance, weather, labor disputes, force majeure and the like shall not count as used laytime. In addition, movement in roads shall not count as used laytime.
DOE or its contractors (other than the purchaser), the rate of demurrage shall be reduced to one-half the rate stipulated herein per running hour and pro rata of such reduced rate for part of an hour for demurrage so incurred. Demurrage payable by DOE, however, shall in no event exceed the actual demurrage expense incurred by the purchaser as the result of the delay.

(d) In the event the purchaser is using more than one vessel to load the contract quantity scheduled to be delivered during a single loading window, the terms of this provision and the Government’s liability for demurrage apply only to the first vessel presenting its Notice of Readiness in accordance with (a) of this provision.

(e) The primary source document and official record for demurrage calculations is the SPRCODR (see Provision No. C.19).

C.10 Vessel Loading Expedition Options

(a) Notwithstanding Provision No. C.8(j)(1), in order to avoid disruption in the SPR distribution process, the Government may limit berthing time for any vessel receiving SPR petroleum to that period required for loading operations and the physical berthing/unberthing of the vessel. At the direction of the Government, activities not associated with the physical loading of the vessel (e.g., preparing documentation, gauging, sampling, etc.) may be required to be accomplished away from the berth. Time consumed by these activities will not be for the Government’s account. If berthing time is to be restricted, the Government will so advise the vessel prior to berthing of the vessel.

(b) In addition to (a) of this provision, the Government may limit vessels calling at SPR terminals to a total of 24 hours for petroleum transfer operations. In such an event, the loading will be considered completed if the vessel has loaded 95 percent or more of the nominated quantity within a total of 24 hours. If the vessel has loaded less than 95 percent of its nominated quantity, then Provision C.11 shall apply.

C.11 Purchaser Liability for Excessive Berth Time

The Government reserves the right to direct a vessel loading SPR petroleum at a delivery point specified in the NS, to vacate its SPR berth, and absorb all costs associated with this movement, should such vessel, through its operational inability to receive oil at the average rates provided for in Provision No. C.8, cause the berth to be unavailable for an already scheduled follow-on vessel. Furthermore, should a breakdown of the vessel’s propulsion system prevent its getting under way on its own power, the Government may cause the vessel to be removed from the berth with all costs to be borne by the purchaser.

C.12 Pipeline Delivery Procedures

(a) The purchaser shall nominate his delivery requirements to the pipeline carrier, to include the total quantity to be moved and his preferred five-day shipment range(s) as specified in C.5. The purchaser shall provide confirmation of the carrier’s acceptance of the nominated quantity [in thousands of barrels per day] and shipment ranges to the SPR/PMO no later than the last day of the month preceding the month of delivery. The purchaser shall also furnish the SPR/PMO with the name and telephone number of the pipeline point of contact with whom the SPR/PMO should coordinate the petroleum delivery.

(b) The SPR/PMO will ensure oil is made available to the carrier within the shipment date range(s) established in accordance with Provision C.5. Once established, the pipeline delivery schedule can only be changed with SPR/PMO’s prior written consent. Should the schedule established in accordance with (a) of this provision vary from the original schedule established in accordance with Provision No. C.5, the Government will provide its best efforts to accommodate this revised schedule but will incur no liability for failure to provide delivery on the dates requested.

(c) Three days prior to the beginning of any five-day shipping range in which the purchaser is to receive delivery, the purchaser shall furnish the SPR/PMO the firm date within that range on which the movement is to commence, the quantity to be moved, and the contract number.

(d) The date of delivery, which will be recorded on the CODR (see Provision No. C.19), is the delivery commenced to the custody transfer point, as identified in the NS.

(e) The purchaser shall receive pipeline deliveries at a minimum average rate of 100,000 barrels per day. The purchaser is solely responsible for making the necessary arrangements with pipeline carriers, including storage, to achieve the stated minimum.

C.13 Title and Risk of Loss

Unless otherwise provided in the NS, title to and risk of loss for SPR petroleum will pass to the purchaser at the delivery point as follows:

(a) For vessel shipment—when the petroleum passes from the dock loading equipment connections to the vessel’s permanent hose connection.

(b) For pipeline shipment—as identified in the NS.

(c) For in-transit shipment—when the petroleum passes the permanent flange of the discharging vessel manifold upon discharge into the purchaser’s designated marine terminal facility or vessel.
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C.14 Acceptance of Crude Oil

(a) When practical, the NS shall update the SPR crude oil stream characteristics shown in Exhibit D, SPR Crude Oil Comprehensive Analysis. However, the purchaser shall accept the crude oil delivered regardless of characteristics. Except as provided in this provision, DOE assumes no responsibility for deviations in quality.

(b) In the event that the crude oil stream delivered both has a total sulfur content (by weight) in excess of 3.5 percent if Bryan Mound Maya, 2.0 percent if any other sour crude oil stream, or 0.50 percent if a sweet crude oil stream, and, in addition, has an API gravity less than 20°API if Bryan Mound Maya, 28°API if any other sour crude oil stream, or 32°API if a sweet crude oil stream, the purchaser shall accept the crude oil delivered and either pay the contract price adjusted in accordance with Provision No. C.16, or request negotiation of the contract price. Unless the purchaser submits a written request for negotiation of the contract price to the Contracting Officer within 10 days from the date of delivery, the purchaser shall be deemed to have accepted the adjustment of the price in accordance with Provision No. C.16. Should the purchaser request a negotiation of the price and the parties be unable to agree as to that price, the dispute shall be settled in accordance with Provision No. C.32.

C.15 Delivery Acceptance and Verification

(a) The purchaser shall provide written confirmation to SPR/PMO, no later than 72 hours prior to the scheduled date of the first delivery under the contract, the name(s) of the authorized agent(s) given signature authority to sign/endorse the delivery documentation (CODR, etc.) on the purchaser’s behalf. Any changes to this listing of names must be provided to SPR/PMO in writing no later than 72 hours before the first delivery to which such change applies. In the event that an independent surveyor (separate from the authorized signatory agent) is appointed by the purchaser to witness the delivery operation (gauging, sampling, testing, etc.), written notification must be provided to SPR/PMO, no later than 72 hours prior to the scheduled date of each applicable cargo delivery.

(b) Absence of the provision of the name(s) of bona fide agent(s) and the signature of such agent on the delivery documentation constitutes acceptance of the delivery quantity and quality as determined by DOE and/or its agents.

C.16 Price Adjustments for Quality Differentials

(a) The NS will specify quality price adjustments applicable to the crude oil streams offered for sale. Unless otherwise specified by the NS, quality price adjustments will be applied only to the amount of variation by which the API gravity of the crude oil delivered differs by more than plus or minus five-tenths of one degree API (+/− 0.5°API) from the API gravity of the crude oil stream contracted for as published in the NS.

(b) Price adjustments for SPR crude oil are expected to be similar to or more commercial crude oil postings for equivalent quality crude oil. The contract price per barrel shall be increased by that amount if the API gravity of the crude oil delivered exceeds the published API gravity by more than 0.5°API and decreased by that amount if the API gravity of the crude oil delivered falls below the published API gravity by more than 0.5°API.

C.17 Determination of Quality

(a) The quality of the crude oil delivered to the purchaser will be determined from samples taken from the delivery tanks in accordance with API Manual of Petroleum Measurement Standards, Chapter 8.1, Manual Sampling of Petroleum and Petroleum Products (ASTM D4057), latest edition; or from a representative sample collected by an automatic sampler whose performance has been proven in accordance with the API Manual of Petroleum Measurement Standards, Chapter 8.2, Automatic Sampling of Petroleum and Petroleum Products (ASTM D4177), latest edition. Preference will be given to samples collected by means of an automatic sampler when such a system is available and operational. Tests to be performed by DOE or its authorized contractor are:

(1) Sediment and Water


§ 625.20 Determination of Quantity

(a) The quantity of crude oil delivered to the purchaser will be determined by opening and closing tank gauges with adjustment for opening and closing free water and sediment and water as determined from shore tank samples where an automatic sampler is not available, or delivery meter reports. All volumetric measurements will be corrected to net standard volume in barrels at 60°F, using the API Manual of Petroleum Measurement Standards, Chapter 11.1, Volume 1, Volume Correction Factors (ASTM D1250) (IP 200); Table 5A-Generalized Crude Oils, Correction of Observed API Gravity to API Gravity at 60°F; Table 6A-Generalized Crude Oils, Correction of Volume to 60°F Against API Gravity at 60°F, latest edition, and by deducting the tanks' free water, and the entrained sediment and water as determined by the testing of composite all-levels samples taken from the delivery tanks; or by deducting the sediment and water as determined by testing a representative portion of the sample collected by a certified automatic sampler, and also corrected by the applicable pressure correction factor and meter factor.

(b) The quantity measurements shall be performed and certified by the DOE contractor responsible for delivery operations, and witnessed by the Government Quality Assurance Representative at the delivery point. The purchaser shall have the right to have representatives present at the gauging/metering, sampling, and testing. Should the purchaser arrange for additional inspection services, such services will be for the account of the purchaser. Any disputes shall be settled in accordance with Provision No. C.32. Should the purchaser not arrange for additional services, then DOE's quantity determination shall be binding on the purchaser.

C.20 Contract Amounts

The contract quantities and dollar value stated in the NA are estimates. The per barrel unit price is subject to adjustment due to variation in the API gravity from the published characteristics, changes in delivery mode and price index values, if applicable. In addition, due to conditions of vessel loading and shipping or pipeline transmission, the quantity actually delivered may vary by +/−10 percent for each shipment. However, a purchaser is not required to engage additional transportation capacity if sufficient capacity to take delivery of at least 90 percent of the contract quantity has been engaged.
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C.21 Payment and Performance Letter of Credit

(a) Within five business days of receipt of notification of Apparently Successful Offeror, the Purchaser must provide to the Contracting Officer an "Irrevocable Standby Letter of Credit" established in favor of the United States Department of Energy equal to 100 percent of the contract awarded value and containing the substantive provisions set out in Exhibit G. The Purchaser must furnish an acceptable letter of credit before DOE will execute the NA. The letter of credit MUST NOT VARY IN SUBSTANCE from the sample at Exhibit G. If the letter of credit contains any provisions at variance with Exhibit G or fails to include any provisions contained in Exhibit G, nonconforming provisions must be deleted and missing substantive provisions must be added or the letter of credit will not be accepted. The letter of credit must be effective on or before the first delivery under the contract and remain in effect for a period of 120 days, must permit multiple partial drawings, and must contain the contract number. The original of the letter of credit must be sent to the Contracting Officer.

(b) The letter of credit must be issued by a depository institution located in and authorized to do business in any state of the United States or the District of Columbia, and authorized to issue letters of credit by the banking laws of the United States or any state of the United States or the District of Columbia. The issuing bank must provide documentation indicating that the person signing the letter of credit is authorized to do so, in the form of corporate minutes, the Authorized Signature List, or the General Resolution of Signature Authority.

(c) All wire deposit electronic funds transfer and letter of credit costs will be borne by the Purchaser.

(d) The letter of credit must be maintained at 100 percent of the contract value of the petroleum remaining to be delivered, plus any other charges owed to the Government under the contract. In the event the letter of credit falls below the level specified, or at the discretion of the Contracting Officer, must be increased because of the effect of the price indexing mechanism provided for in Provision B.2. DOE reserves the right to demand the Purchaser modify the letter of credit to a level deemed sufficient by the Contracting Officer. The Purchaser shall make such modification within two business days of being notified by the Contracting Officer by express mail or electronic means. The Purchaser is deemed to have received such notification the next business day after its dispatch. If such modification is not made within two days after purchaser is deemed to have received the notice, the Contracting Officer may, on the 3rd business day, without prior notice to the purchaser, withhold deliveries in whole or in part under the contract and/or terminate the contract in whole or in part under Provision C.25.

(e) Within 30 calendar days after final payment under the contract, the Contracting Officer shall authorize the cancellation of the letter of credit and shall return it to the bank or financial institution issuing the letter of credit. A copy of the notice of cancellation will be provided to the Purchaser.

C.22 Billing and Payment

(a) The Government will invoice the Purchaser at the conclusion of each delivery.

(b) Payment is due in full on the 20th of the month following each delivery month. Should the 20th of the month fall on a Saturday, Sunday, or Federal holiday, payment will be due and payable in full on the last business day preceding the 20th of the month.

(c) If an invoice is not paid in full, the Government may provide the Purchaser oral or written notification that Purchaser is delinquent in its payments; draw against the letter of credit for all quantities for which unpaid invoices are outstanding; withhold all or any part of future deliveries under the contract; and/or terminate the contract, in whole or in part, in accordance with Provision C.25.

(d) In the event that the bank refuses to honor the draft against the letter of credit, the Purchaser shall be responsible for paying the principal and any interest due (see Provision No. C.24) from the due date.

C.23 Method of Payments

(a) All amounts payable by the Purchaser shall be paid by either:

(1) Deposit to the account of the U.S. Treasury by wire transfer of funds over the Fedwire Deposit System Network. The information to be included in each wire transfer will be provided in the NS.

(2) Electronic funds transfer through the Automated Clearing House (ACH) network, using the Federal Remittance Express Program. The information to be included in each transfer will be provided in the NS.

(b) If the Purchaser disagrees with the amounts invoiced by the Government, the Purchaser shall immediately pay the amounts invoiced, and notify the Contracting Officer of the basis for its disagreement. The Contracting Officer will receive and act upon any such objection. Failure to agree to any adjustment shall be a dispute, and a Purchaser shall file a claim promptly in accordance with Provision C.32.

(c) DOE may designate another place, different timing, or another method of payment after reasonable written notice to the Purchaser.
C.24 Interest

(a) Amounts due and payable by the purchaser or its bank that are not paid in accordance with the provisions governing such payments shall bear interest from the date due until the date payment is received by the Government.

(b) Interest shall be computed on a daily basis. The interest rate shall be in accordance with the Current Value of Funds rate as established by the Department of the Treasury in accordance with the Debt Collection Improvement Act of 1997 and published periodically in Bulletins to the Treasury Fiscal Requirements Manual and in the Federal Register.

C.25 Termination

(a) Immediate Termination

(1) The Contracting Officer may terminate this contract in whole or in part, without liability of DOE, by written notice to the purchaser effective upon its being deposited in the U.S. Postal System addressed to the purchaser as determined by the Contracting Officer that it will not be able to accept, or fails to accept, any delivery line item in accordance with the terms of the contract. Such notice shall invite the purchaser to submit information to the Contracting Officer as to the reasons for the failure to accept the delivery line item in accordance with the terms of the contract.

(2) Within 10 business days after the issuance of the notice of termination, the Contracting Officer may determine that such termination was a termination for default under paragraph (b)(1)(ii) of this provision. In the absence of information which persuades the Contracting Officer that the purchaser’s failure to accept the delivery line item was excusable, the fact of such failure may be the basis for the Contracting Officer determining the purchaser to be in default, without first determining under paragraphs (b)(2) and (b)(3) whether such failure was excusable under the terms of the contract. The Contracting Officer shall promptly give the purchaser written notice of such determination.

(b) Termination for Default

(1) Subject to the provisions of paragraphs (b)(2) and (b)(3), the Contracting Officer may terminate the contract in whole or in part for purchaser default, without liability of DOE, by written notice to the purchaser, effective upon its being deposited in the U.S. Postal System, addressed to the purchaser as provided in Provision No. C.31 in the event that:

(i) The Government does not receive payment in accordance with any payment provision of the contract;

(ii) The purchaser fails to accept delivery of petroleum in accordance with the terms of the contract; or

(iii) The purchaser fails to comply with any other term or condition of the contract;

(iv) Strikes.

(2) Except with respect to defaults of subcontractors, the purchaser shall not be determined to be in default or be charged with any liability to DOE under circumstances which prevent the purchaser’s acceptance of delivery hereunder due to causes beyond the control and without the fault or negligence of the purchaser as determined by the Contracting Officer. Such causes shall include but are not limited to:

(i) Acts of God or the public enemy;

(ii) Acts of the Government acting in its sovereign or contractual capacity;

(iii) Fires, floods, earthquakes, explosions, unusually severe weather, or other catastrophes; or

(iv) Strikes.

(3) If the failure to perform is caused by the default of a subcontractor, the purchaser shall not be determined to be in default or to be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the purchaser to meet the delivery schedule. If:

(i) Such default arises out of causes beyond the control of the purchaser and its subcontractor, and without the fault or negligence of either of them; or

(ii) Such default arises out of causes within the control of a transportation subcontractor, not an affiliate of the purchaser, hired to transport the purchaser’s petroleum...
by vessel or pipeline, and such causes are beyond the purchaser’s control, without the fault or negligence of the purchaser, and notwithstanding the best efforts of the purchaser to avoid default.

(4) In the event that the contract is terminated in whole or in part for default, the purchaser shall be liable to DOE for:

(i) The difference between the contract price on the contract termination date and any lesser price the Contracting Officer obtained upon resale of the petroleum; and

(ii) Liquidated damages as specified in Provision No. C.27 as fixed, agreed, liquidated damages for each day of delay until the petroleum is delivered to a purchaser under either a resolicitation for the sale of the quantities of oil defaulted on, or an NS issued after the date of default that specifies that it is for the sale of quantities of oil defaulted on. In no event shall liquidated damages be assessed for more than 30 days.

(5) In the event that the Government exercises its right of termination for default, and it is later determined that the purchaser’s failure to perform was excused in accordance with paragraphs (b)(2) and (3) of this provision, the rights and obligations of the parties shall be the same as if such termination was a termination for convenience without liability of the Government under paragraph (c) of this provision.

(c) Termination for Convenience

(1) In addition to any other right or remedy provided for in the contract, the Government may terminate this contract at any time in whole or in part whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Such termination shall be without liability of the Government if such termination arises out of causes specified in (a)(1) or (b)(1) of this provision, acts of the Government in its sovereign capacity, or causes beyond the control and without the fault or negligence of the Government, its contractors (other than the purchaser of SPR crude oil under this contract) and agents. For any other termination for convenience, the Government shall be liable for such reasonable costs incurred by the purchaser in preparing to perform the contract, but under no circumstances shall the Government be liable for consequential damages or lost profits as the result of such termination.

(2) The purchaser will be given immediate written notice of any decrease of petroleum deliveries greater than 1 percent, or of termination, under this paragraph (c). The termination or reduction shall be effective upon its notice being deposited in the U.S. Postal System unless otherwise specified in the notice. The purchaser is deemed to have received a mailed notice on the second day after its dispatch and an electronic or express mail notice on the day after dispatch.

(3) Termination for the convenience of the Government shall not excuse the purchaser from liquidated damages accruing prior to the effective date of the termination.

(4) Nothing herein contained shall limit the Government in the enforcement of any legal or equitable remedy that it might otherwise have, and a waiver of any particular cause for termination shall not prevent termination for the same cause occurring at any other time or for any other cause.

(e) In the event that the Government exercises its right of termination, as provided in paragraphs (a), (b), or (c)(1) of this provision, the Contracting Officer may sell any undelivered petroleum under such terms and conditions as he deems appropriate.

(f) DOE's ability to deliver petroleum on the date on which the defaulted purchaser was scheduled to accept delivery, under another contract awarded prior to the date of the contractor's default, shall not excuse a purchaser that has been terminated for default from either liquidated damages or the difference between the contract price and any lesser price obtained on resale.

(g) Any disagreement with respect to the amount due the Government for either resale costs or liquidated damages shall be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision No. C.32.

(h) The term “subcontractor” or “subcontractors” includes subcontractors at any tier.

C.26 Other Government Remedies

(a) The Government’s rights under this provision are in addition to any other right or remedy available to it by law or by virtue of this contract.

(b) The Government may, without liability on its part, withhold deliveries of petroleum under this contract or any other contract the purchaser may have with DOE if payment is not made in accordance with this contract.

(c) If the purchaser fails to take delivery of petroleum in accordance with the delivery schedule developed under the terms of the contract, and such tardiness is not excused under the terms of Provision No. C.25, but the Government does not elect to terminate that item for default, the purchaser nonetheless shall be liable to the Government for liquidated damages in the amount established by Provision No. C.27 for each calendar day of delay or fraction thereof until such time as it accepts delivery of the petroleum. In no event shall such damages be assessed for longer than 30 days. No purchaser that fails to perform in accordance with the terms of the contract shall be excused from liability for liquidated damages by virtue of the fact that DOE is able to deliver petroleum on the
date on which the non-performing purchaser was scheduled to accept delivery, under another contract awarded prior to the date of default.

**C.27 Liquidated Damages**

(a) In case of failure on the part of the purchaser to perform within the time fixed in the contract or any extension thereof, the purchaser shall pay to the Government liquidated damages in the amount of 1 percent of the contract price of the undelivered petroleum per calendar day of delay or fraction thereof in accordance with paragraph (b) of Provision No. C.25 and paragraph (c) of Provision No. C.26.

(b) As provided in (a) of this provision, liquidated damages will be assessed for each day or fraction thereof a purchaser is late in accepting delivery of petroleum in accordance with this contract unless such tardiness is excused under Provision No. C.25. For petroleum to be lifted by vessel, damages will be assessed in the event that the vessel has not commenced loading by 11:59 p.m. on the second day following the last day of the 3-day delivery window established under Provision No. C.5, unless the vessel has arrived in road and its Master has presented a notice of readiness to the Government or its agents. Liquidated damages shall continue until the vessel presents its notice of readiness. For petroleum to be moved by pipeline, if delivery arrangements have not been made by the last day of the month prior to delivery, liquidated damages shall commence on the 3rd day of the delivery month until such delivery arrangements are completed; if delivery arrangements have been made, then liquidated damages shall begin on the 3rd day after the scheduled delivery date if delivery is not commenced and shall continue until delivery is commenced.

(c) Any disagreement with respect to the amount of liquidated damages due the Government will be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision No. C.32.

**C.28 Failure To Perform Under SPR Contracts**

In addition to the usual debarment procedures, 10 CFR Section 625.3 provides procedures to make purchasers that fail to perform in accordance with these provisions ineligible for future SPR contracts.

**C.29 Government Options in Case of Impossibility of Performance**

(a) In the event that DOE is unable to deliver petroleum contracted for to the purchaser due either to events beyond the control of the Government, including actions of the purchaser, or to acts of the Government, its agents, its contractors or subcontractors at any tier, the Government at its option may do either of the following:

1. Terminate for the convenience of the Government under Provision No. C.25; or
2. Offer different SPR crude oil streams or delivery times to the purchaser in substitution for those specified in the contract.

(b) In the event that a different SPR crude oil stream than originally contracted for is offered to the purchaser, the contract price will be negotiated between the parties. In no event shall the negotiated price be less than the minimum acceptable price, if established for the same or similar crude oil streams in the most recent NS or determined after the opening of offers.

(c) DOE’s obligation in such circumstances is to use its best efforts, and DOE under no circumstances shall be liable to the purchaser for damages arising from DOE’s failure to offer alternate SPR crude oil streams or delivery times.

(d) If the parties are unable to reach agreement as to price, crude oil streams or delivery times, DOE may terminate the contract for the convenience of the Government under Provision No. C.26.

**C.30 Limitation of Government Liability**

DOE’s obligation under these SSPs and any resultant contract is to use its best efforts to perform in accordance therewith. The Government under no circumstances shall be liable thereunder to the purchaser for the conduct of the Government’s contractors or subcontractors or for indirect, consequential, or special damages arising from its conduct, except as provided herein; neither shall the Government be liable thereunder to the purchaser for any damages due in whole or in part to causes beyond the control and without the fault or negligence of the Government, including but not restricted to, acts of God or public enemy, acts of the Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

**C.31 Notices**

(a) Any notices required to be given by one party to the contract to the other in writing shall be forwarded to the addressee, prepaid, by U.S. registered, return receipt requested mail, express mail, telegram, or electronic means as provided in the NS. Parties shall give each other written notice of address changes.

(b) Notices to the purchaser shall be forwarded to the purchaser’s address as it appears in the offer and in the contract.

(c) Notices to the Contracting Officer shall be forwarded to the following address: U.S. Department of Energy, Strategic Petroleum Reserve, Project Management Office, Acquisition and Sales Division, Mail Stop FB-4451, 900 Commerce Road East, New Orleans, Louisiana 70123.
Department of Energy

C.32 Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. Section 601 et seq.). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer, who shall issue a written decision on the dispute in the manner specified in 48 CFR 1-33.211.

(b) “Claim” means:

(1) A written request submitted to the Contracting Officer;
(2) For payment of money, adjustment of contract terms, or other relief;
(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and (4) For which a Contracting Officer’s decision is demanded.

(c) In the case of dispute requests or amendments to such requests for payment exceeding $50,000, the purchaser shall certify at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are current, accurate and complete to the best of my knowledge and belief and that the amount requested accurately reflects the contract adjustment for which the purchaser believes the Government is liable.

Purchaser’s Name
Signature
Title

(d) The Government shall pay to the purchaser interest on the amount found due to the purchaser on claims submitted under this provision at the rate established by the Department of the Treasury from the date the amount is due until the Government makes payment. The Contract Disputes Act of 1978 and the Prompt Payment Act adopt the interest rate established by the Secretary of the Treasury under the Renegotiation Act as the basis for computing interest on money owed by the Government. This rate is published semi-annually in the Federal Register.

(e) The purchaser shall pay to DOE interest on the amount found due to the Government and unpaid on claims submitted under this provision at the rate specified in Provision No. C.24 from the date the amount is due until the purchaser makes payment.

(f) The decision of the Contracting Officer shall be final and conclusive and shall not be subject to review by any forum, tribunal, or Government agency unless an appeal or action is commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.

C.33 Assignment

The purchaser shall not make or attempt to make any assignment of a contract that incorporates these SSPs or any interest therein contrary to the provisions of Federal law, including the Anti-Assignment Act (41 U.S.C. 15), which provides:

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

C.34 Order of Precedence

In the event of an inconsistency between the terms of the various parts of this contract, the inconsistency shall be resolved by giving precedence in the following order:

(a) The NA and written modifications thereto;
(b) The NS;
(c) Those provisions of the SSPs (as published in the Federal Register) made applicable to the contract by the NS;
(d) The instructions to the SPR Sales Offer Form; and
(e) The successful offer.

C.35 Gratuities

(a) The Government, by written notice to the purchaser, may terminate the right of the purchaser to proceed under this contract if it is found, after notice and hearing, by the Secretary of Energy or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered by or given by the purchaser, or any agent or representative of the purchaser, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary of Energy or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event that this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (1) to pursue the same remedies against the purchaser as it could pursue in the event of a breach of the contract by purchaser, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined
by the Secretary of Energy or his duly authorized representative) which shall not be less than three nor more than 10 times the cost incurred by the purchaser in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

EXHIBITS

A—SPR Sales Offer Form

B—Sample Notice of Sale
C—SPRMO Form 33S
D—SPR Crude Oil Comprehensive Analysis
E—SPR Delivery Point Data
F—Offer Standby Letter of Credit
G—Payment and Performance Letter of Credit
H—Strategic Petroleum Reserve Crude Oil Delivery Report—SPRPMO–F–6110.2–14b 1/87 REV. 8/91
I—Instruction Guide for Return of Offer Guarantees by Electronic Transfer or Treasury Check
J—Offer Guarantee Calculation Worksheet
Strategic Petroleum Reserve Sales Offer Form

INSTRUCTIONS

1. Maximum MLJ Quantity (MAXQ)
   For each MLJ offered against, offers shall state here, in thousand barrels, the number of barrels which the offeror seeks to purchase on the MLJ, regardless of delivery method. The maximum MLJ quantity shall be not less than the DOE's minimum quantity as stated in the Notice of Sale (NOS).

2. Delivery Line Items (DLI)
   Nominal DLI delivery methods are as follows:
   
   - DLIA Pipeline delivery from first terminal
   - DLI B, C, D Tanker delivery from first terminal
   - DLI E, F, G Barge delivery from first terminal
   - DLIH Pipeline delivery from second terminal
   
   Pipeline DLIs A and H nominally have a 30-day delivery period. Vessel DLIs B, C, D, and E have ten delivery days periods normally from the 1st to the 10th; C, F, and G cover the 11th to the 20th; and D, G, and H cover the 21st to the last day of the period of sale. Additional DLIs may be added when storage sites are connected to more than two pipelines or terminals. However, not all DLIs may be available on a particular MLJ. In addition, buyers are cautioned to read the NOS carefully as it may alter the period of time covered by each DLI if the period of sale does not correspond to a calendar month.

3. Unit Price (UPS)
   The offer shall state the offered price per barrel on each DLI for which the offer indicates a desired DLI quantity. The offerer may state either the same unit price for different DLIs or different unit price. DOE will award the highest price first. Prices may be stated to one-hundredths of a cent ($0.0001), but in no smaller fraction thereof.

4. Delivery Preference (P)
   Where the offer has the same unit price for two or more different DLIs on the same MLJ, the offeror may indicate the offeror's preference for delivery method and period (1st, 2nd, 3rd, etc.). If the offer does not indicate a preference, DOE will select the DLIs to be awarded at its discretion.

5. Desired DLI Quantity (DESIQ)
   Offers must indicate at least one DLI desired (in thousand barrels) the number of barrels which the offeror will accept by the delivery method and during the delivery period established for that DLI. An offeror may indicate a willingness to accept alternate delivery methods or delivery periods. As offeror may request all, part, or none of the offeror's maximum MLJ quantity on any particular DLI. A total of all the offeror's desired DLI quantities should total at least the maximum MLJ quantity, but could exceed the maximum MLJ quantity if the offeror is willing to accept alternate delivery methods or periods. For example, the offer could state:
   
   - MLJ: 001
   - Maximum MLJ Quantity: 1,000
   - Desired DLI Quantities:
     - DLI 001B: 1,000
     - DLI 001C: 1,000
     - DLI 091D: 1,000
   
   This would indicate the offeror would be willing to accept one million barrels of Bryan Mound sweet to be delivered to its vessels either from the 1st through the 10th, the 11th through the 20th, or 21st through the end of the month.

6. Minimum Contract Quantity (MINQ)
   For each DLI on which an offer is made, the offeror should indicate his willingness to accept as little as DOE's specified minimum contract quantity for that DLI by marking the 'Y' block, or unwillingness to accept less than the DESIQ for that DLI by marking the 'N' block. If neither 'Y' or 'N' is indicated, the offerer will be evaluated as though the offeror had indicated a 'Y'. DOE only will award less than the offeror's desired DLI quantity if an offer is otherwise successful, but the quantity which DOE has available for award is less than said desired DLI quantity or award of the desired quantity would cause the offeror's MAXQ on the MLJ to be exceeded.

7. Total Price
   The offer shall calculate the total price (desired DLI quantity times unit price) for each DLI on which an offer is made. The offerer is reminded that DESIQ is stated in thousand barrels.

8. Offer Guarantee
   The amount of the offer guarantee is $10 million dollars or 5 percent of the maximum potential contract amount, whichever is less. The maximum potential contract amount is the sum of the products determined by multiplying the offer's maximum purchase quantity for each MLJ times the highest offer price that the offeror would have to pay for that MLJ if the offer is successful. To assist in this calculation, instructions and a worksheet are available at Exhibit J. Submission of the worksheet is not required.
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* = See instructions

**Offer**

Department of Energy

Exhibit A
### Exhibit A

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<th>Weeks Island Sour</th>
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- **MU1**: Delivery Line Item ("P")
- **UPS$: Initial Price ("S")
- **DESQ**: Desired DES Quantity (1000 BBL.)*
- **Y**: Yes
- **N**: No
- **MAXQ**: Maximum MU1 Quantity (1000 BBL.)*

*See Instructions*
<table>
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<tr>
<th>DLH</th>
<th>Delivery Line Item (&quot;2&quot;, &quot;5&quot;)</th>
<th>UPS</th>
<th>Unit Price (U.S. $/BRL) (&quot;3&quot;)</th>
<th>DESQ</th>
<th>Qnty Line Item (&quot;2&quot;, &quot;5&quot;)</th>
<th>MINQ</th>
<th>Y N</th>
<th>Total Price (UPS X DESQ)</th>
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**Offer**

By signing below the offeror certifies agreement without exception to all terms and conditions applicable to this sale and that the minimum potential contract amount (Instruction 6) is $__________

Signature: Offeror or Agent ____________________________

Company Name ____________________________

Exhibit A
Exhibit B - Sample Notice of Sale (NS)

1. NS No. DE-NS96-92P0x000x is issued (date) for sale of Strategic Petroleum Reserve (SPR) crude oil. All references to "Provision No." refer to the Standard Sales Provisions (SSPs) published in the Federal Register (date). All provisions are applicable to this sale except that provision No(s). (give number or numbers) are supplemented or modified to read: (give changes). Additional requirements applicable to this sale are as follows: (give text).

(Note: Should the SSPs be extensively changed, the Notice of Sale (NS) may include, for information purposes only, a complete text of the SSPs as modified for the sale. Offerors are cautioned, however, that these modified complete text SSPs have no contractual status and that in the event of any inconsistencies, the published SSPs and the NS shall establish the terms and conditions for the sale.)

2. Mailed and handcarried offers and offer guarantees must be received by 3:00 p.m. local time on (date) at (address). Offer guarantees sent by wire transfer must also be received at the U.S. Treasury by the time stated above.

3. Offerors must give names, addresses and telephone numbers, including area codes, for authorized representative of the offeror with whom the Government may conduct any necessary discussions, including financial.

4. Direct questions regarding NS to (name of individual), telephone (504) 734-4660. Collect calls will not be accepted.

5. Master Line Item (MLI) numbers given herein refer to those schedules attached as Exhibit A of the SSPs. The quantities for each MLI offered for sale are as follows:

   MLI 001: _____ bbls; MLI 002 not offered this sale; MLI 003: _____ bbls;
   MLI 004: _____ bbls; MLI 005 not offered this sale; MLI 006 not offered this sale;
   MLI 007: _____ bbls; MLI 008: _____ bbls; MLI 009 not offered this sale; MLI 010: _____ bbls.

6. Offered delivery line items (DLI) and their maximums, i.e., offered DLIs and the Department of Energy's best estimates of the maximum amount of petroleum that can be moved by each delivery line item transportation system over the delivery period, are as follows (see provision No. B.17 of the SSPs).

7. Minimum quantities which will be awarded for each delivery line item (DLI) are as follows:

8. Consideration to be paid for alteration of contract delivery modes in accordance with provision No. C.6 is as follows:

9. Applicable quality differentials are plus or minus _____ º per degree API gravity, or part
thereof; for sweet crude oil streams, and plus or minus ___ ¢ per one-tenth degree API
glory for sour crude oil streams. These quality adjustments will only be applied to the
amount of variation by which the API gravity of the crude oil delivered differs by more than
plus or minus five-tenths of one degree API (±0.5° API) from the API gravity of the crude
oil stream contracted for as published in this Notice of Sale.

10. The following information is provided in connection with SSP Provision No. B.4 "Superfund"
tax on SPR petroleum - caution to offerors".

11. All offerors and purchasers are cautioned that letters of credit must not vary in substance from
the sample provided in Exhibits F and G. Nonconforming provisions must be deleted and
missing substantive provisions must be added or the letter of credit will not be accepted. It
is recommended, therefore, that offerors/purchasers review letters of credit issued on their
behalf, to assure their full compliance with the above cited Exhibits.

12. The information to be included for payment by wire transfer of funds over the Federal Deposit
System Network is provided in Attachment __. Information to be included for payment by
electronic funds transfer using the Automated Clearing House Network is provided in
Attachment __.
<table>
<thead>
<tr>
<th>GOVERNMENT PROPERTY</th>
<th>CONTRACT NUMBER</th>
<th>CONTRACT DESCRIPTION</th>
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<tbody>
<tr>
<td>NAME OF PURCHASER</td>
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<tr>
<td>ADDRESS (City, State &amp; Zip Code)</td>
<td>Type or Horse</td>
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<tr>
<td>SIGNATURE AND TITLE OF PERSON AUTHORIZED TO SIGN THIS CONTRACT</td>
<td>(Type as plot shown in the contract)</td>
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<tr>
<td>UNITED STATES OF AMERICA</td>
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<tr>
<td>NAME AND SIGNATURES OF CONTRACTING OFFICERS</td>
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The offeror acknowledges receipt of amendments to the SOLICITATION for sealed bids and sealed proposals described above in accordance with the terms and conditions of the contract described below.
# EXHIBIT D
## SPR CRUDE OIL COMPREHENSIVE ANALYSIS

<table>
<thead>
<tr>
<th>Sample ID</th>
<th>BRYAN MOUND SWEET</th>
<th>Date of Assay</th>
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<td>API Gravity</td>
<td>35.9</td>
<td>V, ppm</td>
<td>4.12</td>
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<td>Sulfur, Wt. %</td>
<td>0.33</td>
<td>Fx, ppm</td>
<td>0.822</td>
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<tr>
<td>Nitrogen, Wt. %</td>
<td>0.111</td>
<td>Cu, ppm</td>
<td>na</td>
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<td>Micro Car. Res., Wt. %</td>
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<td>Org. Cl, ppm</td>
<td>na</td>
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<td>Pour Point, °F</td>
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<td>UOP &quot;K&quot;</td>
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<th>7</th>
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<th>Residue</th>
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<td>Cut Temp.</td>
<td>C₄⁺</td>
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<tr>
<td>Vol. %</td>
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<td>0.7</td>
<td>8.2</td>
<td>14.1</td>
<td>16.6</td>
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<td>Micro Car. Res., Wt. %</td>
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225
## Compositional Analysis, MLI 001 BRYAN MOUND SWEET

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<td>BP %</td>
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<td>77.86</td>
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### Composition, Wt.%

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## SPR CRUDE OIL COMPREHENSIVE ANALYSIS

### Department of Energy Pt. 625, App. A

**Sample ID** BRYAN MOUND SOUR  
**Date of Assay** 5/16/1996

### Crude Properties

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## Compositional Analysis, MLI 002 BRYAN MOUND SOUR

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### Composition, Wt.%

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### SPR CRUDE OIL COMPREHENSIVE ANALYSIS

**Sample ID:** ML1 003  Bryan Mound Maya  
**Date of Assay:** 3/13/1999

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## Compositional Analysis, MLJ 003 Bryan Mound Maya

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### Composition - wt%

- **Ethane**: 3.10
- **Propane**: 27.90
- **N-Butane**: 45.04
- **I-Butane**: 12.96
- **N-Pentane**: 3.77
- **I-Pentane**: 6.98
- **Cyclopentane**: 0.06
- **N-Hexane**: 0.04
- **2-Methylpentane**: 0.08
- **3-Methylpentane**: 0.04
- **2,2-Dimethylbutane**: 0.00
- **2,3-Dimethylbutane**: 0.02
- **Methylcyclopentane**: 0.01
- **Cyclohexane**: 0.00
- **Benzene**: 0.00
- **N-Heptane**: 0.00
- **2-Methylhexane**: 0.00
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- **2,2-Dimethylpentane**: 0.00
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- **3-Ethylpentane**: 0.00
- **1,1-Dimethycyclopentane**: 0.00
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- **1-Trans-2-Dimethycyclopentane**: 0.00
- **1-Trans-3-Dimethycyclopentane**: 0.00
- **Ethylcyclopentane**: 0.00
- **Methylcyclohexane**: 0.00
- **Toluene (Methylbenzene)**: 0.00
- **N-Octane**: 0.00
- **I-Octane**: 0.00
- **Dimethylcyclohexane**: 0.00
- **P-Xylene**: 0.00
- **M-Xylene**: 0.00
- **G-Xylene**: 0.00
- **Ethylbenzene**: 0.00
- **N-Nonane**: 0.00
- **C9 Isoparaffins**: 0.00
- **Isobutylcyclopentane**: 0.00
- **Isopropylcyclohexane**: 0.00
- **C9 Aromatics**: 0.00
### SPR CRUDE OIL COMPREHENSIVE ANALYSIS

**Sample ID:** MLJ 604  **WEST HACKBERRY SWEET**  **Date of Assay:** 6/16/1998

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## Compositional Analysis, MLI 004 WEST HACKBERRY SWEET

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# SPR CRUDE OIL COMPREHENSIVE ANALYSIS

**Sample ID:** MLJ 005  **Date of Assay:** 5/12/1998  **WEST HACKBERRY SOUR**

## Crude

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## Compositional Analysis, MIL 005 WEST HACKBERRY SOUR

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### Composition, Wt.%

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<td>i-Octane</td>
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<td>Dimethylcyclohexane</td>
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<td>O-Xylene</td>
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<td>N-Nonane</td>
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234
## SPR CRUDE OIL COMPREHENSIVE ANALYSIS

### Sample ID: MLI 007  
**Sample Name:** BAYOU CHOCTAW SWEET  
**Date of Assay:** 4/30/1998

### Crude Properties

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<tr>
<td>API Gravity</td>
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<tr>
<td>Nitrogen, Wt. %</td>
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<tr>
<td>Micro Carbon Res., Wt. %</td>
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<tr>
<td>Pour Point, °F</td>
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</tr>
<tr>
<td>RVP, psi @ 100° F</td>
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<tr>
<td>Acid Number, mg KOH/g</td>
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<td>Mercaptan Sulfur, ppm</td>
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<td>H₂S Sulfur, ppm</td>
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<td>Orgn. Cl, ppm</td>
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<td>100°F F</td>
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### Fractional Analysis

| Cut Temp | C₂ - | C₅ - | C₆ - | C₇ - | C₈ - | C₉ - | C₁₀ - | C₁₁ - | C₁₂+ | Vol. % | Vol. Sum % | Wt. % | Wt. Sum % | Specific Gravity, 60/60°F | API Gravity | Sulfur, Wt. % | Nitrogen, Wt. % | Micro Carbon Res., Wt. % | Pour Point, °F | RVP, psi @ 100° F | Acid Number, mg KOH/g | Mercaptan Sulfur, ppm | H₂S Sulfur, ppm | Orgn. Cl, ppm | Viscosity, 77°F cSt | 100°F F |
|-----------|------|------|------|------|------|------|------|------|------|-------|-----------|-------|----------|---------------------|-------------|----------------|-----------------|--------------------------|----------------|----------------|-------------------|----------------|----------------|-------------|----------------|----------------|--------|
| 195°F      |      |      |      |      |      |      |      |      |      | 1.7   | 7.3      | 8.1    | 14.2     | 16.3   | 19.0     | 31.8   | 42.4    | 10.7                  |
| 200°F      |      |      |      |      |      |      |      |      |      | 1.7   | 9.0      | 17.1   | 31.3     | 47.6   | 57.5     | 99.3   | 100.0   | 100.0                   |
| 250°F      |      |      |      |      |      |      |      |      |      | 1.2   | 5.8      | 7.1    | 13.1     | 15.9   | 10.1     | 34.3   | 47.0     | 12.7                  |
| 375°F      |      |      |      |      |      |      |      |      |      | 1.2   | 7.0      | 14.1   | 27.1     | 43.0   | 53.1     | 97.4   | 100.0   | 100.0                   |
| 530°F      |      |      |      |      |      |      |      |      |      |       |          |        |                      |        |          |      |          |                       |
| 650°F      |      |      |      |      |      |      |      |      |      |       |          |        |                      |        |          |      |          |                       |
| 1050°F     |      |      |      |      |      |      |      |      |      |       |          |        |                      |        |          |      |          |                       |

### Other Properties

- Molecular Weight
- Hydrogen, Wt. %
- H₂S Sulfur, ppm
- Orgn. Cl, ppm
- Research Cetane Number
- Motor Octane Number
- Flash Point, °F
- CC Index
- Diesel Index
- Naphthenes, Vol. %
- Smoke point, mm
- Nitrogen, Wt. %
- Viscosity, cSt
- Freezing Point, °F
- Cloud Point, °F
- Pour Point, °F
- Ni, ppm
- V, ppm
- Fe, ppm
- Cu, ppm
- Micro Carbon Res., Wt. %

### Additional Notes

- Date of Assay: 4/30/1998
- Sample ID: MLI 007
- Sample Name: BAYOU CHOCTAW SWEET
- API Gravity: 36.0
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<tr>
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**Composition, Wt.%**

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## SPR CRUDE OIL COMPREHENSIVE ANALYSIS

**Sample ID**  BAYOU CHOCTAW SOUR  **Date of Assay**  5/1/1998

### Crude

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<tr>
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### Fraction

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<th>Residuum</th>
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<td>C₃⁺</td>
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## Compositional Analysis, MLI 008 BAYOU CHOCTAW SOUR

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### Composition, Wt.%

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### SPR CRUDE OIL COMPREHENSIVE ANALYSIS

**Sample ID:** MIL 009  **BIG HILL SWEET**  
**Date of Assay:** 5/4/1988

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### Compositional Analysis, MLI 009 BIG HILL SWEET

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#### Composition, Wt.%

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## SPR CRUDE OIL COMPREHENSIVE ANALYSIS

### Sample ID: MIL-619 BIG HILL SOUR

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### Crude Properties

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<td>Vol. Sum %</td>
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<td>Cu, ppm</td>
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### Notes

- Values are rounded to significant figures.
- All measurements are in standard conditions unless specified otherwise.

---

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## Compositional Analysis, MLI 010 BIG HILL SOUR

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<th>3 175°F</th>
<th>4 250°F</th>
<th>5 375°F</th>
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### Composition, Wt.%

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<th>3 175°F</th>
<th>4 250°F</th>
<th>5 375°F</th>
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EXHIBIT E - SPR DELIVERY POINT DATA

SEAWAY FREEPORT TERMINAL
(Formerly Phillips Terminal)

LOCATION: Brazoria County, Texas (three miles southwest of Freeport, Texas on the Old Brazos River, four miles from the sea buoy)

CRUDE OIL STREAMS: Bryan Mound Sweet, Bryan Mound Sour, and Bryan Mound Maya

DELIVERY POINTS: Seaway Terminal marine dock facility number 2

MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:

TANKSHIP DOCKS: 3 Docks: Nos. 1, 2 and 3

MAXIMUM LENGTH OVERALL (LOA):
Dock 1 - 750 feet during daylight and 615 feet during hours of darkness.
Dock 2 and 3 - 820 feet during daylight and 615 feet during hours of darkness

MAXIMUM BEAM:
Dock 1 - 107 feet
Dock 2 and 3 - 145 feet

MAXIMUM DRAFT:
Dock 1 - 36.5 feet salt water; Docks 2 and 3 - 42 feet salt water; subject to change due to weather and silting conditions

MAXIMUM AIR DRAFT: None

MAXIMUM DEADWEIGHT TONS (DWT):
Maximum DWT at Dock No. 1 is 50,000 DWT. Dock Nos. 2 and 3 can accommodate up to 120,000 DWT if they meet other port restrictions. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

BARGE LOADING CAPABILITY:
Dock No. 1 has the capability to load barges of a minimum 30,000-barrel capacity. Its use, however, is contingent upon the consent of the Government and non-interference with the Government's obligations to other parties.

OILY WASTE RECEPTION FACILITIES:
Facilities are available for oily bilge waste and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

CUSTOMARY ANCHORAGE: Freeport Harbor sea buoy approximately 4.5 miles from the terminal.
SEAWAY TEXAS CITY TERMINAL
(Formerly ARCO Texas City)

LOCATION: Docks 11 and 12, Texas City Harbor, Galveston County, Texas

CRUDE OIL STREAMS: Bryan Mound Sweet, Bryan Mound Sour, and Bryan Mound Maya

DELIVERY POINTS: Marine Docks (11 and 12) and connections to local commercial pipelines

MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:

TANKSHIP DOCKS: 2 Docks: Nos. 11 and 12

MAXIMUM LENGTH OVERALL (LOA): 1020 feet. Maximum bow to manifold centerline distance is 468 feet.

MAXIMUM BEAM: Dock 11 - 180 feet; Dock 12 - 220 feet

MAXIMUM DRAFT: 39.5 feet brackish water; subject to change due to weather and silting conditions

MAXIMUM AIR DRAFT: None

MAXIMUM DEADWEIGHT TONS (DWT): 150,000 DWT each. Terminal permission is required for less than 30,000 DWT or greater than 150,000 DWT. Vessels larger than 120,000 DWT are restricted to daylight transit. Purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

BARGE LOADING CAPABILITY: None

OILY WASTE RECEPTION FACILITIES: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing all costs associated with such arrangements.

CUSTOMARY ANCHORAGE: Bolivar Roads (breakwater) or Galveston sea buoy.
SUN PIPE LINE COMPANY, NEDERLAND TERMINAL

LOCATION: Nederland, Texas (on the Neches River at Smith's Bluff in southwest Texas, 47.6 nautical miles from the bar)

CRUDE OIL STREAMS: West Hackberry Sweet, West Hackberry Sour

DELIVERY POINTS: Sun Terminal marine dock facility and Sun Terminal connections to local commercial pipelines

MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:

TANKSHIP DOCKS: 5 Docks: Nos. 1, 2, 3, 4 and 5

MAXIMUM LENGTH OVERALL (LOA): 1000 feet

MAXIMUM BEAM: 150 feet

MAXIMUM DRAFT: 40 feet fresh water

MAXIMUM AIR DRAFT: 136 feet

MAXIMUM DEADWEIGHT TONS (DWT): Maximum DWT at Dock No. 1 is 85,000 DWT. Dock Nos. 2, 3, 4 and 5 can accommodate up to 150,000 DWT. Vessels larger than 85,000 DWT, 875 feet LOA, or 125 feet beam are restricted to daylight transit. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

BARGE LOADING CAPABILITY: 3 Barge Docks: A, B and C. Each is capable of handling barges up to 25,000 barrels capacity.

OILY WASTE RECEPTION FACILITIES: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

CUSTOMARY ANCHORAGE: South of Sabine Bar Bouy. There is an additional anchorage at the Sabine Bar for vessels with draft of 39 feet of less.

TEXACO 22-INCH/DOE LAKE CHARLES PIPELINE CONNECTION

LOCATION: Lake Charles Upper Junction, located in Section 36, Township 10 South, Range 10 West, Calcasieu Parish, (Lake Charles) Louisiana

CRUDE OIL STREAMS: West Hackberry Sweet, West Hackberry Sour

DELIVERY POINT: Texaco 22-Inch/DOE Lake Charles Pipeline Connection

MARINE DISTRIBUTION FACILITIES: None
EQUILON SUGARLAND TERMINAL

LOCATION: St. James Parish, Louisiana (30 miles southwest of Baton Rouge on the west bank of the Mississippi River at mile-marker 158.3)

CRUDE OIL STREAMS: Bayou Choctaw Sweet, Bayou Choctaw Sour

DELIVERY POINTS: Sugarland Terminal marine dock facility and LOCAP and Capline Terminals (connections to Capline interstate pipeline system and local commercial pipelines)

MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:

TANKSHIP DOCKS: 2 Docks: Nos. 1 and 2

MAXIMUM LENGTH OVERALL (LOA): 940 feet

MAXIMUM BEAM: None

MAXIMUM DRAFT: 45 feet fresh water

MAXIMUM AIR DRAFT: 153 feet less the river stage

MAXIMUM DEADWEIGHT TONS (DWT): 100,000 DWT. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

BARGE LOADING CAPABILITY: None

OILY WASTE RECEPTION FACILITIES: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements and for bearing all costs associated with such arrangements. Terminal can provide suitable contacts.

CUSTOMARY ANCHORAGE: Grandview Reach approximately 11 miles from the terminal.
UNOCAL BEAUMONT TERMINAL

LOCATION: Beaumont Terminal, located downstream south bank of the Neches River, approximately 8 miles SE of Beaumont, Texas

CRUDE OIL STREAMS: Big Hill Sweet, Big Hill Sour

DELIVERY POINTS: Unocal Beaumont Terminal No. 2 Crude Dock and connections to local commercial pipelines

MARINE DOCK FACILITIES AND VESSEL RESTRICTIONS:

TANKSHIP DOCKS: 1 Dock (No. 2)

MAXIMUM LENGTH
OVERALL (LOA): 1,020 feet

MAXIMUM BEAM: 150 feet

MAXIMUM DRAFT: 40 foot fresh water

MAXIMUM AIR DRAFT: 136 feet

MAXIMUM DEADWEIGHT TONS (DWT): Maximum DWT at Dock No. 2 is 150,000 DWT. Vessels larger than 85,000 DWT, 875 feet LOA, or 125 feet beam are restricted to daylight transit. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size and they are responsible for confirming that proposed vessels can be accommodated.

BARGE LOADING CAPABILITY: None

OILY WASTE RECEPTION FACILITIES: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

VAPOR RECOVERY: Dock No. 2 is equipped with a crude oil vapor control system. All vessels loading crude must be outfitted with vapor control equipment. No vessel will be allowed to load without this equipment onboard.

CUSTOMARY ANCHORAGE: South of Sabine Bar Buoy. There is an additional anchorage at the Sabine Bar for vessels with draft of 39 feet or less.

TEXACO 20-INCH PIPELINE (TPL) METER STATION

LOCATION: Jefferson County, Texas, Seven miles west and one mile north of FM 365 and Old West Port Arthur Road.

CRUDE OIL STREAMS: Big Hill Sweet, Big Hill Sour

DELIVERY POINT: TPL East Houston Terminal, Exxon Junction (Channelview), Oil Tanking Junction

MARINE DISTRIBUTION FACILITIES: None
EXHIBIT F

SAMPLE - OFFER STANDBY LETTER OF CREDIT

BANK LETTERHEAD

IRREVOCABLE STANDBY LETTER OF CREDIT

DATE: _______________________

Acquisition and Sales Division
Mail Stop FE-4451
Project Management Office
Strategic Petroleum Reserve
U.S. Department of Energy
900 Commerce Road East
New Orleans, LA 70123

To the Strategic Petroleum Reserve Sales Contracting Officer:

By order of our customer __________________________ we hereby establish in the U.S. Department of Energy’s favor, an irrevocable standby Letter of Credit, Numbered __________, for an amount not to exceed U.S. $____________ (_________), effective immediately on account of our customer in response to the U.S. Department of Energy’s Notice of Sale No. __________, including any amendments thereto, for the sale of Strategic Petroleum Reserve petroleum. This Letter of Credit expires 60 days from the date of issuance of this Letter of Credit.

This Letter of Credit is available by wire payment to the U.S. Department of Energy against presentation of a demand on us of a manually signed statement (with blanks filled in) containing the following:

“THIS DRAWING OF U.S. $____________ (____________) AGAINST YOUR LETTER OF CREDIT NUMBERED __________, DATED __________, IS DUE THE U.S. GOVERNMENT BECAUSE OF THE FAILURE OF __________________________ TO HONOR ITS OFFER TO ENTER INTO A CONTRACT FOR THE PURCHASE OF PETROLEUM FROM THE STRATEGIC PETROLEUM RESERVE, IN ACCORDANCE WITH THE U.S. GOVERNMENT’S NOTICE OF SALE NO. __________, INCLUDING ANY AMENDMENTS THERETO.”

Upon receipt of the U.S. Department of Energy’s demand by hand, mail express delivery, or other means, at our office located __________________________________, we will honor the demand and make payment, by 3 p.m. Eastern Time of the next business day following receipt of the demand,
by either wire transfer of funds as a deposit to the account of the U.S. Treasury over the Fedwire Deposit System Network, or by electronic funds transfer through the Automated Clearing House Network, using the Federal Remittance Express Program. The information to be included in each transfer will be as provided by the above referenced Notice of Sale.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision, International Chamber of Commerce Publication No 500) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the State in which the issuer’s head office within the United States is located.

Address all communications regarding this Letter of Credit to
______________________________________________.

Yours truly,

__________________________________________
(Authorized Signature)

_______________________________________
(Typed Name and Title)

INSTRUCTIONS FOR OFFER LETTER OF CREDIT

1. Letters of Credit must not vary in substance from this attachment. Provide a copy of this exhibit to your bank.

2. Insert date of issuance of Letter of Credit.

3. Insert dollar amount of Letter of Credit in numbers and in words.

4. Banks shall fill in all blanks except those in drawing statement. The drawing statement is in bold print with double lines for the blanks. Do not fill in the double-lined blanks.

5. The information to be included and format to be used either for wire transfer as a deposit over the Fedwire Deposit System Network or for electronic funds transfer through the Automated Clearing House network, using the Federal Remittance Express Program, will be provided in the applicable Notice of Sale.

6. If available, please include the American Bank Association Number on Letter of Credit.

7. Type name under authorized signature.

8. If Offeror (banker’s customer) or bank forwards letter of credit separately from the offer, the envelope shall clearly say “Offer Standby Letter of Credit (Name of Company)” and shall be clearly marked in accordance with Standard Sales Provision B.7(c).
EXHIBIT G

SAMPLE - PAYMENT AND PERFORMANCE LETTER OF CREDIT

BANK LETTERHEAD

IRREVOCABLE STANDBY LETTER OF CREDIT

DATE: ________________________________

TO: Acquisition and Sales Division
    Mail Stop FE-4451
    Project Management Office
    Strategic Petroleum Reserve
    U.S. Department of Energy
    900 Commerce Road East
    New Orleans, LA 70123

CONTRACTOR: ______________________________________________________
CONTRACT NO.: ____________________________________________________
LETTER OF CREDIT NO.: ____________________________________________

Gentlemen:

We hereby establish in the U.S. Department of Energy’s favor our irrevocable standby Letter of Credit for about $U S (_____) effective immediately. This letter of credit is available by your draft/s at sight, drawn on us and accompanied by a manually signed statement that the signer is an authorized representative of the Department of Energy, and one or both of the following statements:

a. "I HEREBY CERTIFY THAT THE UNITED STATES GOVERNMENT HAS DELIVERED CRUDE OIL UNDER THE TERMS OF CONTRACT NUMBER (____), AND THAT (CONTRACTOR) HAS NOT PAID UNDER THE TERMS OF THAT CONTRACT, AND AS A RESULT OWES THE GOVERNMENT $ (____)"

b. "I HEREBY CERTIFY THAT (CONTRACTOR) HAS FAILED TO TAKE DELIVERY OF CRUDE OIL UNDER THE TERMS OF CONTRACT NUMBER (____), AND AS A RESULT OWES THE GOVERNMENT $ (____)"

Drafts must be presented for negotiations on or before the expiration date of this Letter of Credit, (Expiration Date), at our bank. The Government may make multiple drafts against this Letter of Credit.

Upon receipt of the U.S. Department of Energy’s demand by hand, mail express delivery, or other means, at our office we will honor the demand and make payment, by 3 p.m. Eastern Time of the next business day following receipt of the demand, by either wire transfer of funds as a
Department of Energy  
Pt. 625, App. A  

deposit to the account of the U.S. Treasury over the Fedwire Deposit System Network, or by electronic funds transfer through the Automated Clearing House Network, using the Federal Remittance Express Program. The information to be included in each transfer will be as provided in the above referenced Contract.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 Revision, International Chamber of Commerce Publication No. 500) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the state in which the issuer's head office within the United States is located.

We hereby agree with the drawers, endorsers and bona fide holders that all drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored upon presentation and delivery of the above documents for negotiation at our bank on or before the expiration date.

Sincerely,

(Authorized Signature)  
(Typed Name and Title)  

INSTRUCTIONS FOR PAYMENT AND PERFORMANCE  
LETTER OF CREDIT

1. Letter of Credit must not vary in substance from this attachment. Provide a copy of this attachment to your bank.

2. Insert date of issuance of Letter of Credit.

3. Insert dollar amount of Letter of Credit in numbers and in words.

4. Banks shall fill in all blanks except those in the drawing statements. The drawing statements are in bold print with double lines for the blanks. Do not fill in the double-lined blanks.

5. The information to be included and format to be used either for wire transfer as a deposit over the Fedwire Deposit System Network or for electronic funds transfer through the Automated Clearing House network, using the Federal Remittance Express Program, will be provided in the Contract.

6. If available please include the American Bank Association Number on Letter of Credit.

7. Type name under authorized signature.
Exhibit H

STRATEGIC PETROLEUM RESERVE CRUDE OIL DELIVERY REPORT

1. SALE CONTRACT NUMBER
2. TERMINAL REPORT NUMBER
3. CARGO NUMBER

4. DATE DELIVERED
5. TRANSPORTATION MODE
   □ TANKER □ RAILCAR □ PIPELINE
6. ACCEPTANCE POINT
7. PRICE DATE

8. SHIPPER NAME AND ADDRESS
9. TERM OR DESTINATION
10. CARRIER

11. CONTRACT UNIT ITEM
12. DESCRIPTION OF CRUDE OIL AND GROSS BILLS
13. API GRAVITY
14. TOTAL SUMP %
15. DELIVERED NET BILLS & @ 60°F
16. UNIT PRICE
17. AMOUNT DUE

18. QUALITY ADJUSTMENT - INCREASE/DIVERSE
   □ ADJUSTED API GRAVITY
   □ DELIVERED API GRAVITY
   □ VARIANCE = (2) - (1)
   □ ALLOWABLE VARIANCE
   □ NET VARIANCE = (3) - (4)

19. NET AMOUNT DUE

20. THE DELIVERED NET BARRELS, UNIT PRICE, PRICE DATE, QUALITY
    ADJUSTMENT AND NET AMOUNT DUE HAVE BEEN VERIFIED.
    SIGNATURE: ________________________
    ACCOUNTABLE OFFICER: ________________________

21. TIME STATEMENT
   □ NOTICE OF READINESS TO LOAD
   □ VESSEL ARRIVED IN PORT
   □ PILOT ON BOARD
   □ WEIGHED ANCHOR
   □ FIRST LINE ADDED
   □ MODIFIED AS AGREED
   □ STARTED BALLAST DISCHARGE
   □ FINISHED BALLAST DISCHARGE
   □ INSPECTED AND READY TO LOAD
   □ CARGO HOSES CONNECTED
   □ COMMENCED LOADING
   □ STOPPED LOADING
   □ RESUMED LOADING
   □ FINISHED LOADING
   □ CARGO HOSES REMOVED
   □ VESSEL RELEASED BY INSPECTOR
   □ COMMENCED UNLOADING
   □ RESUMED UNLOADING
   □ FINISHED UNLOADING
   □ VESSEL LEFT BERTH (ACTUAL OR ESTIMATED)

22. REMARKS

23. GOVERNMENT INSPECTOR'S CERTIFICATE
   I HEREBY CERTIFY THAT THE CARGO (PIE) SHIPMENT
   WAS INSPECTED, DELIVERED AND ACCEPTED AS SHOWN HEREBE.
   DATE: ________________________
   SIGNATURE: ________________________
   NAME TYPED PRINTED: ________________________

24. RECEIPT IS ACKNOWLEDGED FOR THE QUANTITY AND QUALITY
    SHOWN HEREBE.
    DATE RECEIVED: ________________________
    AGENT: ________________________
    NAME TYPED PRINTED: ________________________

25. I CERTIFY THAT THE TIME STATEMENT SHOWN HEREBE IS
    CORRECT.
    SIGNATURE: ________________________
    NAME TYPED PRINTED: ________________________

SPRMD-301D.3-56 1/87 REV. 8/91
Department of Energy

Pl. 625, App. A

EXHIBIT I

INSTRUCTION GUIDE FOR RETURN OF OFFER GUARANTEES
BY ELECTRONIC TRANSFER OR TREASURY CHECK

Offer guarantees will be returned at the option of the Government by either check or electronic funds transfer through the Treasury Fedline Payment System (FEDLINE). Offerors shall designate a financial institution for receipt of electronic funds transfer payments and provide the following information:

(1) Name and address of the financial institution receiving payment.

(2) The American Bankers Association 9-digit identifying number for wire transfers of the financing institution receiving payment if the institution has access to FEDLINE.

(3) Payee's account number at the financial institution where funds are to be transferred.

(4) If the financial institution does not have access to FEDLINE, name and address of the correspondent financial institution through which the financial institution receiving payment obtains wire transfer activity. Provide the American Bankers Association identifying number for the correspondent institution.

EXHIBIT J

OFFER GUARANTEE CALCULATION WORKSHEET

<table>
<thead>
<tr>
<th>ROW</th>
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1. Using a separate worksheet for each ML offered against, from the FPR Sales Offer Form, enter the ML maximum quantity offered on (expressed in thousands of barrels) in Column (A), Row 1.

2. Starting with the highest DL unit price offered on the ML from the FPR Sales Offer Form (and the highest preference if the unit prices of two or more DLs are the same) enter the unit price in Row 1, Column (B); the DL letter in Row 1, Column (C); the DL desired quantity in Row 1, Column (D) (in thousands of barrels) and the maximum quantity in Row 1, Column (E) (the minimum quantity in either the Governments minimum contract quantity, if the offer indicates the offerer will accept as little as that amount, or the desired quantity. If the offer indicates he will accept no less than that amount). See instructions for the FPR Sales Offer Form.

3. If either the desired quantity in Column (D), or the minimum quantity in Column (E) exceeds the maximum quantity in Column (A), you have made an error; either on this form or the offer form and should recheck your figures.

4. Multiply the price in Row 1, Column (B) times the desired quantity in Column (D) (as expressed in thousands) and write the total DL price in Column (F).

5. Multiply the total DL price in Column (F) times the factor in Column (G) and enter the product in Column (H). The factor is 5% of 1000.

6. Subtract the DL desired quantity in Row 1, Column (D) from the maximum quantity in Row 1, Column (A). Enter the result in Row 2, Column (A). If the result is zero, go to step 11.

7. Enter the next highest unit price for the ML from the offer form in Row 2, Column (B). Enter the DL letter, desired quantity, and minimum quantity in their respective columns. If there is a maximum quantity remaining in Row 2, Column (A), but no more DLs letters, or the minimum quantity in Row 2, Column (E) exceeds the maximum quantity, you may have made an error and should recheck your figures.

8. Multiply the lesser of the remaining maximum quantity in Column (A) (even if this quantity is less than MINQ), or the desired quantity in Column (D) times the unit price and enter the resulting total DL price in Column (F).
9. Multiply Column (F) times the factor in Column (G) and enter the product in Column (H).
10. Repeat steps 8-9 for the next higher unit price until the maximum quantity remaining is zero, then go to step 11.
11. Sum the amounts in Column (H) and enter the total in Row 8, Column (H). Sum the amount for all the worksheets. If the sum of all the worksheets is less than $10,000,000, enter the sum in the space marked offer bond on the SRS Sales Offer Form. If the sum exceeds $16,000,000, then enter $16,000,000 on the offer form. Send with the offer or wire concurrently to the U.S. Treasury (refer to instructions in the Notice of Sale) an offer guarantee in the amount indicated on the offer form. These worksheets need not be submitted with the offer and should be retained for your files.

[63 FR 54198, Oct. 8, 1998]
### CHAPTER III—DEPARTMENT OF ENERGY

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PART 706—SECURITY POLICIES AND PRACTICES RELATING TO LABOR-MANAGEMENT RELATIONS

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SOURCE: 41 FR 56776, Dec. 30, 1976, unless otherwise noted.

GENERAL

§ 706.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter “DOE,” security policies and practices in the area of labor-management relations.

§ 706.2 Basis and scope.

The specific policies contained in this part are worked out within the framework of DOE’s general objectives for labor-management relations in the DOE program, namely:

(a) Wholehearted acceptance by contractors and by labor and its representatives of the moral responsibility inherent in participation in the DOE program;

(b) Development of procedures to assure (1) that all participants in the program are loyal to the United States including those whose participation involves the exercise of negotiating and disciplinary authority over bargaining units, and (2) that determination of unit, jurisdiction, and similar questions will not breach security;

(c) Continuity of production at vital DOE installations;

(d) Consistent with DOE’s responsibility under the law, the least possible governmental interference with the efficient management expected from DOE contractors;

(e) Minimum interference with the traditional rights and privileges of American labor.

SECURITY POLICIES AND PROCEDURES IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

§ 706.10 Policy.

It is policy of DOE that NLRB cases falling within the scope of the Labor Management Relations Act at the various DOE installations should be conducted in normal fashion wherever possible, on the basis of open hearings, unclassified records and published decisions. This policy does not preclude adoption of special arrangements which may be required for reasons of program security at any stage of the proceedings in particular areas.

§ 706.11 Consent elections.

In accordance with the recommendation of the President’s Commission on Labor Relations in the Atomic Energy Installations, it is the policy of DOE to encourage every effort by management and labor at DOE installations to determine bargaining units and representatives by agreement and consent elections in preference to contested proceedings before the National Labor Relations Board.

§ 706.12 Administrative Law Judges.

By agreement with the National Labor Relations Board, a panel of cleared NLRB administrative law judges is maintained to facilitate resolution of questions as to the materiality of classified information in NLRB hearings and to facilitate preparation of an unclassified record. The assignment of individual administrative law judges to DOE cases remains a matter within the discretion of the National Labor Relations Board.
§ 706.13 Clearance of counsel.

It is recognized that clearance of counsel for the parties is sometimes desirable for proper preparation of a case even though the record is to be unclassified. Clearance of counsel makes possible their participation in any closed discussions needed preparatory to making an unclassified record. Each party is responsible for requesting clearance of its counsel well in advance so that clearance requirements will not delay the proceeding. The clearance of temporary special counsel will be terminated on completion of the proceeding.

§ 706.14 DOE’s role in proceedings.

If controversies within the scope of the Labor Management Relations Act arise which cannot be adjusted by mutual agreement, and contested proceedings before NLRB result, each party to such proceedings will present his own position and the evidence in support thereof with due regard for existing security rules. DOE will be continuously informed of the progress of such proceedings and will act as may appear desirable (a) to assure the protection of classified information; (b) to assure that material and relevant information is not withheld from the record on grounds of security if such information can be supplied in unclassified form; and (c) to assist in determining appropriate action where a decision may turn on data which can be expressed only in classified form.

LOYALTY OF PARTICIPANTS

§ 706.20 Policy.

Loyalty to the United States is a paramount factor applicable to all participants in DOE program including those whose participation (although not requiring access to restricted data) involves the exercise of administrative, negotiating and disciplinary authority over bargaining units composed of employees engaged on classified work. Individuals involved in questions of loyalty will be given full opportunity to explore the questions with DOE. DOE will take such further steps as may be appropriate in the circumstances.

§ 706.30 Clearance of certain local union representatives.

It is recognized that security clearance of certain union representatives may be necessary to assure opportunity for effective representation of employees in collective bargaining relationships with DOE contractors. Accordingly, DOE managers may authorize investigation for “Q” clearance of union officials whose functions as representatives of employees may reasonably be expected to require access to Restricted Data under NLRB and other procedures according to applicable law (LMRA, 1947); to effectively perform their representation functions in the resolution of grievances and in other collective bargaining relationships with contractors; to effectuate the recommendation of the President’s Commission on Labor Relations in the Atomic Energy Installations in respect to integration of the union into the plant organization “as to two-way channel of communication and a medium of understanding between management and workers”.

(a) In the pre-contract stage of union-management relations, the requirements of the Labor Management Relations Act normally will be the applicable criteria for determining which bargaining representatives, if any, will need access to classified material in the exercise of their functions as employee representatives.

(b) After a bargaining relationship has been established between the contractor and the representatives of its employees the nature of this relationship and the procedures followed in it normally will be the controlling criteria for determination of the access to be granted to particular persons in carrying out their functions as employee representatives. For example, many contract grievance procedures designate by title certain union and management officials who are to have definite roles in the resolution of grievances under the procedure. Investigation for “Q” clearance will normally be
in order for such officials, both company and union, employee, and non-employee. In addition, persons not so designated may be investigated for clearance where the company and the union advise DOE manager that their established relationships contemplate access for such persons.

§ 706.31 Clearance of conciliators and arbitrators.
Conciliators and arbitrators who are regularly assigned to DOE cases may be processed for “Q” clearance at the discretion of the local DOE manager, either on the manager’s initiative or at the request of a contractor.

§ 706.32 Security indoctrination of non-employee representatives.
All collective bargaining representatives, company and union, who are to have access to Restricted Data, will be given appropriate security indoctrination.

§ 706.40 Final responsibility of DOE in security matters.
On all matters of security at all Government-owned, privately operated DOE installations, DOE retains absolute and final authority, and neither the security rules nor their administration are matters for collective bargaining between management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.

PART 707—WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES

Subpart A—General Provisions

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707.2 Scope.
707.3 Policy.
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Subpart B—Procedures

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707.17 Permissible actions in the event of contractor noncompliance.


Source: 57 FR 32656, July 22, 1992, unless otherwise noted.
§ 707.3 Policy.

It is the policy of DOE to conduct its programs so as to protect the environment, maintain public health and safety, and safeguard the national security. This policy is advanced in this rule by requiring contractors and subcontractors within its scope to adopt procedures consistent with the baseline requirements of this part, and to impose significant sanctions on individuals in testing designated positions or with unescorted access to the control areas of certain DOE reactors, who use or are involved with illegal drugs.

§ 707.4 Definitions.

For the purposes of this part, the following definitions apply:

Collection Site Person means a technician or other person trained and qualified to take urine samples and to secure urine samples for later laboratory analysis.

Confirmed Positive Test means, for drugs, a finding based on a positive initial or screening test result, confirmed by another positive test on the same sample. The confirmatory test must be by the gas chromatography/mass spectrometry method.

Counseling means assistance provided by qualified professionals to employees, especially, but not limited to those employees whose job performance is, or might be, impaired as a result of illegal drug use or a medical-behavioral problem; such assistance may include short-term counseling and assessment, crisis intervention, referral to outside treatment facilities, and follow-up services to the individual after completion of treatment and return to work.

Drug Certification means a written assurance signed by an individual with known past illegal drug involvement, as a condition for obtaining or retaining a DOE access authorization, stating that the individual will refrain from using or being involved with illegal drugs while employed in a position requiring DOE access authorization (security clearance).

Employee Assistance means a program of counseling, referral, and educational services concerning illegal drug use and other medical, mental, emotional, or personal problems of employees, particularly those which adversely affect behavior and job performance.

Hazardous Material means any material subject to the placarding requirements of 49 CFR 172.504, table 1, and materials presenting a poison-inhalation hazard that must be placarded under the provisions of 49 CFR 172.505.

Illegal Drug means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811, 812. The term "illegal drugs" does not apply to the use of a controlled substance in accordance with terms of a valid prescription, or other uses authorized by law.

Management and Operating Contract means an agreement for the operation, maintenance, or support, on behalf of the Government, of a Government-owned or controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of DOE.

Medical Review Officer (MRO) means a licensed physician, approved by DOE to perform certain functions under this part. The MRO is responsible for receiving laboratory results generated by an employer’s drug testing program, has knowledge of illegal drug use and
other substance abuse disorders, and has appropriate medical training to interpret and evaluate an individual's positive test result, together with that person's medical history and any other relevant biomedical information. For purposes of this part a physician from the site occupational medical department may be the MRO.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any Department of Energy or Department of Energy-controlled operation, if the deviation has environmental, public health and safety, or national security protection significance. Incidents having such significance include the following, or incidents of a similar nature:

(1) Injury or fatality to any person involving actions of a Department of Energy contractor employee.
(2) Involvement of nuclear explosives under Department of Energy jurisdiction which results in an explosion, fire, the spread of radioactive material, personal injury or death, or significant damage to property.
(3) Accidental release of pollutants which results or could result in a significant effect on the public or environment.
(4) Accidental release of radioactive material above regulatory limits.

Random Testing means the unscheduled, unannounced urine drug testing of randomly selected individuals in testing designated positions, by a process designed to ensure that selections are made in a non-discriminatory manner.

Reasonable Suspicion means a suspicion based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts, as detailed further in §707.10.

Referral means the direction of an individual toward an employee assistance program or to an outside treatment facility by the employee assistance program professional, for assistance with prevention of illegal drug use, treatment, or rehabilitation from illegal drug use or other problems. Referrals to an employee assistance program can be made by the individual (self-referral), by contractor supervisors or managers, or by a bargaining unit representative.

Rehabilitation means a formal treatment process aimed at the resolution of behavioral-medical problems, including illegal drug use, and resulting in such resolution.

Special Nuclear Material has the same meaning as in section 11aa of the Atomic Energy Act of 1954 (42 U.S.C. 2014(aa)).

Specimen Chain of Custody Form is a form used to document the security of the specimen from time of collection until receipt by the laboratory. This form, at a minimum, shall include specimen identifying information, date and location of collection, name and signature of collector, name of testing laboratory, and the names and signatures of all individuals who had custody of the specimen from time of collection until the specimen was prepared for shipment to the laboratory.

Testing Designated Position names a position whose incumbents are subject to drug testing under this part.

Subpart B—Procedures

§ 707.5 Submission, approval, and implementation of a baseline workplace substance abuse program.

(a) Each contractor subject to this part shall develop a written program consistent with the requirements of this part and the guidelines of the Department of Health and Human Services and subsequent amendments to those guidelines ("Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 FR 11970, April 11, 1988; hereinafter "HHS Mandatory Guidelines"), and applicable to appropriate DOE sites. Such a program shall be submitted to DOE for review and approval, and shall include at least the following baseline elements:

(1) Prohibition of the use; possession, sale, distribution, or manufacture of illegal drugs at sites owned or controlled by DOE;
(2) Plans for instruction of supervisors and employees concerning problems of substance abuse, including illegal drug use, and the availability of assistance through the employee assistance program and referrals to other resources, and the penalties that may be imposed upon employees for drug-related violations occurring on the DOE owned or controlled site;

(3) Provision for distribution to all employees engaged in performance of the contract on the DOE owned or controlled site of a statement which sets forth the contractor's policies prohibiting the possession, sale, distribution, or manufacture of illegal drugs at the DOE owned or controlled site. The statement shall include notification to all employees that as a condition of employment under the contract, the employee will:

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring on the DOE owned or controlled site no later than 10 calendar days after such conviction;

(4) Provision for written notification to the DOE contracting officer within 10 calendar days after receiving notice under paragraph (a)(3)(ii) of this section, from an employee or otherwise receiving actual notice of an employee's conviction of a drug-related offense;

(5) Provision for imposing one of the following actions, with respect to any employee who is convicted of a drug-related violation occurring in the workplace, within 30 calendar days after receiving such notice of conviction under paragraph (a)(4) of this section:

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Offering such employee, consistent with the contractor's policies, an opportunity to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency. If the employee does not participate in such a rehabilitation program, the contractor must take appropriate personnel action, up to and including termination, in accordance with the contractor's policies.

(6) Commitment to make a good faith effort to maintain a workplace free of substance abuse through implementation of paragraphs (a)(1) through (a)(5) of this section.

(b) In addition, the following baseline elements must be included in programs developed by contractors that have identified testing designated positions (see §707.7(b));

(1) Notification to DOE of the positions subject to drug testing;

(2) Prohibition of individuals in testing designated positions who are not free from the use of illegal drugs from working in those positions;

(3) Sanctions for individuals in testing designated positions who violate the prohibitions of paragraphs (a)(1) or (b)(2) of this section;

(4) Provision for:

(i) Notification, at least 60 days in advance of initiating testing, to those individuals subject to drug testing, unless the contractor is currently conducting a testing program.

(ii) Urine drug analysis of applicants for testing designated positions before final selection for employment or assignment;

(iii) Random urine drug analysis for employees in testing designated positions;

(iv) Urine drug analysis for employees in testing designated positions on the basis of reasonable suspicion, as a result of an occurrence, or as a follow-up to rehabilitation; and

(v) Random urine drug analysis and urine drug analysis on the basis of reasonable suspicion or as the result of an occurrence, for any individual with unescorted access to the control areas of certain DOE reactors (see §707.7(c)).

(vi) Written notice to the contractor by an employee in a testing designated position of a drug-related arrest or conviction, or receipt of a positive drug test result regarding that employee, as soon as possible but within 10 calendar days of such arrest, conviction, or receipt; and

(vii) Appropriate action, if any, to be taken regarding an employee who:

(A) is arrested for or convicted of a drug-related offense; or
(B) has a positive drug test result (consistent with §707.14).

(5) Provision to employees of the opportunity for rehabilitation, consistent with the contractor's policies, under circumstances as provided in this part (see §707.14(b));

(6) Immediate notification to DOE security officials whenever the circumstances in connection with procedures under this part raise a security concern as provided in DOE Orders, rules and regulations; such circumstances including, but are not necessarily limited to, a determination that an individual holding a DOE access authorization has used an illegal drug.

(c) Each contractor's written policy and procedures under this part shall comply with the requirements of 10 CFR part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material."

(d) Contractors are required to submit all subcontracts they believe to be within the scope of this part to DOE for a determination as to whether the subcontract falls within the scope of this part. Subcontractors so determined to be within the scope of this part shall be required to agree to comply with its requirements, as a condition of eligibility for performing the subcontract work. Each subcontractor subject to this part shall submit its plan to the appropriate prime contractor for approval; the contractor shall be responsible for periodically monitoring the implementation of the subcontractor's program for effectiveness and compliance with this part.

(e) In reviewing each proposed workplace substance abuse plan, DOE shall decide whether the program meets the applicable baseline requirements established by this part. The responsible DOE official will reject proposed workplace substance abuse plans approved by DOE. DOE will also periodically review implementation of programs conducted by prime contractors, to assure consistency of application among prime contracts (and subcontracts where appropriate) throughout DOE.

(f) DOE shall periodically review and evaluate each contractor's program, including the contractor's oversight of the covered subcontractors, to assure effectiveness and compliance with this part.

(g) Contractors or proposers will submit their program to DOE for review within 30 days of notification by DOE that the contract or proposed contract falls within the scope of this part. Workplace substance abuse programs, as provided in this part, shall be implemented within 30 days of approval by DOE. DOE may grant an extension to the notification or implementation period, as warranted by local conditions. Implementation may require changes to collective bargaining agreements as discussed in §707.15 of this part.

(h) To assure consistency of application, DOE shall periodically review designated contracts and testing designated positions included in the workplace substance abuse plans approved by DOE. DOE will also periodically review implementation of programs conducted by prime contractors, to assure consistency of application among prime contracts (and subcontracts where appropriate) throughout DOE.

(i) This part preempts any State or local law, rule, regulation, order, or standard to the extent that:

(1) compliance with both the State or local requirement and any requirements in this part is not possible; or

(2) compliance with the State or local requirement is an obstacle to the accomplishments and execution of any requirement in this part.

§707.6 Employee assistance, education, and training.

Contractor programs shall include the following or appropriate alternatives:

(a) Employee assistance programs emphasizing preventive services, education, short-term counseling, coordination and referral to outside agencies,
and follow-up. These services shall be available to all contractor on-site employees involved in the DOE contract. The contractor has no obligation to pay the costs of any individual’s counseling, treatment, or rehabilitation beyond those services provided by the contractor’s employee assistance program, except as provided for in the contractor’s benefits programs. DOE undertakes no obligation to pay for any individual’s counseling, rehabilitation, or treatment, unless specifically provided for by contract.

(b) Education and training programs for on-site employees on a periodic basis, which will include, at a minimum, the following subjects:

(1) For all on-site employees: Health aspects of substance abuse, especially illegal drug use; safety, security, and other workplace-related problems caused by substance abuse, especially illegal drug use; the provisions of this rule; the employer’s policy; and available employee assistance services.

(2) For managers and supervisors:

(i) The subjects listed in paragraph (b)(1) of this section;

(ii) Recognition of deteriorating job performance or judgment, or observation of unusual conduct which may be the result of possible illegal drug use;

(iii) Responsibility to intervene when there is deterioration in performance, or observed unusual conduct, and to offer alternative courses of action that can assist the employee in returning to satisfactory performance, judgment, or conduct, including seeking help from the employee assistance program;

(iv) Appropriate handling and referral of employees with possible substance abuse problems, especially illegal drug use; and

(v) Employer policies and practices for giving maximum consideration to the privacy interests of employees and applicants.

§ 707.7 Random drug testing requirements and identification of testing designated positions.

(a)(1) Each workplace substance abuse program will provide for random testing for evidence of the use of illegal drugs of employees in testing designated positions identified in this section.

(2) Programs developed under this part for positions identified in paragraph (b)(3) of this section shall provide for random tests at a rate equal to 50 percent of the total number of employees in testing designated positions for each 12 month period. Employees in the positions identified in paragraphs (b)(1), (b)(2), and (c) of this section will be subject to random testing at a rate equal to 100 percent of the total number of employees identified, and those identified in paragraphs (b)(1) and (b)(2) of this section may be subject to additional drug tests.

(b) The testing designated positions subject to random drug testing are:

(1) Positions determined to be covered by the Personnel Security Assurance Program (PSAP), codified at 10 CFR part 710. PSAP employees will be subject to the drug testing standards of this part and any additional requirements of the PSAP rule.

(2) Positions which entail critical duties that require an employee to perform work which affords both technical knowledge of and access to nuclear explosives sufficient to enable the individual to cause a detonation (high explosive or nuclear), in what is commonly known as the Personnel Assurance Program (PAP). PAP employees will be subject to the drug testing standards of this part and any additional requirements of the PAP program.

(3) Positions identified by the contractor which entail duties where failure of an employee adequately to discharge his or her position could significantly harm the environment, public health or safety, or national security, such as:

(i) Pilots;

(ii) Firefighters;

(iii) Protective force personnel, exclusive of those covered in paragraphs (b)(1) or (b)(2) of this section, in positions involving use of firearms where the duties also require potential contact with, or proximity to, the public at large;

(iv) Personnel directly engaged in construction, maintenance, or operation of nuclear reactors; or

(v) Personnel directly engaged in production, use, storage, transportation,
or disposal of hazardous materials sufficient to cause significant harm to the environment or public health and safety.

(4) Other positions determined by the DOE, after consultation with the contractor, to have the potential to significantly affect the environment, public health and safety, or national security.

(c) Each contractor shall require random testing of any individual, whether or not an employee, who is allowed unescorted access to the control areas of the following DOE reactors: Advanced Test Reactor (ATR); C Production Reactor (C); Experimental Breeder Reactor II (EBR-II); Fast Flux Test Facility (FPTF); High Flux Beam Reactor (HFR); High Flux Isotope Reactor (HFIR); K Production Reactor (K); L Production Reactor (L); N Production Reactor (N); Oak Ridge Research Reactor (ORR); and P Production Reactor (P). A confirmed positive test shall result in such an individual being denied unescorted access. If such an individual is not an employee of the contractor, that individual may be granted unescorted access only after the individual meets the conditions established in §707.14(d) of this part. If, after restoration of unescorted access, such an individual is determined to have used illegal drugs for a second time, unescorted access shall be denied for a period of not less than three (3) years. Such an individual thereafter shall be granted unescorted access only upon a determination by DOE that a grant of unescorted access to the individual presents no unacceptable safety or security risk. If such an individual is an employee, that individual is subject to the other requirements of this part, including appropriate disciplinary measures.

(d) A position otherwise subject to testing under this part may be exempted from such testing if it is within the scope of another comparable Federal drug testing program, as determined by DOE, after consultation with the contractor, to avoid unnecessary multiple tests.

§707.10 Drug testing for reasonable suspicion of illegal drug use.

(a)(1) It may be necessary to test any employee in a testing designated position, or individuals with unescorted access to the control areas of the DOE reactors listed in §707.7(c), for the use of illegal drugs, if such individuals could have contributed to the conditions which caused the occurrence. For an occurrence requiring immediate notification or reporting as required by applicable DOE Orders, rules, and regulations, the contractor will require testing as soon as possible after the occurrence but within 24 hours of the occurrence, unless DOE determines that it is not feasible to do so. For other occurrences requiring notifications to DOE as required by applicable DOE Orders, rules, and regulations, the contractor may require testing.

§707.8 Applicant drug testing.

An applicant for a testing designated position will be tested for the use of illegal drugs before final selection for employment or assignment to such a position. Provisions of this part do not prohibit contractors from conducting drug testing on applicants for employment in any position.

§707.9 Drug testing as a result of an occurrence.

When there is an occurrence which is required to be reported to DOE by the contractor, under contract provisions incorporating applicable DOE Orders, rules, and regulations, it may be necessary to test individuals in testing designated positions, or individuals with unescorted access to the control areas of the DOE reactors listed in §707.7(c), for the use of illegal drugs, if such individuals could have caused or contributed to the conditions which caused the occurrence. For an occurrence requiring immediate notification or reporting as required by applicable DOE Orders, rules, and regulations, the contractor will require testing as soon as possible after the occurrence but within 24 hours of the occurrence, unless DOE determines that it is not feasible to do so. For other occurrences requiring notifications to DOE as required by applicable DOE Orders, rules, and regulations, the contractor may require testing.

§707.10 Drug testing for reasonable suspicion of illegal drug use.

(a)(1) It may be necessary to test any employee in a testing designated position, or individuals with unescorted access to the control areas of the DOE reactors listed in §707.7(c), for the use of illegal drugs, if the behavior of such an individual creates the basis for reasonable suspicion of the use of illegal drugs. Two or more supervisory or management officials, at least one of whom is in the direct chain of supervision of the employee, or is a physician from the site occupational medical department, must agree that such testing is appropriate. Reasonable suspicion must be based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts.

(2) Such a belief may be based upon, among other things:
§ 707.11 Drugs for which testing is performed.

Where testing is performed under this part, at a minimum, contractors will be required to test for the use of the following drugs or classes of drugs: marijuana; cocaine; opiates; phencyclidine; and amphetamines. However, when conducting reasonable suspicion or occurrence testing, the contractor may test for any drug listed in Schedules I or II of the Controlled Substances Act.

§ 707.12 Specimen collection, handling and laboratory analysis for drug testing.

(a) Procedures for providing urine specimens must allow individual privacy, unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. Contractors shall utilize a chain of custody procedure for maintaining control and accountability from point of collection to final disposition of specimens, and testing laboratories shall use appropriate cutoff levels in screening specimens to determine whether they are negative or positive for a specific drug, consistent with the HHS Mandatory Guidelines (see §707.5(a)). The contractor shall ensure that only testing laboratories certified by the Department of Health and Human Services, under subpart C of the HHS Mandatory Guidelines are utilized.

(b)(1) If the individual refuses to cooperate with the urine collection (e.g., refusal to provide a specimen, or to complete paperwork), then the collection site person shall inform the MRO and shall document the non-cooperation on the specimen chain of custody form. The MRO shall report the failure to cooperate to the appropriate management authority, who shall report to DOE if the individual holds an access authorization. Individuals so failing to cooperate shall be treated in all respects as if they had been tested and had been determined to have used an illegal drug. The contractor may apply additional sanctions consistent with its disciplinary policy.

(2) The collection site person shall ascertain that there is a sufficient amount of urine to conduct an initial test, a confirmatory test, and a retest, in accordance with the HHS Mandatory Guidelines. If there is not a sufficient amount of urine, additional urine will be collected in a separate container. The individual may be given reasonable amounts of liquid and a reasonable amount of time in which to provide the specimen required. The individual and the collection site person must keep the specimen in view at all times. When collection is complete, the partial specimens will be combined in a single container. In the event that the individual fails to provide a sufficient amount of urine, the amount collected will be noted on the “Urine Sample Custody Document.” In this case, the collection site person will telephone the individual’s supervisor who will determine the next appropriate action.
This may include deciding to reschedule the individual for testing, to return the individual to his or her work site and initiate disciplinary action, or both.

§ 707.13 Medical review of results of tests for illegal drug use.

(a) All test results shall be submitted for medical review by the MRO. A confirmed positive test for drugs shall consist of an initial test performed by the immunoassay method, with positive results on that initial test confirmed by another test, performed by the gas chromatography/mass spectrometry method (GC/MS). This procedure is described in paragraphs 2.4 (e) and (f) of the HHS Mandatory Guidelines.

(b) The Medical Review Officer will consider the medical history of the employee or applicant, as well as any other relevant biomedical information. When there is a confirmed positive test result, the employee or applicant will be given an opportunity to report to the MRO the use of any prescription or over-the-counter medication. If the MRO determines that there is a legitimate medical explanation for a confirmed positive test result, consistent with legal and non-abusive drug use, the MRO will certify that the test results do not meet the conditions for a determination of use of illegal drugs. If no such certification can be made, the MRO will make a determination of use of illegal drugs. Determinations of use of illegal drugs will be made in accordance with the criteria provided in the Medical Review Officer Manual issued by the Department of Health and Human Services [DHHS Publication No. (ADM) 88–1526].

§ 707.14 Action pursuant to a determination of illegal drug use.

(a) When an applicant for employment has been tested and determined to have used an illegal drug, processing for employment will be terminated and the applicant will be so notified.

(b)(1) When an employee who is in a testing designated position has been tested and determined to have used an illegal drug, the contractor shall immediately remove that employee from the testing designated position; if such employee also holds, or is an applicant for, an access authorization, then the contractor shall immediately notify DOE security officials for appropriate adjudication. If this is the first determination of use of illegal drugs by that employee (for example, the employee has not previously signed a DOE drug certification, and has not previously tested positive for use of illegal drugs), the employee may be offered a reasonable opportunity for rehabilitation, consistent with the contractor’s policies. If rehabilitation is offered, the employee will be placed in a non-testing designated position, which does not require a security clearance, provided there is such an acceptable position in which the individual can be placed during rehabilitation; if there is no acceptable non-testing designated position, the employee will be placed on sick, annual, or other leave status, for a reasonable period sufficient to permit rehabilitation. However, the employee will not be protected from disciplinary action which may result from violations of work rules other than a positive test result for illegal drugs.

(2) Following a determination by the site occupational medical department, after counseling or rehabilitation, that the employee can safely return to duty, the contractor may offer the employee reinstatement, in the same or a comparable position to the one held prior to the removal, consistent with the contractor’s policies and the requirements of 10 CFR part 710. Failure to take the opportunity for rehabilitation, if it has been made available, for the use of illegal drugs, will require significant disciplinary action up to and including removal from employment under the DOE contract, in accordance with the contractor’s policies. Any employee who is twice determined to have used illegal drugs shall in all cases be removed from employment under the DOE contract. Also, if an employee who has signed a DOE drug certification violates the terms of the certification, DOE shall conduct a timely review of the circumstances of such violation, and the individual’s continued eligibility for a DOE access authorization shall be determined under the provisions of 10 CFR part 710,
§ 707.15 Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material.

(c) An employee who has been removed from a testing designated position because of the use of illegal drugs may not be returned to such position until that employee has:

(1) Successfully completed counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of safely returning to duty.

(d) An individual who is not an employee of a contractor who has been denied unescorted access because of the use of illegal drugs may not have the unescorted access reinstated until that individual has:

(1) Provided evidence of successful completion of counseling or a program of rehabilitation;

(2) Undergone a urine drug test with a negative result; and

(3) Been evaluated by the site occupational medical department, which has determined that the individual is capable of being permitted unescorted access to a reactor control area.

(e) If a DOE access authorization is involved, DOE must be notified of a contractor’s intent to return to a testing designated position an employee removed from such duty for use of illegal drugs. Positions identified in §707.7(b)(1) and (2) will require DOE approval prior to return to a testing designated position.

(f) An individual who has been notified of a positive test result may request a retest of the same sample at the same or another certified laboratory. The individual shall bear the costs of transportation and/or testing of the specimen. The contractor will inform employees of their right to request a retest under the provisions of this paragraph.

(g) After an employee determined to have used illegal drugs has been returned to duty, the employee shall be subject to unannounced drug testing, at intervals, for a period of 12 months.

§ 707.16 Records.

(a) Confirmed positive test results shall be provided to the Medical Review Officer and other contractor and DOE officials with a need to know. Any other disclosure may be made only with the written consent of the individual.

(b) Contractors shall maintain maximum confidentiality of records related to illegal drug use, to the extent required by applicable statutes and regulations (including, but not limited to, 42 U.S.C. 290dd–3, 42 U.S.C. 290ee–3, and 42 CFR part 2). If such records are sought from the contractor for criminal investigations, or to resolve a question or concern relating to the Personnel Assurance Program certification or access authorization under 10 CFR part 710, any applicable procedures in statute or regulation for disclosure of such information shall be followed. Moreover, owing to DOE’s express environmental, public health and safety, and national security interests, and the need to exercise proper contractor oversight, DOE must be kept fully apprised of all aspects of the contractor’s program, including such information as incidents involving reasonable suspicion, occurrences, and
confirmed test results, as well as information concerning test results in the aggregate.

(c) Unless otherwise approved by DOE, the contractors shall ensure that all laboratory records relating to positive drug test results, including initial test records and chromatographic tracings, shall be retained by the laboratory in such a manner as to allow retrieval of all information pertaining to the individual urine specimens for a minimum period of five years after completion of testing of any given specimen, or longer if so instructed by DOE or by the contractor. In addition, a frozen sample of all positive urine specimens shall be retained by the laboratory for at least six months, or longer if so instructed by DOE.

(d) The contractor shall maintain as part of its medical records copies of specimen chain of custody forms.

(e) The specimen chain of custody form will contain the following information:

1. Date of collection;
2. Tested person’s name;
3. Tested employee/applicant’s social security number or other identification number unique to the individual;
4. Specimen number;
5. Type of test (random, applicant, occurrence, reasonable suspicion, follow-up, or other);
6. Temperature range of specimen;
7. Remarks regarding unusual behavior or conditions;
8. Collector’s signature; and
9. Certification signature of specimen provider certifying that specimen identified is in fact the specimen the individual provided.

§ 707.17 Permissible actions in the event of contractor noncompliance.

Actions available to DOE in the event of contractor noncompliance with the provisions of this part or otherwise performing in a manner inconsistent with its approved program include, but are not limited to, suspension or debarment, contract termination, or reduction in fee in accordance with the contract terms.
§ 708.1  What is the purpose of this part?

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

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

For purposes of this part:

Contractor means a seller of goods or services who is a party to:

1. A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or
2. A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

Day means a calendar day.

Discovery means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property and requests for production of documents.

DOE Official means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract.

EC Director means the Director of the Office of Employee Concerns at DOE Headquarters, or any official to whom the Director delegates his or her functions under this part.

Employee means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in §708.5 of this subpart.
§ 708.4 What employee complaints are not covered?

If you are an employee of a contractor, you may not file a complaint against your employer under this part if:

(a) The complaint is based on race, color, religion, sex, age, national origin, or other similar basis; or

(b) The complaint involves misconduct that you, acting without direction from your employer, deliberately caused, or in which you knowingly participated; or

(c) Except as provided in §708.15(a), the complaint is based on the same facts for which you have chosen to pursue a remedy available under:

(1) Department of Labor regulations at 29 CFR part 24, “Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes;”

(2) Federal Acquisition Regulations, 48 CFR part 3, “Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics);” or

(3) State or other applicable law, including final and binding grievance-arbitration, as described in §708.15 of subpart B; or

(d) The complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation. This part does not override any provision or requirement of any regulation pertaining to Restricted Data, national security information, or any other classified or sensitive information; or

(e) The complaint deals with “terms and conditions of employment” within the meaning of the National Labor Relations Act, except as provided in §708.5.
§ 708.5 What employee conduct is protected from retaliation by an employer?

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:

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

(1) A substantial violation of a law, rule, or regulation;
(2) A substantial and specific danger to employees or to public health or safety; or
(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
(c) Subject to §708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would—

(1) Constitute a violation of a federal health or safety law; or
(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

§ 708.6 What constitutes “a reasonable fear of serious injury?”

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if:

(a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or
(b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

§ 708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?

You may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:

(a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and
(b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

§ 708.8 Does this part apply to pending cases?

The procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.

§ 708.9 When is a complaint or other document considered to be “filed” under this part?

Under this part, a complaint or other document is considered “filed” on the date it is mailed or on the date it is personally delivered to the specified official or office.

Subpart B—Employee Complaint Resolution Process

§ 708.10 Where does an employee file a complaint?

(a) If you were employed by a contractor whose contract is handled by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, you must file two copies of your written complaint with the EC Director.
(b) If you were employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, you must file two copies of your written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.
§ 708.11 Will an employee's identity be kept confidential if the employee so requests?

No. The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the contractor and it becomes a public document.

§ 708.12 What information must an employee include in a complaint?

Your complaint does not need to be in any specific form but must be signed by you and contain the following:

(a) A statement specifically describing
(1) The alleged retaliation taken against you and
(2) The disclosure, participation, or refusal that you believe gave rise to the retaliation;

(b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in §708.15 of this subpart;

(c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and

(d) An affirmation, as described in §708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

§ 708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?

(a) To show that you have exhausted all applicable grievance-arbitration procedures, you must:

(1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or

(2) State that you filed a grievance under applicable grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that you filed your grievance; or

(3) State that your employer has established no grievance-arbitration procedures.

(b) If you do not provide the information specified in §708.13(a), your complaint may be dismissed for lack of jurisdiction as provided in §708.17 of this subpart.

§ 708.14 How much time does an employee have to file a complaint?

(a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint you file under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

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

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) Your complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) Your complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or
(3) You have exhausted grievance-arbitration procedures pursuant to §708.13, and issues related to alleged retaliation for conduct protected under §708.5 remain.

(b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent you from filing a complaint under this part.

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

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

§ 708.16 Will a contractor or a labor organization that represents an employee be notified of an employee's complaint and be given an opportunity to respond with information?

(a) By the 15th day after receiving your complaint, the Head of Field Element or EC Director (as applicable) will provide your employer a copy of your complaint. Your employer has 10 days from receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

(b) If you are part of a bargaining unit represented for purposes of collective bargaining by a labor organization, the Head of Field Element or EC Director (as applicable) will provide your representative a copy of your complaint by the 15th day after receiving it. The labor organization will be advised that it has 10 days from the receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

§ 708.17 When may DOE dismiss a complaint for lack of jurisdiction or other good cause?

(a) The Head of Field Element or EC Director (as applicable) may dismiss your complaint for lack of jurisdiction or for other good cause after receiving your complaint, either on his or her own initiative or at the request of a party named in your complaint. Such decisions are generally issued by the 15th day after the receipt of your employer’s comments.

(b) The Head of Field Element or EC Director (as applicable) will notify you by certified mail, return receipt requested, if your complaint is dismissed for lack of jurisdiction or other good cause, and give you specific reasons for the dismissal, and will notify other parties of the dismissal.

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

(1) Your complaint is untimely; or
(2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or
(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or
(4) Your complaint is frivolous or without merit on its face; or
(5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or
(6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

§ 708.18 How can an employee appeal dismissal of a complaint for lack of jurisdiction or other good cause?

(a) If your complaint is dismissed by the Head of Field Element or EC Director, the administrative process is terminated unless you appeal the dismissal to the OHA Director by the 10th day after you receive the notice of dismissal as evidenced by a receipt for delivery of certified mail.

(b) If you appeal a dismissal to the OHA Director, you must send copies of your appeal to the Head of Field Element or EC Director (as applicable) and all parties. Your appeal must include a copy of the notice of dismissal, and state the reasons why you think the dismissal was erroneous.
§ 708.21 What are the employee’s options if the complaint cannot be resolved informally?

(a) If the attempt at informal resolution is not successful, the Head of Field Element or EC Director (as applicable) will notify you in writing that you have the following options:

(1) Request that your complaint be referred to the Office of Hearings and Appeals for a hearing without an investigation; or

(2) Request that your complaint be referred to the Office of Hearings and Appeals for an investigation followed by a hearing.

(b) You must notify the Head of Field Element or EC Director (as applicable), in writing, by the 20th day after receiving notice of your options, whether you request referral of your complaint to the Office of Hearings and Appeals for a hearing without an investigation, or an investigation followed by a hearing.

(c) If the Head of Field Element or EC Director does not receive your response to the notice of options by the 20th day after your receipt of that notice, DOE will consider your complaint withdrawn.

(d) If you timely request referral to the Office of Hearings and Appeals, the Head of Field Element or EC Director

§ 708.21 What are the employee’s options if the complaint cannot be resolved informally?

(a) If the attempt at informal resolution is not successful, the Head of Field Element or EC Director (as applicable) will notify you in writing that you have the following options:

(1) Request that your complaint be referred to the Office of Hearings and Appeals for a hearing without an investigation; or

(2) Request that your complaint be referred to the Office of Hearings and Appeals for an investigation followed by a hearing.

(b) You must notify the Head of Field Element or EC Director (as applicable), in writing, by the 20th day after receiving notice of your options, whether you request referral of your complaint to the Office of Hearings and Appeals for a hearing without an investigation, or an investigation followed by a hearing.

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§ 708.22 What process does the Office of Hearings and Appeals use to conduct an investigation of the complaint?

(a) If you request a hearing without an investigation, the OHA Director will not initiate an investigation even if another party requests one.

(b) If you request an investigation followed by a hearing, the OHA Director will appoint a person from the Office of Hearings and Appeals to conduct the investigation. The investigator may not participate or advise in the initial or final agency decision on your complaint.

(c) The investigator will determine the appropriate scope of investigation based on the circumstances of the complaint. The investigator may enter and inspect places and records; make copies of records; interview persons alleged to have been involved in retaliation and other employees of the charged contractor who may have relevant information; take sworn statements; and require the production of any documents or other evidence.

(d) A contractor must cooperate fully with the investigator by making employees and all pertinent evidence available upon request.

(e) A person being interviewed in an investigation has the right to be represented by a person of his or her choosing.

(f) Parties to the complaint are not entitled to be present at interviews conducted by an investigator.

(g) If a person other than the complainant requests that his or her identity be kept confidential, the investigator may grant confidentiality, but must advise such person that confidentiality means that the Office of Hearings and Appeals will not identify the person as a source of information to anyone outside the Office of Hearings and Appeals, except as required by statute or other law, or as determined by the OHA Director to be unavoidable.

§ 708.23 How does the Office of Hearings and Appeals issue a report of investigation?

(a) The investigator will complete the investigation and issue a report of investigation by the 60th day after the complaint is received by the Office of Hearings and Appeals, unless the OHA Director, for good cause, extends the investigation for no more than 30 days.

(b) The investigator will provide copies of the report of investigation to the parties. The investigation will not be reopened after the report of investigation is issued.

(c) If the parties informally resolve the complaint (e.g., through mediation) after an investigation is started, you must notify the OHA Director in writing of your decision to withdraw the complaint.

§ 708.24 Will there always be a hearing after a report of investigation is issued?

(a) No. An employee may withdraw a hearing request after the report of investigation is issued. However, the hearing may be canceled only if all parties agree that they do not want a hearing.

(b) If the hearing is canceled, the Hearing Officer will issue an initial agency decision pursuant to § 708.31 of this subpart.

§ 708.25 Who will conduct the hearing?

(a) The OHA Director will appoint a Hearing Officer from the Office of Hearings and Appeals to conduct a hearing.

(b) The Hearing Officer may not be subject to the supervision or direction of the investigator.

§ 708.26 When and where will the hearing be held?

(a) The Hearing Officer will schedule a hearing to be held by the 90th day after receipt of the complaint, or issuance of the report of investigation, whichever is later. Any extension of the hearing date must be approved by the OHA Director.
§ 708.27 May the Hearing Officer recommend mediation to the parties?

The Hearing Officer may recommend, but may not require, that the parties attempt to resolve the complaint through mediation or other informal means at any time before issuance of an initial agency decision on the complaint.

§ 708.28 What procedures govern a hearing conducted by the Office of Hearings and Appeals?

(a) In all hearings under this part:

(1) The parties have the right to be represented by a person of their choosing or to proceed without representation. The parties are responsible for producing witnesses in their behalf, including requesting the issuance of subpoenas, if necessary;

(2) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury;

(3) Witnesses are subject to cross-examination;

(4) Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide; and

(5) A court reporter will make a transcript of the hearing.

(b) The Hearing Officer has all powers necessary to regulate the conduct of proceedings:

(1) The Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint;

(2) The Hearing Officer may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission;

(3) The Hearing Officer may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence;

(4) The Hearing Officer may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing;

(5) The Hearing Officer may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party’s representative to comply with a lawful order of the Hearing Officer, or, without good cause, to attend a hearing;

(6) The Hearing Officer, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Hearing Officer.

(7) The parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Hearing Officer.

(8) Parties allowed to file written submissions must serve copies upon the other parties within the time prescribed by the Hearing Officer.

(9) The Hearing Officer is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in ex parte (private) discussions with any party on the merits of the complaint.
§ 708.29 What must the parties to a complaint prove?

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure, participation, or refusal.

§ 708.30 What process does the Hearing Officer follow to issue an initial agency decision?

(a) The Hearing Officer will issue an initial agency decision on your complaint by the 60th day after the later of:
   (1) The date the Hearing Officer approves the parties’ agreement to cancel the hearing;
   (2) The date the Hearing Officer receives the transcript of the hearing; or
   (3) The date the Hearing Officer receives post-hearing submissions permitted under §708.28(b)(7) of this subpart.

(b) The Hearing Officer will serve the initial agency decision on all parties.

§ 708.31 If no hearing is conducted, what is the process for issuing an initial agency decision?

(a) If no party wants a hearing after the issuance of a report of investigation, the Hearing Officer will issue an initial agency decision by the 60th day after the hearing is canceled pursuant to §708.24. The standards in §708.30, governing the issuance of an initial agency decision, apply whether or not a hearing has been held on the complaint.

(b) The Hearing Officer will serve the initial agency decision on all parties.

§ 708.32 Can a dissatisfied party appeal an initial agency decision?

(a) Yes. By the 15th day after receiving an initial agency decision from the Hearing Officer, any party may file a notice of appeal with the OHA Director requesting review of the initial agency decision.

(b) A party who appeals an initial agency decision (the appellant) must serve a copy of the notice of appeal on all other parties.

(c) A party who receives an initial agency decision by a Hearing Officer has not exhausted its administrative remedies until an appeal has been filed with the OHA Director and a decision granting or denying the appeal has been issued.

§ 708.33 What is the procedure for an appeal?

(a) By the 15th day after filing a notice of appeal under §708.32, the appellant must file a statement identifying the issues that it wishes the OHA Director to review. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(b) In considering the appeal, the OHA Director:
   (1) May initiate an investigation of any statement contained in the request for review and utilize any relevant facts obtained by such investigation in conducting the review of the initial agency decision;
§ 708.36 What remedies for retaliation may be ordered in initial and final agency decisions?

(a) General remedies. If the initial or final agency decision determines that an act of retaliation has occurred, it may order:

(1) Reinstatement;
(2) Transfer preference;
(3) Back pay;
(4) Reimbursement of your reasonably incurred costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or
(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

(b) Interim relief. If an initial agency decision contains a determination that
§ 708.37 Will an employee whose complaint is denied by a final agency decision be reimbursed for costs and expenses incurred in pursuing the complaint?

No. If your complaint is denied by a final agency decision, you may not be reimbursed for the costs and expenses you incurred in pursuing the complaint.

§ 708.38 How is a final agency decision implemented?

(a) The Head of Field Element having jurisdiction over the contract under which you were employed when the alleged retaliation occurred, or EC Director, will implement a final agency decision by forwarding the decision and order to the contractor, or subcontractor, involved.

(b) A contractor’s failure or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer’s decision to disallow certain costs or terminate the contract for default. In the event of a contracting officer’s decision to disallow costs or terminate a contract for default, the contractor may file a claim under the disputes procedures of the contract.

§ 708.39 Is a decision and order implemented under this regulation considered a claim by the government against a contractor or a decision by the contracting officer under sections 6 and 7 of the Contract Disputes Act?

No. A final agency decision and order issued pursuant to this regulation is not considered a claim by the government against a contractor or “a decision by the contracting officer” under sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 606).

§ 708.40 Are contractors required to inform their employees about this program?

Yes. Contractors who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name and address of the DOE office where you can file a complaint under this part.

§ 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

§ 708.42 May the deadlines established by this part be extended by any DOE official?

Yes. The Secretary of Energy (or the Secretary’s designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under §708.22 through §708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process).

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

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

PART 709—POLYGRAPH EXAMINATION REGULATIONS

Subpart A—General Provisions

Sec. 709.1 What is the purpose of this part?
Subpart A—General Provisions

§ 709.1 What is the purpose of this part?
This part:
(a) Describes the categories of individuals who are eligible for counterintelligence-scope polygraph testing; and
(b) Provides guidelines for the use of counterintelligence-scope polygraph examinations and for the use of exculpatory polygraph examinations, upon the request of an individual, in order to resolve counterintelligence investigations and personnel security issues; and
(c) Provides guidelines for protecting the rights of individual DOE, and DOE contractor, and employees subject to this rule.

§ 709.2 What is the scope of this part?
This part includes:
(a) A description of the conditions under which DOE may administer and use polygraph examinations;
(b) A description of the positions which DOE may subject to polygraph examination;
(c) Controls on the use of polygraph examinations; and
(d) Safeguards to prevent unwarranted intrusion into the privacy of individuals.

§ 709.3 What are the definitions of the terms used in this part?
For purposes of this part:
Accelerated Access Authorization Program or AAAP means the program for granting interim access to classified matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, and a counterintelligence-scope polygraph examination consistent with this part.
Access means the admission of DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE to the eight categories of positions identified in §709.4(a)(1)–(8).
Access authorization means an administrative determination that an individual is eligible for access to classified...
matter or is eligible for access to, or control over, special nuclear material. 

Adverse personnel action means

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or 
(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means a DOE contractor or a subcontractor at any tier.

Control questions means questions used during a polygraph examination that are designed to produce a physiological response, which may be compared to the physiological responses to the relevant questions.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

Deception indicated means an opinion that indicates that an analysis of the polygraph charts reveal physiological responses to the relevant questions that were indicative of evasion.

DOE means the Department of Energy.

Eligibility evaluation means the process employed by the Office of Counterintelligence to determine whether DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE will be recommended for access or continued access to the eight categories of positions identified in §709.4(a)(1)-(8).

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

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

No deception indicated means an opinion that indicates that an analysis of the polygraph charts revealed the physiological responses to the relevant questions were not indicative of evasion.

No opinion refers to an evaluation of a polygraph test in which the polygraph examiner cannot render an opinion based upon the physiological data on the polygraph charts.

Personnel assurance program or PAP means the human reliability program set forth under 10 CFR part 711 designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental or physical incapacities that could result in a threat to nuclear explosive safety.

Personnel security assurance Program or PSAP means the program in subpart B of 10 CFR part 710.

Personnel security clearance means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Polygraph means an instrument that

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and
(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraph examination means a process that encompasses all activities that take place between a polygraph examiner and individual during a specific series of interactions, including the pre-test interview, the use of the polygraph instrument to collect physiological data from the individual while the polygraph examiner is presenting a series of tests, the test data analysis phase, and the post-test phase.

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

Polygraph report refers to a polygraph document that may contain identifying
data of the individual, a synopsis of the basis for which the examination was conducted, the relevant questions utilized and the polygraph examiner’s conclusions.

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

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

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

Unresolved issues refers to an opinion which indicates that the analysis of the polygraph charts revealed consistent, significant, timely physiological responses to the relevant questions in personnel screening.

§ 709.4 To whom does the polygraph examination requirement under this part apply?

(a) Except as provided in paragraph (b) of this section, this part applies to DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE, who are in:

(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods;

(2) Positions that DOE has determined include intelligence activities or access to intelligence sources and methods;

(3) Positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy;

(4) Positions that are subject to the Personnel Security Assurance Program (PSAP);

(5) Positions that are subject to the Personnel Assurance Program (PAP);

(6) Positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary regarding the design and operation of nuclear weapons and associated use control features;

(7) Positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department;

(8) Positions within the Office of Security and Emergency Operations, or any successor thereto;

(9) The Accelerated Access Authorization Program (AAAP); and

(10) Positions where the applicant or incumbent has requested a polygraph examination in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues. These examinations are referred to in this part as exculpatory polygraph examinations.

(b) This part does not apply to:

(1) Any individual for whom the Director of the Office of Counterintelligence (D/OCI), gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or counterintelligence-scope polygraph examination administered within the last five years;

(2) Any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested; or

(3) Any individual for whom the Secretary of Energy gives a written waiver in the interest of national security.

(c) The Program Manager responsible for each program with positions identified in paragraphs (a)(1)-(8) of this section identifies in the first instance, in order of priority, those specific positions that will be polygraphed.

(d) The Program Manager submits positions identified under paragraph (c) of this section to the D/OCI for review and concurrence. The D/OCI forwards the positions, with suggested additions
§ 709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

(a) All positions in the programs described in §709.4(a)(1)(8) are eligible for polygraph examination. When a polygraph examination is scheduled, DOE must notify the individual, in accordance with §709.21.

(b) Any job announcement or posting with respect to any position in those programs must indicate that the selection of an individual for the position may be conditioned upon his or her successful completion of a counterintelligence-scope polygraph examination.

§ 709.6 How often will an individual be subject to polygraph examination?

Positions identified in §709.4(a)(1)(8) are subject to a five year periodic, as well as an aperiodic, reinvestigation polygraph.

Subpart B—Polygraph Examination Protocols and Protection of National Security

§ 709.11 What types of topics are within the scope of a polygraph examination?

(a) DOE may ask questions that are appropriate to a counterintelligence-scope examination or that are relevant to the matter at issue in an exculpatory examination.

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

(c) DOE may not ask questions that:

(1) Probe a person’s thoughts or beliefs;

(2) Concern conduct that has no counterintelligence implication; or

(3) Concern conduct that has no direct relevance to an investigation.

§ 709.12 How does DOE determine the wording of questions?

The examiner determines the exact wording of the polygraph questions based on the examiner’s pretest interview of the individual, the individual’s understanding of the questions, and other input from the individual.

§ 709.13 May an individual refuse to take a polygraph examination?

(a) Yes. An individual may refuse to take a counterintelligence-scope or exculpatory polygraph examination, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a counterintelligence-scope or exculpatory polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under §709.14.

§ 709.14 What are the consequences of a refusal to take a polygraph examination?

(a) If an individual is an applicant for employment, assignment, or detail to one of the positions described in §709.4(a)(1)(8), and the individual refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail the individual to the identified position.

(b) If the individual is an applicant for employment, assignment, or detail to one of the positions described in §709.4(a)(1)(8) and the individual refuses to take a counterintelligence polygraph examination otherwise required by this part, DOE and its contractors may refuse to employ, assign, or detail the individual to the identified position.

(c) If an individual is an incumbent in a position described in §709.4(a)(1)(8) and the individual refuses to take a counterintelligence polygraph examination required by statute as a condition of continued access, DOE and its contractors must deny the individual access to the information or involvement in the activities that justified conducting the examination, consistent with §709.15. If the individual is a DOE employee, DOE may reassign or
§ 709.15 How does DOE use polygraph examination results?

(a) If, following the completion of the polygraph test, there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues.

(b) If, after the polygraph examination, there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE must so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

(c) The Office of Counterintelligence (OCI) will conduct an eligibility evaluation that considers examination results, the individual's personnel security file, and other pertinent information. If unresolved issues remain at the time of the eligibility evaluation, DOE will interview the individual if it is determined that a personal interview will assist in resolving the issue. No denial or revocation of access will occur until the eligibility evaluation is completed.

(d) Following the eligibility evaluation, D/OCI must recommend, in writing, to the Program Manager responsible for the access that the individual's access be approved or retained, or denied or revoked.

(1) If the Program Manager agrees with the recommendation, the Program Manager will notify the individual, in writing, that the individual's access has been approved or retained, or denied or revoked.

(2) If the Program Manager disagrees with the D/OCI's recommendation the matter will be referred to the Secretary for a final decision.

(3) If the Program Manager denies or revokes the individual's access, and the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties within the local commuting area or take other actions consistent with the denial of access.
§ 709.21 When is an individual notified that a polygraph examination is scheduled?

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

§ 709.22 What rights to counsel or other representation does an individual have?

(a) At the individual’s own expense, an individual has the right to obtain and consult with legal counsel or another representative prior to the polygraph examination. The counsel or representative may not be present during the polygraph examination. No one other than the individual and the examiner may be present in the examination room during the polygraph examination.

(b) At the individual’s own expense, an individual has the right to obtain and consult with legal counsel or another representative at any time during an interview conducted in accordance with §709.15(c).

§ 709.23 How does DOE obtain an individual’s consent to a polygraph examination?

DOE may not administer a polygraph examination unless DOE has:

(a) Notified the individual of the polygraph examination in writing in accordance with §709.21; and

(b) Obtained written consent from the individual.
§ 709.24 What other information is provided to the individual prior to a polygraph examination?

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms;
(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;
(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;
(d) Review with the individual the control questions and relevant questions to be asked during the examination;
(e) Advise the individual of the individual’s privilege against self-incrimination; and
(f) Provide the individual with a preaddressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination.

§ 709.25 Are there limits on use of polygraph examination results that reflect “deception indicated” or “no opinion”?

(a) DOE or its contractors may not:
(1) Take an adverse personnel action against an individual solely on the basis of a polygraph examination result of “deception indicated” or “no opinion”; or
(2) Use a polygraph examination that reflects “deception indicated” or “no opinion” as a substitute for any other required investigation.

(b) The Secretary or the D/OCI may suspend an individual’s access based upon a written determination that the individual’s admission of involvement in one or more of the activities covered by the counterintelligence polygraph, when considered in the context of the individual’s access to one or more of the high risk programs identified in § 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. In such cases, DOE will investigate the matter immediately and make a determination of whether to revoke the individual’s access.

§ 709.26 How does DOE protect the confidentiality of polygraph examination records?

(a) DOE owns all polygraph examination records and reports.
(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all polygraph examination records and reports in a system of records established under the Privacy Act of 1974, 5 U.S.C. 552a.
(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified in § 709.4(a)(2) in a system of records established under the Privacy Act.
(d) Polygraph examination records and reports used to make AAAP determinations or generated as a result of an exculpatory personnel security polygraph examination are maintained in a system of records established under the Privacy Act of 1974.
(e) DOE must afford the full privacy protection provided by law to information regarding an employee’s refusal to take a polygraph examination.
(f) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the polygraph examination, then all the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.
§ 709.32 What are the training requirements for polygraph examiners?

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

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

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


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

Subpart A—General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material

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APPENDIX B TO SUBPART A OF PART 710—ADJUDICATIVE GUIDELINES APPROVED BY THE PRESIDENT IN ACCORDANCE WITH THE PROVISIONS OF EXECUTIVE ORDER 12968


GENERAL PROVISIONS

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[59 FR 35185, July 8, 1994, as amended at 66 FR 47062, Sept. 11, 2001]

§ 710.2 Scope.

The criteria and procedures outlined in this subpart shall be used in those cases in which there are questions of eligibility for DOE access authorization involving:

(a) Employees (including consultants) of, and applicants for employment with, contractors and agents of the DOE;

(b) Access permittees of the DOE and their employees (including consultants) and applicants for employment;

(c) Employees (including consultants) of, and applicants for employment with, the DOE; and

(d) Other persons designated by the Secretary of Energy.

§ 710.3 Reference.

The pertinent sections of the Atomic Energy Act of 1954, as amended, relative to this regulation are set forth in Appendix A to this subpart.

§ 710.4 Policy.

(a) It is the policy of DOE to provide for the security of its programs in a manner consistent with traditional
§ 710.5 American concepts of justice and fairness. To this end, the Secretary has established criteria for determining eligibility for access authorization and procedures that will afford those individuals described in § 710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization.

(b) It is also the policy of DOE that none of the procedures established by DOE for determining eligibility for access authorization shall be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate, or retaliate against individuals for exercising their rights under any statute, regulation or DOE directive. Any DOE officer or employee violating, or causing the violation of this policy, shall be subject to appropriate disciplinary action.

(c) If the individual is currently awaiting a hearing or trial, or has been convicted of a crime punishable by imprisonment of six (6) months or longer, or is awaiting or serving a form of preprosecution probation, suspended or deferred sentencing, court ordered probation, or parole in conjunction with an arrest or criminal charges initiated against the individual for a crime that is punishable by imprisonment of six (6) months or longer, DOE may suspend processing an application for access authorization until such time as the hearing, trial, criminal prosecution, suspended sentencing, deferred sentencing, probation, or parole has been completed.

(d) DOE may suspend processing an application for access authorization if sufficient information about the individual’s background cannot be obtained to meet the investigative scope and extent requirements for the access authorization requested.

(e) DOE may suspend processing an application for access authorization until such time as a question regarding an individual’s national allegiance is resolved. For example, if an individual is exercising rights of citizenship conferred by a country other than the United States, DOE will be concerned with whether granting access authorization to that individual constitutes an unacceptable national security risk.

(f) DOE may suspend processing an application for access authorization whenever an individual fails to fulfill the responsibilities described in §710.6.

(g) If an individual believes that the provisions of paragraph (c), (d), or (e) of this section have been inappropriately applied, a written appeal may be filed with the Director, Office of Safeguards and Security, DOE Headquarters, within 30 calendar days of the date the individual was notified of the action. The Director, Office of Safeguards and Security, shall act on the written appeal as described in section 710.6(c).

§ 710.5 Definitions.

(a) As used in this subpart:

Access authorization means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Classified Matter means the material of thought or expression that is classified pursuant to statute or Executive Order.

DOE Counsel means a DOE attorney assigned to represent DOE in proceedings under this subpart. DOE Counsel shall be a U.S. citizen and shall have been subject to a favorably adjudicated background investigation.

Hearing Officer means a DOE attorney or senior management official appointed by the Director, Office of Hearings and Appeals, pursuant to §710.25. A Hearing Officer shall be a U.S. citizen and shall have been subject to a favorably adjudicated background investigation.

Local Director of Security means the Operations Office or Naval Reactors Office Security and Safeguards Division Director, or other similar title; for Washington, DC area cases, the Director, Headquarters Operations Division; for the Idaho Operations Office, the Program Manager, Security and Resource Management Division; for the Pittsburgh Naval Reactors Office, the Director, Contracts and Securities Division; and any person designated in writing to serve in one of
the aforementioned positions in an "acting" capacity.

National Security Information means any information that has been determined, pursuant to Executive Order 12358 or any predecessor Order, to require protection against unauthorized disclosure and that is so designated.

Operations Office Manager or Manager means the Manager of a DOE Operations Office (Albuquerque, Chicago, Idaho, Nevada, Oak Ridge, Oakland, Richland, or Savannah River), the Manager of the Pittsburgh Naval Reactors Office, the Manager of the Schenectady Naval Reactors Office, and, for Washington, DC area cases, the Director, Office of Safeguards and Security.

Secretary means the Secretary of Energy, as provided by section 201 of the Department of Energy Organization Act.

Special nuclear material means plutonium, uranium enriched in the isotope 233, or in the isotope 235, and any other material which, pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source material, or any material artificially enriched by any of the foregoing, not including source material.

(b) Throughout this subpart the use of the male gender shall include the female gender and vice versa.

§ 710.6 Cooperation by the individual.

(a) It is the responsibility of the individual to cooperate by providing full, frank, and truthful answers to DOE's relevant and material questions, and when requested, to furnish or authorize others to furnish information that the DOE deems pertinent to the individual's eligibility for DOE access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation or reinvestigation, and at any stage of DOE's processing of the individual's access authorization, including but not limited to, personnel security interviews, DOE-sponsored mental evaluations, and other authorized DOE investigatory activities under this subpart. The individual may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing access authorization. In this event, any access authorization then in effect may be terminated, or, for applicants, further processing may be suspended.

(b) If the individual believes that the provisions of paragraph (a) of this section have been inappropriately applied in his case, he may file a written appeal of the action with the Director, Office of Safeguards and Security, DOE Headquarters, within 30 calendar days of the date he was notified of the action.

(c) Upon receipt of the written appeal, the Director, Office of Safeguards and Security, shall conduct an inquiry as to the circumstances involved in the action and shall, within 30 calendar days of receipt of the written appeal, notify the individual, in writing, as to whether the action to terminate or suspend processing of access authorization was appropriate. If the Director, Office of Safeguards and Security, determines that the action was inappropriate, he shall direct that the individual continue to be processed for access authorization, or that access authorization for the individual be reinstated.

§ 710.7 Application of the criteria.

(a) The decision as to access authorization is a comprehensive, commonsense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security. Absent any derogatory information, a favorable determination usually will be made as to access authorization eligibility.
§ 710.8 Criteria.

Derogatory information shall include, but is not limited to, information that the individual has:

(a) Committed, prepared or attempted to commit, or aided, abetted or conspired with another to commit or attempt to commit any act of sabotage, espionage, treason, terrorism, or sedition.

(b) Knowingly established or continued a sympathetic association with a saboteur, spy, terrorist, traitor, seditionist, anarchist, or revolutionist, espionagem agent, or representative of a foreign nation whose interests are im-
classified or sensitive information technology systems.

(h) An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.

(i) Refused to testify before a Congressional Committee, Federal or state court, or Federal administrative body, regarding charges relevant to eligibility for DOE, or another Federal agency’s access authorization.

(j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

(k) Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.

(l) Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.

§ 710.9 Action on derogatory information.

(a) If the reports of investigation of an individual or other reliable information tend to establish the validity and significance of one or more items in the criteria, or of other reliable information or facts which are of security concern, although outside the scope of the stated categories, such information shall be regarded as derogatory and create a question as to the individual’s access authorization eligibility.

(b) If a question arises as to the individual’s access authorization eligibility, the Local Director of Security shall authorize the conduct of an interview with the individual, or other appropriate actions, which may include a DOE-sponsored mental evaluation, and, on the basis of the results of such interview or actions, may authorize the granting of the individual’s access authorization. If, in the opinion of the Local Director of Security, the question as to the individual’s access authorization eligibility has not been favorably resolved, he shall submit the matter to the Manager with a recommendation that authority be obtained to process the individual’s case under administrative review procedures.

(c) If the Manager agrees that unresolved derogatory information is present and that appropriate attempts to resolve such derogatory information have been unsuccessful, he shall notify the Director, Office of Safeguards and Security, of his proposal to conduct an administrative review proceeding, accompanied by an explanation of the security concerns and a duplicate Personnel Security File. If the Manager believes that the derogatory information has been favorably resolved, he shall direct that access authorization be granted for the individual. The Manager may also direct the Local Director of Security to obtain additional information in the matter prior to deciding whether to grant the individual access authorization or to submit a request for authority to conduct an administrative review proceeding. A decision in the matter shall be rendered by the Manager within 10 calendar days of its receipt.

(d) Upon receipt of the Manager’s notification, the Director, Office of Safeguards and Security, shall review the matter and confer with the Manager on:

(1) The institution of administrative review proceedings set forth in §§ 710.20 through 710.32;
§ 710.10 Suspension of access authorization.

(a) If information is received that raises a question concerning an individual’s continued access authorization eligibility, the Local Director of Security shall authorize action(s), to be taken on an expedited basis, to resolve the question pursuant to §710.9(b). If the question as to the individual’s continued access authorization eligibility is not resolved in favor of the individual, the Local Director of Security shall submit the matter to the Manager with a recommendation that the individual’s access authorization be suspended pending the final determination resulting from the procedures in this subpart.

(b) Within two working days of receipt of the recommendation from the Local Director of Security to suspend the individual’s DOE access authorization, the Manager shall immediately notify the Director, Office of Safeguards and Security, of the action and the reason(s) therefore. In addition, the Manager, within 10 calendar days of the date of suspension, shall notify the Director, Office of Safeguards and Security, of his proposal to conduct an administrative review proceeding, accompanied by an explanation of its basis and a duplicate Personnel Security File.

(d) Following the decision to suspend an individual’s DOE access authorization, the Manager shall immediately notify the Director, Office of Safeguards and Security, of the action and the reason(s) therefore. In addition, the Manager, within 10 calendar days of the date of suspension, shall notify the Director, Office of Safeguards and Security, of his proposal to conduct an administrative review proceeding, accompanied by an explanation of its basis and a duplicate Personnel Security File.

(e) Upon receipt of the Manager’s notification, the Director, Office of Safeguards and Security, shall review the matter and confer with the Manager on:

(1) The institution of administrative review procedures set forth in §§710.20 through 710.32;

(2) The reinstatement of access authorization; or

(3) Other actions as the Director deems appropriate.

(f) The Director, Office of Safeguards and Security, shall act pursuant to one of these options within 30 calendar days of the receipt of the Manager’s notification unless an extension is granted by the Director, Office of Security Affairs.
review of questions concerning an individual’s eligibility for access authorization when it is determined that such questions cannot be favorably resolved by interview or other action.

§ 710.21 Notice to the individual.

(a) Unless an extension is authorized by the Director, Office of Safeguards and Security, within 30 calendar days of receipt of authority to institute administrative review procedures, the Manager shall prepare and deliver to the individual a notification letter approved by the local Office of Chief Counsel, or the Office of General Counsel for Headquarters cases. Where practicable, the letter shall be delivered to the individual in person.

(b) The letter shall state:

(1) That reliable information in the possession of DOE has created a substantial doubt concerning the individual’s eligibility for access authorization.

(2) The information which creates a substantial doubt regarding the individual’s access authorization eligibility (which shall be as comprehensive and detailed as the national security permits) and why that information creates such doubt.

(3) That the individual has the option to have the substantial doubt regarding eligibility for access authorization resolved in one of two ways:

(i) By the Manager, without a hearing, on the basis of the existing information in the case;

(ii) By personal appearance before a Hearing Officer (a “hearing”).

(4) That, if the individual desires a hearing, the individual must, within 20 calendar days of the date of receipt of the notification letter, indicate this in writing to the Manager from whom the letter was received.

(5) That the individual may also file with the Manager the individual’s written answer to the reported information which raises the question of the individual’s eligibility for access authorization, and that, if the individual requests a hearing without filing a written answer, the request shall be deemed a general denial of all of the reported information.

(6) That, if the individual so requests, a hearing will be scheduled before a Hearing Officer, with due regard for the convenience and necessity of the parties or their representatives, for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization;

(7) That, if a hearing is requested, the individual will have the right to appear personally before a Hearing Officer; to present evidence in his own behalf, through witnesses, or by documents, or both; and, subject to the limitations set forth in §710.26(g), to be present during the entire hearing and be accompanied, represented, and advised by counsel or representative of the individual’s choosing and at the individual’s own expense;

(8) That the individual’s failure to file a timely written request for a hearing before a Hearing Officer in accordance with paragraph (b)(4) of this section, unless time deadlines are extended for good cause, will be considered as a relinquishment by the individual of the right to a hearing provided in this subpart, and that in such event a final decision will be made by the Manager; and

(9) That in any proceedings under this subpart DOE Counsel will be participating on behalf of and representing the Department of Energy, and that any statements made by the individual to DOE Counsel may be used in subsequent proceedings.

(c) The notification letter referenced in paragraph (b) of this section shall also:

(1) Describe the individual’s access authorization status until further notice;

(2) Advise the individual of the right to representation at the individual’s own expense at each and every stage of the proceedings;

(3) Provide the name and telephone number of the designated DOE official to contact for any further information desired concerning the proceedings, including an explanation of the individual’s rights under the Freedom of Information and Privacy Acts; and

(4) Include a copy of this subpart.

[59 FR 35185, July 8, 1994, as amended at 66 FR 47064, Sept. 11, 2001]
§ 710.22 Initial decision process.

(a) The Manager shall make an initial decision as to the individual’s access authorization eligibility based on the existing information in the case if:

(1) The individual fails to respond to the notification letter by filing a timely written request for a hearing before a Hearing Officer or fails to respond to the notification letter after requesting an extension of time to do so;

(2) The individual’s response to the notification letter does not request a hearing before a Hearing Officer; or

(3) The Hearing Officer refers the individual’s case to the Manager in accordance with § 710.25(e) or § 710.26(b).

(b) Unless an extension of time is granted by the Director, Office of Safeguards and Security, the Manager’s initial decision as to the individual’s access authorization eligibility shall be made within 15 calendar days of the date of receipt of the information in paragraph (a) of this section. The Manager shall either grant or deny, or reinstate or revoke, the individual’s access authorization.

(c) A letter reflecting the Manager’s initial decision in the individual’s case shall be signed by the Manager and delivered to the individual within 15 calendar days of the date of the Manager’s decision unless an extension of time is granted by the Director, Office of Safeguards and Security. If the Manager’s initial decision is unfavorable to the individual, the individual shall be advised:

(1) Of the Manager’s unfavorable decision and the reason(s) therefor;

(2) That within 30 calendar days from the date of receipt of the letter, he may file a written request for a review of the Manager’s initial decision through the Director, Office of Safeguards and Security, DOE Headquarters, to the DOE Headquarters Appeal Panel (hereafter referred to as the “Appeal Panel”);

(3) That the Director, Office of Safeguards and Security, may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a review of the case by the Appeal Panel; and

(4) That if the written request for a review of the Manager’s initial decision by the Appeal Panel is not filed within 30 calendar days of the individual’s receipt of the Manager’s letter, the Manager’s initial decision in the case shall be final.

[66 FR 47064, Sept. 11, 2001]

§ 710.23 Extensions of time by the Manager.

The Manager may, for good cause shown, at the written request of the individual, extend the time for filing a written request for a hearing, and/or the time for filing a written answer to the matters contained in the notification letter. The Manager shall notify the Director, Office of Safeguards and Security, when such extensions have been approved.

§ 710.24 Appointment of DOE Counsel.

(a) Upon receipt from the individual of a written request for a hearing, an attorney shall forthwith be assigned by the Manager to act as DOE Counsel.

(b) DOE Counsel is authorized to consult directly with the individual if he is not represented by counsel, or with the individual’s counsel or representative if so represented, to clarify issues and reach stipulations with respect to testimony and contents of documents and other physical evidence. Such stipulations shall be binding upon the individual and the DOE Counsel for the purposes of this subpart.

§ 710.25 Appointment of Hearing Officer; prehearing conference; commencement of hearings.

(a) Upon receipt of a request for a hearing, the Manager shall in a timely manner transmit that request to the Office of Hearings and Appeals, and identify the DOE Counsel. The Manager shall at the same time transmit a copy of the notification letter and the individual’s response to the Office of Hearings and Appeals.

(b) Upon receipt of the hearing request from the Manager, the Director, Office of Hearings and Appeals, shall appoint, as soon as practicable, a Hearing Officer.

(c) Immediately upon appointment of the Hearing Officer, the Office of Hearings and Appeals shall notify the individual and DOE Counsel of the Hearing Officer’s identity and the address to
which all further correspondence should be sent.

(d) The Hearing Officer shall have all powers necessary to regulate the conduct of proceedings under this subpart, including, but not limited to, establishing a list of persons to receive service of papers, issuing subpoenas for witnesses to attend the hearing or for the production of specific documents or other physical evidence, administering oaths and affirmations, ruling upon motions, receiving evidence, regulating the course of the hearing, disposing of procedural requests or similar matters, and taking other actions consistent with the regulations in this subpart. Requests for subpoenas shall be liberally granted except where the Hearing Officer finds that the grant of subpoenas would clearly result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case. The Hearing Officer may take sworn testimony, sequester witnesses, and control the dissemination or reproduction of any record or testimony taken pursuant to this part, including correspondence, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(e) The Hearing Officer will determine the day, time, and place for the hearing. Hearings will normally be held at or near the appropriate DOE facility, unless the Hearing Officer determines that another location would be more appropriate. Normally the location for the hearing will be selected for the convenience of all participants. In the event the individual fails to appear at the time and place specified, the record in the case shall be closed and returned to the Manager, who will then make a final determination regarding the eligibility of the individual for DOE access authorization.

(f) At least 7 calendar days prior to the date scheduled for the hearing, the Hearing Officer will convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference will usually be conducted by telephone.

(g) Hearings shall commence within 90 calendar days from the date the individual’s request for hearing is received by the Office of Hearings and Appeals. Any extension of the hearing date past 90 calendar days from the date the request for hearing is received by the Office of Hearings and Appeals shall be approved by the Director, Office of Hearings and Appeals.

§ 710.26 Conduct of hearings.

(a) In all hearings conducted under this subpart, the individual shall have the right to be represented by a person of his own choosing. The individual is responsible for producing witnesses in his own behalf, including requesting the issuance of subpoenas, if necessary, or presenting other proof before the Hearing Officer to support his defense to the allegations contained in the notification letter. With the exception of procedural or scheduling matters, the Hearing Officer is prohibited from initiating or otherwise engaging in ex parte discussions about the case during the pendency of proceedings under this part.

(b) Unless the Hearing Officer finds good cause for granting a waiver of this paragraph or granting an extension of time, in the event that the individual unduly delays the hearing, such as by failure to meet deadlines set by the Hearing Officer, the record shall be closed, and a final decision shall be made by the Manager on the basis of the record in the case.

(c) Hearings shall be open only to DOE Counsel, duly authorized representatives of the staff of DOE, the individual and his counsel or other representatives, and such other persons as may be authorized by the Hearing Officer. Unless otherwise ordered by the Hearing Officer, witnesses shall testify in the presence of the individual but not in the presence of other witnesses.

(d) DOE Counsel shall assist the Hearing Officer in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Hearing Officer. The individual shall be afforded the opportunity of presenting evidence, including testimony by the individual
§ 710.26  

in the individual’s own behalf. The proponent of a witness shall conduct the direct examination of that witness. All witnesses shall be subject to cross-examination, if possible. Whenever reasonably possible, testimony shall be given in person.

(e) The Hearing Officer may ask the witnesses any questions which the Hearing Officer deems appropriate to assure the fullest possible disclosure of relevant and material facts.

(f) During the course of the hearing, the Hearing Officer shall rule on all questions presented to the Hearing Officer for the Hearing Officer’s determination.

(g) In the event it appears during the course of the hearing that Restricted Data or national security information may be disclosed, it shall be the duty of the Hearing Officer to assure that disclosure is not made to persons who are not authorized to receive it.

(h) Formal rules of evidence shall not apply, but the Federal Rules of Evidence may be used as a guide for procedures and principles designed to assure production of the most probative evidence available. The Hearing Officer shall admit into evidence any matters, either oral or written, which are material, relevant, and competent in determining issues involved, including the testimony of responsible persons concerning the integrity of the individual. In making such determinations, the utmost latitude shall be permitted with respect to relevancy, materiality, and competency. The Hearing Officer may also exclude evidence which is incompetent, immaterial, irrelevant, or unduly repetitious. Every reasonable effort shall be made to obtain the best evidence available. Subject to §§ 710.26(1), 710.26(m), 710.(n), 710.26(o), hearsay evidence may in the discretion of the Hearing Officer and for good cause shown be admitted without strict adherence to technical rules of admissibility and shall be accorded such weight as the circumstances warrant.

(i) Testimony of the individual and witnesses shall be given under oath or affirmation. Attention of the individual and each witness shall be directed to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(j) The Hearing Officer shall endeavor to obtain all the facts that are reasonably available in order to arrive at findings. If, prior to or during the proceedings, in the opinion of the Hearing Officer, the allegations in the notification letter are not sufficient to cover all matters into which inquiry should be directed, the Hearing Officer shall recommend to the Operations Office Manager concerned that, in order to give more adequate notice to the individual, the notification letter should be amended. Any amendment shall be made with the concurrence of the local Office of Chief Counsel or the Office of General Counsel in Headquarters cases.

(k) A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Hearing Officer without affording the individual an opportunity to cross-examine the person making the statement on matters relating to the characterization of such organization or person, provided the individual is given notice that it has been received and may be considered by the Hearing Officer, and is informed of its contents provided such is not prohibited by paragraph (g) of this section.

(l) Any oral or written statement adverse to the individual relating to a controverted issue may be received and considered by the Hearing Officer without affording an opportunity for cross-examination in either of the following circumstances:

(1) The head of the agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of the informant’s identity would be substantially harmful to the national interest;

(2) The Secretary or his special designee for that particular purpose has
preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that:

(i) The statement concerned appears to be reliable and material; and

(ii) Failure of the Hearing Officer to receive and consider such statement would, in view of the access sought to Restricted Data, national security information, or special nuclear material, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify

(A) Due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or

(B) Due to some other specified cause determined by the head of the agency to be good and sufficient.

(m) Whenever procedures under paragraph (l) of this section are used:

(1) The individual shall be given a summary or description of the information which shall be as comprehensive and detailed as the national interest permits, and

(2) Appropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine such person(s).

(n) Records compiled in the regular course of business, or other physical evidence other than investigative reports obtained by DOE, may be received and considered subject to rebuttal without authenticating witnesses provided that such information has been furnished to DOE by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary to safeguard Restricted Data, national security information, or special nuclear material.

(o) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the individual, may be received and considered provided that:

(1) The Secretary or his special designee for that particular purpose has made a preliminary determination that such physical evidence appears to be material;

(2) The Secretary or his special designee for that particular purpose has made a determination that failure to receive and consider such physical evidence would, in view of the access sought to Restricted Data, national security information, or special nuclear material sought, be substantially harmful to the national security; and

(3) To the extent that national security permits, a summary or description of such physical evidence is made available to the individual. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency shall be considered.

(p) The Hearing Officer may request the Local Director of Security to arrange for additional investigation on any points which are material to the deliberations of the Hearing Officer and which the Hearing Officer believes need further investigation or clarification. In this event, the Hearing Officer shall set forth in writing those issues upon which more evidence is requested, identifying where possible persons or sources from which the evidence should be sought. The Local Director of Security shall make every effort through appropriate sources to obtain additional information upon the matters indicated by the Hearing Officer.

(q) A written transcript of the entire proceedings shall be made and, except for portions containing Restricted Data or national security information, a copy of such transcript shall be furnished the individual without cost.

(r) Whenever information is made a part of the record under the exceptions authorized by paragraphs (l) or (o) of this section, the record shall contain certificates evidencing that the determinations required therein have been made.

§ 710.27 Hearing Officer's decision.

(a) The Hearing Officer shall carefully consider the record in view of the standards set forth herein and shall render a decision as to whether the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent
§ 710.28 Action on the Hearing Officer's decision.

(a) Within 10 calendar days of receipt of the decision and the administrative record, unless an extension of time is granted by the Director, Office of Safeguards and Security, the Manager shall:

(1) Notify the individual in writing of the Hearing Officer's decision;

(2) Advise the individual in writing of the appeal procedures available to the individual in paragraph (b) of this section if the decision is unfavorable to the individual;

(3) Advise the individual in writing of the appeal procedures available to the Manager and the Director, Office of Safeguards and Security, in paragraph (c) of this section if the decision is favorable to the individual; and,

(4) Provide the individual and/or counsel or representative, a copy of the Hearing Officer's decision and the administrative record.

(b) If the Hearing Officer's decision is unfavorable to the individual:

(1) The individual may file with the Director, Office of Safeguards and Security, a written request for further review of the decision by the Appeal Panel along with a statement required by paragraph (e) of this section within 30 calendar days of the individual's receipt of the Manager's notice;

(2) The Director, Office of Safeguards and Security may, for good cause shown, extend the time for filing a request for further review of the decision by the Appeal Panel at the written request of the individual provided the request for an extension of time is filed by the individual within 30 calendar days of receipt of the Manager's notice;

(3) The Hearing Officer's decision shall be considered final if the individual does not: file a written request for a review of the decision by the Appeal Panel or for an extension of time to file a written request for further review of the decision by the Appeal Panel in accordance with paragraphs (b)(1) or (b)(2) of this section; or, file a written request for a further review of the decision by the Appeal Panel after having been granted an extension of time to do so.

(c) If the Hearing Officer's decision is favorable to the individual, within 30
§ 710.29 Final appeal process.

(a) The Appeal Panel shall be convened by the Director, Office of Security Affairs, to review and render a final decision in an access authorization eligibility case referred by the individual, the Manager, or the Director, Office of Safeguards and Security, in accordance with §§710.22, 710.28, and 710.32.

(b) The Appeal Panel shall consist of three members, each of whom shall be a DOE Headquarters employee, a United States citizen, and hold a DOE Q access authorization. The Director, Office of Security Affairs, shall serve as a permanent member of the Appeal Panel and as the Appeal Panel Chairman. The second member of the Appeal Panel shall be a DOE attorney designated by the General Counsel. The head of the DOE Headquarters element who has cognizance over the individual whose access authorization eligibility is being considered may designate an employee to act as the third member on the Appeal Panel; otherwise, the third member will be designated by the Chairman. Only one member of the Appeal Panel shall be from the security field.

(c) In filing a written request for a review by the Appeal Panel in accordance with §§710.22 and 710.28, the individual, or the counsel or representative, shall identify the relevant issues and may also submit any relevant material in support of the individual. The individual’s written request and supportive material shall be made a part of the administrative record. The Director, Office of Safeguards and Security, shall provide staff support to the Appeal Panel as requested by the Director, Office of Security Affairs.

(d) Within 15 calendar days from the date of receipt of a request for a review of a case by the Appeal Panel, the Director, Office of Security Affairs, shall:

1. Request the General Counsel to designate an attorney who shall serve as an Appeal Panel member;

2. Either request the head of the cognizant DOE element to designate, or himself designate, an employee from outside the security field who shall serve as the third member of the Appeal Panel; and

3. Arrange for the Appeal Panel members to convene to review the administrative record or provide a copy of the administrative record to the other Appeal Panel members for their independent review.

(e) The Appeal Panel may initiate an investigation of any statement or material contained in the request for an Appeal Panel review and use any relevant facts obtained by such investigation in the conduct of the final decision process. The Appeal Panel may solicit and accept submissions from either the individual or DOE officials that are relevant to the final decision process and may establish appropriate time frames to allow for such submissions. The Appeal Panel may also consider any other source of information that will advance the final decision process, provided calendar days of the individual’s receipt of the Manager’s notice:

1. The Manager or the Director, Office of Safeguards and Security, may file a written request for further review of the decision by the Appeal Panel along with the statement required by paragraph (e) of this section;

2. The Director, Office of Security Affairs, may, at the written request of the Manager or Director, Office of Safeguards and Security, extend the time for filing a request for further review of the decision by the Appeal Panel; or

3. The Manager, with the concurrence of the Director, Office of Safeguards and Security, shall grant or reinstate the individual’s access authorization.

(d) A copy of any request for further review of the individual’s case by the Appeal Panel filed by the Manager or the Director, Office of Safeguards and Security, shall be provided to the individual by the Manager.

(e) The party filing a request for review of the individual’s case by the Appeal Panel shall include with the request a statement identifying the issues on which it wishes the Appeal Panel to focus. A copy of such statement shall be served on the other party, who may file a response with the Appeal Panel within 20 calendar days of receipt of the statement.

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that both parties are afforded an opportunity to respond to all third party submissions. All information obtained by the Appeal Panel under this section shall be made a part of the administrative record.

(f) Within 45 work days of the closing of the administrative record, the Appeal Panel shall render a final written decision in the case predicated upon an evaluation of the administrative record, findings as to each of the allegations contained in the notification letter, and any new evidence that may have been submitted pursuant to §710.30. If a majority of the Appeal Panel members determine that it will not endanger the common defense and security and will be clearly consistent with the national interest, the Director, Office of Security Affairs, shall grant or reinstate access authorization for the individual; otherwise, the Director, Office of Security Affairs, shall deny or revoke access authorization for the individual. The Appeal Panel written decision shall be made a part of the administrative record.

(g) The Director, Office of Security Affairs, through the Director, Office of Safeguards and Security, shall inform in writing the individual involved and counsel or representative of the Appeal Panel’s final decision. A copy of the correspondence shall also be provided to the other panel members and the Manager.

(h) If, upon receipt of a written request for a review of the individual’s case by the Appeal Panel, the Director, Office of Security Affairs, is aware or subsequently becomes aware of information that the individual is the subject of an unresolved inquiry or investigation of a matter that could reasonably be expected to affect the individual’s DOE access authorization eligibility, the Director may defer action by the Appeal Panel on the request until the inquiry or investigation is completed and its results available for review by the Appeal Panel. In such instances, the Director, Office of Security Affairs, shall:

1. Obtain written approval from the Secretary to defer review of the individual’s case by the Appeal Panel for an initial interval not to exceed 90 calendar days;

2. Advise the individual and appropriate DOE officials in writing of the initial deferral and the reason(s) therefor;

3. Request that the individual’s employment status not be affected during the initial and any subsequent deferral interval, except at the written request of the individual;

4. Obtain written approval from the Secretary to extend the deferral for each subsequent 90 calendar day interval and advise in writing all concerned parties of the Secretary’s approval;

5. Inform in writing all concerned parties when the inquiry or investigation has been completed and the results made available to the Appeal Panel.

(i) If, upon receipt of a written request for review of an individual’s case by the Appeal Panel, the Director, Office of Security Affairs, is aware or subsequently becomes aware of information that adversely affects the individual’s DOE access authorization eligibility and that cannot for national security reasons be disclosed in the proceedings before a DOE Hearing Officer, the Director may refer the information and the administrative record to the Secretary for the final decision as to the individual’s DOE access authorization eligibility. In such instances, the Director, Office of Security Affairs, shall notify in writing all concerned parties that the individual’s case has been provided to the Secretary for a final decision in accordance with §710.31.

(j) Upon the recommendation of the Appeal Panel, the Secretary may exercise the appeal authority of the Appeal Panel. If the Secretary exercises the appeal authority, then the decision of the Secretary is final.

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§ 710.30 New evidence.

(a) In the event of the discovery of new evidence relevant to the allegations contained in the notification letter prior to final decision of the individual’s eligibility for access authorization, such evidence shall be submitted by the offering party to the Director, Office of Safeguards and Security. DOE Counsel shall notify the individual of any new evidence submitted by DOE.

(b) The Director, Office of Safeguards and Security, shall:

(1) Refer the matter to the Hearing Officer appointed in the individual’s case if the Hearing Officer has not yet issued a decision. The Hearing Officer receiving the application for the presentation of new evidence shall determine the appropriate form in which any new evidence, and the other party’s response, shall be received, e.g., by testimony before the Hearing Officer, by deposition or by affidavit.

(2) In those cases where the Hearing Officer’s decision has been issued, the application for presentation of new evidence shall be referred to the Director, Office of Security Affairs. In the event that the Director, Office of Security Affairs, determines that the new evidence shall be received, he shall determine the form in which it, and the other party’s response, shall be received.

(c) When new evidence submitted by either party is received into the record, the opposing party shall be afforded the opportunity to cross-examine the source of the new information or to submit a written response, unless the information is subject to the exceptions in §710.26(l) or (o).

§ 710.31 Action by the Secretary.

(a) Whenever an individual has not been afforded an opportunity to cross-examine witnesses who have furnished information adverse to the individual under the provisions of §§710.26(l) or (o), or the opportunity to review and respond to the information provided by the Director, Office of Security Affairs, to the Secretary under §710.29(l), only the Secretary may issue a final decision to deny or revoke DOE access authorization for the individual after personally reviewing the administrative record and any additional material provided by the Director, Office of Security Affairs. The Secretary’s authority may not be delegated and may be exercised only when the Secretary determines that the circumstances described in §710.26(l) or (o), or §710.29(l) are present, and such determination shall be final.

(b) Whenever the Secretary issues a final decision as to the individual’s DOE access authorization eligibility, the individual and other concerned parties will be notified in writing, by the Director, Office of Security Affairs, of that decision and of the Secretary’s findings with respect to each of the allegations contained in the notification letter and each substantial issue identified in the statement in support of the request for review to the extent allowed by the national security.

(c) Nothing contained in these procedures shall be deemed to limit or affect the responsibility and powers of the Secretary to issue subpoenas or to deny or revoke access to Restricted Data, national security information, or special nuclear material.

(d) Only the Secretary may approve initial and subsequent requests under §710.29(h) by the Director, Office of Security Affairs, to defer the review of an individual’s case by the Appeal Panel.

[66 FR 47066, Sept. 11, 2001]

§ 710.32 Reconsideration of access eligibility.

(a) If, pursuant to the procedures set forth in §§710.20 through 710.31 the Manager, Hearing Officer, Appeal Panel, or the Secretary has made a decision granting or reinstating access authorization for an individual, the individual’s access authorization eligibility shall be reconsidered as a new administrative review under the procedures set forth in this subpart when previously unconsidered derogatory information is identified, or the individual violates a commitment or promise upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility.

(b) If, pursuant to the procedures set forth in §§710.20 through 710.31 the
§ 710.33 Manager, Hearing Officer, Appeal Panel, or the Secretary has made a decision denying or revoking access authorization for the individual, the individual’s access authorization eligibility may be reconsidered only when the individual so requests, when there is a bona fide offer of employment requiring access to Restricted Data, national security information, or special nuclear material, and when there is either:

(1) Material and relevant new evidence which the individual and the individual’s representatives are without fault in failing to present earlier, or

(2) Convincing evidence of rehabilitation or reformation.

(c) A request for reconsideration shall be submitted in writing to the Director, Office of Security Affairs, accompanied by an affidavit setting forth in detail the new evidence or evidence of rehabilitation or reformation. If the Director, Office of Security Affairs, determines that the regulatory requirements for reconsideration have been met, the Director shall notify the individual that the individual’s access authorization shall be reconsidered in accordance with established procedures for determining eligibility for access authorizations.

(d) If the individual’s access authorization is not reinstated following reconsideration, the individual shall be advised by the Director, Office of Safeguards and Security, in writing:

(1) Of the unfavorable action and the reason(s) therefor; and

(2) That within 30 calendar days from the date of receipt of the notification, he may file, through the Director, Office of Safeguards and Security, DOE Headquarters, a written request for a review of the decision by the Appeal Panel, in accordance with §710.29.

§ 710.34 Attorney representation.

In the event the individual is represented by an attorney or other representatives, the individual shall file with the Hearing Officer and DOE Counsel a document designating such attorney or representatives and authorizing one such attorney or representative to receive all correspondence, transcripts, and other documents pertaining to the proceeding under this subpart.

§ 710.35 Time frames.

Statements of time established for processing aspects of a case under this subpart are the agency’s desired time frames in implementing the procedures set forth in this subpart. However, failure to meet the time frames shall have no impact upon the final disposition of an access authorization by a Manager, Hearing Officer, the Appeal Panel, or the Secretary, and shall confer no procedural or substantive rights upon an individual whose access authorization eligibility is being considered.

§ 710.36 Acting officials.

Except for the Secretary, the responsibilities and authorities conferred in this subpart may be exercised by persons who have been designated in writing as acting for, or in the temporary capacity of, the following DOE positions: The Local Director of Security, the Manager, the Director, Office of Safeguards and Security, or the General Counsel. The responsibilities and authorities of the Director, Office of Security Affairs, may be exercised in his absence only by the Deputy Director, Office of Security Affairs.

(By authority of the Department of Energy Organization Act, 42 U.S.C. 7151(a), the Secretary of Energy or her designated representative is to be substituted for the “Commission” and “General Manager” as appropriate.)

Sec. 141. Policy. It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. * * *

Sec. 145. Restriction. (a) No arrangement shall be made under section 31, no contract shall be made or continued in effect under section 141, and no license shall be issued under section 103 or 104, unless the person with whom such arrangement is made, the contractor or prospective contractor, or the prospective licensee agrees in writing not to permit any individual to have access to Restricted Data until the Civil Service Commission shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security.

(b) Except as authorized by the Commission or the General Manager upon a determination by the Commission or General Manager that such action is clearly consistent with the national interest, no individual shall be employed by the Commission nor shall the Commission permit any individual to have access to Restricted Data until the Civil Service Commission shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security.

(c) In lieu of the investigation and report to be made by the Civil Service Commission pursuant to subsection (b) of this appendix, the Commission may accept an investigation and report on the character, associations, and loyalty of an individual made by another Government agency which conducts personnel security investigations, provided that a security clearance has been granted to such individual by another Government agency based on such investigation and report.

(d) In the event an investigation made pursuant to subsections (a) and (b) of this appendix develops any data reflecting that the individual who is the subject of the investigation is of questionable loyalty, the Civil Service Commission shall refer the matter to the Federal Bureau of Investigation for the conduct of a full field investigation, the results of which shall be furnished to the Civil Service Commission for its information and appropriate action.

(e) If the President deems it to be in the national interest he may from time to time determine that investigations of any group or class which are required by subsections (a), (b), and (c) of this appendix be made by the Federal Bureau of Investigation.

(f) Notwithstanding the provisions of subsections (a), (b), and (c) of this appendix, a majority of the members of the Commission shall certify those specific positions which are of a high degree of importance or sensitivity, and upon such certification, the investigation and reports required by such provisions shall be made by the Federal Bureau of Investigation.

(g) The Commission shall establish standards and specifications in writing as to the scope and extent of investigations, the reports of which will be utilized by the Commission in making the determination, pursuant to subsections (a), (b), and (c) of this appendix, that permitting a person access to Restricted Data will not endanger the common defense and security. Such standards and specifications shall be based on the location and class or kind of work to be done, and shall, among other considerations, take into account the degree of importance to the common defense and security of the Restricted Data to which access will be permitted.

(h) Whenever the Congress declares that a state of war exists, or in the event of a national disaster due to enemy attack, the Commission is authorized during the state of war or period of national disaster due to enemy attack to employ individuals and to permit individuals access to Restricted Data pending the investigation report, and determination required by section 145b, to the extent that and so long as the Commission finds that such action is required to prevent impairment of its activities in furtherance of the common defense and security.

Sec. 161. General provisions. In the performance of its functions the Commission is authorized to:

(a) Establish advisory boards to advise with and make recommendations to the Commission on legislation, policies, administration, research, and other matters, provided that the Commission issues regulations setting forth the scope, procedure, and limitations of the authority of each such board;

(b) Establish by rule, regulation, or order, such standards and instructions to govern...
the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

(c) Make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpoenaed under this subsection, shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

* * * * *

(i) Prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to the Act, to prevent any use or disposition there- of which the Commission may determine to be inimical to the common defense and security, including regulations or orders designating activities, involving quantities of special nuclear material which in the opinion of the Commission are important to the common defense and security, that may be conducted only by persons whose character, associations, and loyalty shall have been investigated under standards and specifications established by the Commission and to whom the Commission shall have determined that permitting each such person to conduct the activity will not be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

* * * * *

(n) Delegate to the General Manager or other officers of the Commission any of those functions assigned to it under this Act except those specified in sections 51, 57b, 61, 108, 123, 145b (with respect to the determination of those persons to whom the Commission may reveal Restricted Data in the national interest), 145f, and 161a;

* * * * *

(p) Make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.

APPENDIX B TO SUBPART A OF PART 710—ADJUDICATIVE GUIDELINES APPROVED BY THE PRESIDENT IN ACCORDANCE WITH THE PROVISIONS OF EXECUTIVE ORDER 12968

(The following guidelines, included in this subpart for reference purposes only, are reproduced as provided to the DOE by the Security Policy Board. The President may change the guidelines without notice.)

ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

1. Introduction. The following adjudicative guidelines are established for all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs and are to be used by government departments and agencies in all final clearance determinations.

2. The Adjudicative Process.

(a) The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual’s conduct, the adjudicator should consider the following factors:

(1) The nature, extent, and seriousness of the conduct;
(2) The circumstances surrounding the conduct, to include knowledgeable participation;
(3) The frequency and recency of the conduct;
(4) The individual’s age and maturity at the time of the conduct;
(5) The voluntariness of participation;
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(6) The presence or absence of rehabilitative and other pertinent behavioral changes;
(7) The motivation for the conduct;
(8) The potential for pressure, coercion, exploitation, or duress; and
(9) The likelihood of continuation or recurrence.

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.

(c) The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person concept, as explained further below:

1. Guideline A: Allegiance to the United States;
2. Guideline B: Foreign influence;
3. Guideline C: Foreign preference;
4. Guideline D: Sexual behavior;
5. Guideline E: Personal conduct;
7. Guideline G: Alcohol consumption;
8. Guideline H: Drug involvement;
9. Guideline I: Emotional, mental, and personality disorders;
10. Guideline J: Criminal Conduct;
12. Guideline L: Outside activities;

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding, the whole person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider the following:

- (1) Voluntarily reported the information;
- (2) Was truthful and complete in responding to questions;
- (3) Sought assistance and followed professional guidance, where appropriate;
- (4) Resolved or appears likely to favorably resolve the security concern;
- (5) Has demonstrated positive changes in behavior and employment;
- (6) Should have his or her access temporarily suspended pending final adjudication of the information.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

GUIDELINE A: ALLEGIANCE TO THE UNITED STATES

3. The Concern. An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual’s allegiance to the United States.

4. Conditions that could raise a security concern and may be disqualifying include:

(a) Involvement in any act of sabotage, espionage, treason, terrorism, sedition, or other act whose aim is to overthrow the Government of the United States or alter the form of government by unconstitutional means;

(b) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(c) Association or sympathy with persons or organizations that advocate the overthrow of the United States Government, or any state or subdivision, by force or violence or by other unconstitutional means;

(d) Involvement in activities which unlawfully advocate or practice the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

5. Conditions that could mitigate security concerns include:

(a) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(b) The individual’s involvement was only with the lawful or humanitarian aspects of such an organization;

(c) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;

(d) The person has had no recent involvement or association with such activities.

GUIDELINE B: FOREIGN INFLUENCE

6. The Concern. A security risk may exist when an individual’s immediate family, including cohabitants and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of
the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

7. Conditions that could raise a security concern and may be disqualifying include:
   (a) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.
   (b) Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.
   (c) Relatives, cohabitants, or associates who are connected with any foreign country;
   (d) Failing to report, where required, associations with foreign nationals;
   (e) Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service;
   (f) Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;
   (g) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure;
   (h) A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

8. Conditions that could mitigate security concerns include:
   (a) A determination that the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;
   (b) Contacts with foreign citizens are the result of official United States Government business;
   (c) Contact and correspondence with foreign citizens are casual and infrequent;
   (d) The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a foreign country;
   (e) Foreign financial interests are minimal and not sufficient to affect the individual’s security responsibilities.

GUIDELINE C: FOREIGN PREFERENCE

9. The Concern. When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. Conditions that could raise a security concern and may be disqualifying include:
   (a) The exercise of dual citizenship;
   (b) Possession and/or use of a foreign passport;
   (c) Military service or a willingness to bear arms for a foreign country;
   (d) Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;
   (e) Residence in a foreign country to meet citizenship requirements;
   (f) Using foreign citizenship to protect financial or business interests in another country;
   (g) Seeking or holding political office in the foreign country;
   (h) Voting in foreign elections; and
   (i) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

11. Conditions that could mitigate security concerns include:
   (a) Dual citizenship is based solely on parents’ citizenship or birth in a foreign country;
   (b) Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;
   (c) Activity is sanctioned by the United States;
   (d) Individual has expressed a willingness to renounce dual citizenship.

GUIDELINE D: SEXUAL BEHAVIOR

12. The Concern. Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. (The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and emotional, mental, and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior.) Sexual orientation or preference may not be used as a basis for a disqualifying factor in determining a person’s eligibility for a security clearance.

13. Conditions that could raise a security concern and may be disqualifying include:
   (a) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
   (b) Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive high-risk behavior or that which is symptomatic of a personality disorder;
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(c) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
(d) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

14. Conditions that could mitigate security concerns include:
(a) The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;
(b) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
(c) There is no other evidence of questionable judgment, irresponsibility, or emotional instability;
(d) The behavior no longer serves as a basis for coercion, exploitation, or duress.

GUIDELINE E: PERSONAL CONDUCT

15. The Concern. Conduct involving questionable judgment, antrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:
(a) Refusal to undergo or cooperate with required security processing, including medical and psychological testing; or
(b) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

16. Conditions that could raise a security concern and may be disqualifying also include:
(a) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;
(b) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
(c) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
(d) Personal conduct or concealment of information that may increase an individual’s vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person’s personal, professional, or community standing or render the person susceptible to blackmail;
(e) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;
(f) Association with persons involved in criminal activity.

17. Conditions that could mitigate security concerns include:
(a) The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
(b) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
(c) The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;
(d) Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;
(e) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;
(f) A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information;
(g) Association with persons involved in criminal activities has ceased.

GUIDELINE F: FINANCIAL CONSIDERATIONS

18. The Concern. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

19. Conditions that could raise a security concern and may be disqualifying include:
(a) A history of not meeting financial obligations;
(b) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
(c) Inability or unwillingness to satisfy debts;
(d) Unexplained affluence;
(e) Financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.

20. Conditions that could mitigate security concerns include:
(a) The behavior was not recent;
(b) It was an isolated incident;
(c) The conditions that resulted in the behavior were largely beyond the person’s control (e.g., loss of employment, a business
downturn, unexpected medical emergency, or a death, divorce or separation); (d) The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; (e) The affluence resulted from a legal source; and (f) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

GUIDELINE G: ALCOHOL CONSUMPTION

21. The Concern. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

22. Conditions that could raise a security concern and may be disqualifying include:
   (a) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;
   (b) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;
   (c) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
   (d) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
   (e) Habitual or binge consumption of alcohol to the point of impaired judgment;
   (f) Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

23. Conditions that could mitigate security concerns include:
   (a) The alcohol related incidents do not indicate a pattern;
   (b) The problem occurred a number of years ago and there is no indication of a recent problem;
   (c) Positive changes in behavior supportive of sobriety;
   (d) Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participated frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

GUIDELINE H: DRUG INVOLVEMENT

24. The Concern. Improper or illegal involvement with drugs raises questions regarding an individual’s willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

25. Conditions that could raise a security concern and may be disqualifying include:
   (a) Any drug abuse (see above definition);
   (b) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
   (c) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
   (d) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;
   (e) Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

26. Conditions that could mitigate security concerns include:
   (a) The drug involvement was not recent;
   (b) The drug involvement was an isolated or aberrational event;
   (c) A demonstrated intent not to abuse any drugs in the future;
   (d) Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

GUIDELINE I: EMOTIONAL, MENTAL, AND PERSONALITY DISORDERS

27. The Concern. Emotional, mental, and personality disorders can cause a significant defect in an individual’s psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental
health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual’s mental health care provider.

28. Conditions that could raise a security concern and may be disqualifying include:
   (a) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;
   (b) Information that suggests that an individual has failed to follow appropriate medical advice related to treatment of a condition, e.g., failure to take prescribed medication;
   (c) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;
   (d) Information that suggests that the individual’s current behavior indicates a defect in judgment, reliability and trustworthiness.

29. Conditions that could mitigate security clearance concerns include:
   (a) There is no indication of a current problem;
   (b) Recent opinion by a credentialed mental health professional that an individual’s previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation;
   (c) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.

GUIDELINE J: CRIMINAL CONDUCT

30. The Concern. A history or pattern of criminal activity creates a doubt about a person’s judgment, reliability and trustworthiness.

31. Conditions that could raise a security concern and may be disqualifying include:
   (a) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
   (b) A single serious crime or multiple lesser offenses.

32. Conditions that could mitigate security concerns include:
   (a) The criminal behavior was not recent;
   (b) The crime was an isolated incident;
   (c) The person was pressured or coerced into committing the act and those pressures are no longer present in that person’s life;
   (d) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
   (e) Acquittal;
   (f) There is clear evidence of successful rehabilitation.

GUIDELINE K: SECURITY VIOLATIONS

33. The Concern. Noncompliance with security regulations raises doubt about an individual’s trustworthiness, willingness, and ability to safeguard classified information.

34. Conditions that could raise a security concern and may be disqualifying include:
   (a) Unauthorized disclosure of classified information;
   (b) Violations that are deliberate or multiple or due to negligence.

35. Conditions that could mitigate security concerns include actions that:
   (a) Were inadvertent;
   (b) Were isolated or infrequent;
   (c) Were due to improper or inadequate training;
   (d) Demonstrate a positive attitude towards the discharge of security responsibilities.

GUIDELINE L: OUTSIDE ACTIVITIES

36. The Concern. Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an individual’s security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

37. Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with:
   (a) A foreign country;
   (b) Any foreign national;
   (c) A representative of any foreign interest;
   (d) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.

38. Conditions that could mitigate security concerns include:
   (a) Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual’s security responsibilities;
   (b) The individual terminates employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities.

GUIDELINE M: MISUSE OF INFORMATION TECHNOLOGY SYSTEMS

39. The Concern. Noncompliance with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual’s trustworthiness, willingness, and ability to properly protect classified systems, networks, and information. Information Technology Systems include all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information.
§ 710.50 Conditions that could raise a security concern and may be disqualifying include:

(a) Illegal or unauthorized entry into any information technology system;

(b) Illegal or unauthorized modification destruction, manipulation or denial of access to information residing on an information technology system;

(c) Removal (or use) of hardware, software, or media from any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations;

(d) Introduction of hardware, software, or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.

§ 710.51 Conditions that could mitigate security concerns include:

(a) The misuse was not recent or significant;

(b) The conduct was unintentional or inadvertent;

(c) The introduction or removal of media was authorized;

(d) The misuse was an isolated event;

(e) The misuse was followed by a prompt, good faith effort to correct the situation.

[66 FR 47067, Sept. 11, 2001]


SOURCE: 60 FR 20368, Apr. 25, 1995, unless otherwise noted.

GENERAL PROVISIONS

§ 710.50 Purpose.

(a) This subpart establishes the policies and procedures for implementing the Department of Energy (DOE) Personnel Security Assurance Program (PSAP) for individuals in positions:

1. Which afford direct access to or have direct responsibility for transportation or protection of Category I quantities of special nuclear materials (SNM);

2. Which afford unescorted access to the control areas of a nuclear material production reactor; or

3. With the potential for causing unacceptable damage to national security.

(b) The DOE Personnel Security Assurance Program is designed to establish the procedures for DOE and DOE contractors to utilize in the selection and continuing evaluation of individuals for assignment to positions described by paragraph (a) of this section. Individuals selected for assignment to such positions must be granted access authorization in accordance with the procedures and requirements set forth in subparts A and B of this part.

§ 710.51 Scope.

The criteria and procedures establishing the Personnel Security Assurance Program shall apply to:

(a) Those employees of, and applicants for employment with, DOE who either occupy or make application for PSAP positions, as described by paragraph (a) of § 710.50.

(b) Those employees of, and applicants for employment with, contractors and agents of the DOE who either occupy or make application for PSAP positions, as described by paragraph (a) of § 710.50.

§ 710.52 References.


(c) 10 CFR part 707, “Workplace Substance Abuse Programs at DOE Sites,” which requires DOE contractors to establish workplace substance abuse prevention programs, including urine drug
testing for individuals who occupy sensitive positions such as those requiring a PSAP access authorization.

(d) Implementing directives (DOE Orders) which provide Departmental guidance on the PSAP and related areas are available from the U.S. Department of Energy, Washington, DC 20585, Attention: Directives Distribution.

§ 710.53 Policy.

The protection of certain of the DOE’s security interests, with the potential, if compromised, of causing unacceptable damage to the national security requires the implementation of a program designed to assure that individuals occupying positions affording access to certain material, facilities, and programs meet the highest standards of reliability. This objective is accomplished through a system of continuous evaluation which identifies those individuals whose judgment may be impaired by physical and/or emotional disorders, substance abuse, or the use of alcohol habitually to excess. This process will reduce the risk resulting from the potential threat represented by such employees to an acceptable level. The determination to grant initially and to continue annually the access authorization to a PSAP position is based upon a DOE security assessment of any information of security concern developed in the course of an initial and annual security review process.

§ 710.54 Definitions.

As used in this part:

Contractor means the contractor and subcontractors at all tiers.

Direct access means access to Category I quantities of SNM which would permit an individual to remove, divert, or misuse that material in spite of any controls that have been established to prevent such unauthorized actions.

Illegal drugs means a controlled substance included in Schedules I, II, III, IV, or V, as defined by 21 U.S.C. 802(6), the possession of which is unlawful under chapter 13 of that title. The term “illegal drugs” does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by law.

Management official means an individual designated by the DOE or a DOE contractor, as appropriate, who has programmatic responsibility for PSAP positions.

Occurrence means any event or incident that is a deviation from the planned or expected behavior or course of events in connection with any Department of Energy or Department of Energy-controlled operation, if the deviation has environmental, public health and safety, or national security protection significance. Incidents having such significance include the following, or incidents of a similar nature:

(1) Injury or fatality to any person involving actions of a Department of Energy contractor employee.

(2) Involvement of nuclear explosives under Department of Energy jurisdiction which results in an explosion, fire, the spread of radioactive material, personal injury or death, or significant damage to property.

(3) Accidental release of pollutants which results or could result in a significant effect on the public or environment.

(4) Accidental release of radioactive material above regulatory limits.

PSAP Approving Official means a senior DOE official with direct personnel security responsibilities appointed by an operations office manager to review all relevant information, including DOE F 5631.35, “PSAP Management, Medical, and Security Report” as part of the DOE security review process, and who is responsible for granting or continuing the PSAP access authorization, or determining that an individual be processed under the provisions of subpart A of this part.

PSAP position means a position that affords direct access to or has direct responsibility for transportation or protection of Category I quantities of SNM, affords unescorted access to nuclear material production reactor control areas, or with the potential to cause unacceptable damage to national security.

Reasonable suspicion means a suspicion based on an articulable belief that an employee uses illegal drugs, drawn from particularized facts and reasonable inferences from those facts,
§ 710.55 Designation of PSAP positions.

PSAP positions shall be designated by the cognizant Operations Office Manager in accordance with the following criteria:

(a) Positions that afford direct access to Category I quantities of SNM or have direct responsibility for transportation or protection of Category I quantities of SNM.

(b) Positions that afford direct access to the control areas of a nuclear material production reactor.

(c) Positions with the potential for causing unacceptable damage to national security which are not included in paragraph (a) or (b) of this section, and are designated by the Director, Office of Safeguards and Security, DOE.

§ 710.56 Program process.

(a) Individuals selected for assignment to PSAP positions must be granted a PSAP access authorization in accordance with the procedures and requirements set forth in this subpart.

(b) The PSAP involves four components: Supervisory review; Medical assessment; management evaluation; and security determination. A DOE determination to grant initially and to continue annually an individual’s PSAP access authorization is based upon a DOE security assessment of any information of security concern developed in the course of the supervisory review, medical assessment, management evaluation, and security review.

(c) DOE shall make its decision as to a PSAP access authorization in accordance with the criteria in subpart A, §710.8 of this part.

§ 710.57 Supervisory review.

(a) The supervisory review shall be performed on all applicants tentatively selected for PSAP positions, transferes to PSAP positions, individuals occupying PSAP positions but not yet holding a PSAP access authorization, and PSAP-cleared employees.

(b) The initial SF 86, OMB Control No. 3206.007, “Questionnaire for Sensitive Positions” of an applicant tentatively selected for a PSAP position and an annual update of the “Questionnaire for Sensitive Positions,” Part II, of each incumbent in a PSAP position shall be completed and forwarded to the appropriate PSAP Approving Officer.

(c) Before being selected for a PSAP position, any tentatively selected applicant must undergo a pre-employment suitability determination as defined by 48 CFR 970.2201. For DOE employees, this pre-employment check must comply with the requirements established by the Office of Personnel Management in part 731 of title 5, Code of Federal Regulations. For contractor employees, this pre-employment check must comply with the requirements established by the DOE in section 970.2201(b)(1)(ii) of title 48.

(d) Each applicant tentatively selected for a PSAP position and each individual occupying a PSAP position but not a yet holding a PSAP access authorization shall execute the appropriate PSAP releases, acknowledgments, and waivers. The request for a PSAP access authorization shall not be
further processed until these documents are completed. Failure of an individual, occupying a PSAP position but not yet holding a PSAP access authorization, to complete these documents may prevent DOE from reaching an affirmative finding required for granting or continuing PSAP access authorization. An effort shall be made to reassign that individual to a position not requiring a PSAP access authorization. For purposes of this section and all sections of this rule that relate to reassignment from PSAP duties, any Federal employee will be immediately removed from PSAP duties. The affected employee’s supervisor may reassign the employee or realign the employee’s current duties. If these actions are not feasible, the supervisor must contact the appropriate servicing personnel office for guidance.

(e) Applicants tentatively selected for PSAP positions and each individual occupying a PSAP position, but not yet holding a PSAP access authorization, shall undergo testing for the use of illegal drugs in accordance with the provisions of the DOE policies implementing Executive Order 12564, or part 707 of this chapter, which establish workplace substance abuse programs for DOE and contractor employees respectively. A determination of the use of illegal drugs, based on a drug test, shall result in termination of consideration for the PSAP access authorization. An employee who has been determined to have used illegal drugs, based on a drug test, shall be immediately reassigned from the PSAP duties and processed under the provisions of subpart A of this part.

(f) Applicants tentatively selected for PSAP positions and each individual occupying a PSAP position, but not yet holding a PSAP access authorization, must submit to a polygraph examination under 10 CFR part 709.

(g) The supervisor (or selecting official) shall report any security concerns, resulting from his or her review, to the appropriate management official.

(h) Annual review. Each PSAP-cleared employee shall have an annual PSAP review conducted by the supervisor during which the supervisor shall evaluate information relevant to security. The supervisor shall report any security concerns, resulting from his or her review, to the appropriate management official.

(i) Recognition of security concerns and unusual conduct. In order to facilitate early recognition of an individual who represents a possible security concern, individuals who, in the judgment of the responsible supervisor, exhibit unusual conduct shall be referred to the site Occupational Medical Director, who may arrange for the PSAP-cleared employee to be examined by the appropriate medical staff. Information indicating a possible security concern shall be reported immediately to the appropriate management official and PSAP Approving Official.

(j) Temporary reassignment to non-PSAP duties. Where an individual has demonstrated a possible security concern or a condition which may temporarily affect his or her reliability, the individual, with the recommendation of the site Occupational Medical Director or the PSAP Approving Official, may be temporarily reassigned to non-PSAP duties. In the event that a PSAP-cleared employee is temporarily reassigned to non-PSAP duties, the supervisor, jointly with the site Occupational Medical Director and/or the PSAP Approving Official, may determine the temporary restrictions to be placed on the employee. The PSAP Approving Official shall be notified immediately upon the decision to temporarily reassign the employee to non-PSAP duties and the reason for such action, and upon the decision to reinstate such employee. If the reason for the temporary reassignment was based upon a security concern, the PSAP Approving Official must approve the request for reinstatement.

[60 FR 20368, Apr. 25, 1995, as amended at 64 FR 70980, Dec. 17, 1999]

§ 710.58 Medical assessment.

(a) The medical examination. The purpose of the PSAP medical examination is to ensure that an applicant tentatively selected for, or incumbent in, a PSAP position does not represent a security concern or have a condition which may prevent the individual from performing PSAP duties in a reliable manner.
§ 710.59 Management evaluation.

(a) Examination for the cause of reported unusual conduct. Upon referral of a PSAP-cleared employee by a supervisor for observed unusual conduct, the site Occupational Medical Director may arrange for the employee to be examined by appropriate specialists.

(b) Report of occupational Medical Director. Upon completion of the medical assessment, the site Occupational Medical Director shall report any security concerns resulting from the medical assessment to the appropriate management official.

(c) Temporary restrictions on a PSAP position. In the event that a condition or circumstance develops that may affect the judgment or reliability of a PSAP-cleared employee, the site Occupational Medical Director may recommend restrictions. The site Occupational Medical Director shall report these restrictions immediately in writing, to the appropriate management official who shall immediately notify the appropriate PSAP Approving Official. Removal of restrictions requires notification in writing to both the management official and the PSAP Approving Official by the site Occupational Medical Director.

(d) Sick leave from a PSAP position. PSAP-cleared employees who have been on sick leave for five or more consecutive work days are required to report in person to the site Occupational Medical Director before being allowed to return to normal duties. The site Occupational Medical Director shall provide a recommendation to the appropriate management official regarding the employee’s return to work. A PSAP-cleared employee may in certain circumstances also be required to report to the site Occupational Medical Director for written recommendation to return to normal duties after any period of sick leave.

§ 710.59 Management evaluation.

(a) Examination components. A management evaluation based upon a careful review of the results of the supervisory review, medical assessment, and drug testing of an individual in, or an applicant tentatively selected for, a PSAP position is required before that individual can be considered for an initial granting or the continuance of a PSAP access authorization. The appropriate manager of an organization having

and safe manner. The examination shall include an evaluation to determine the presence of any physical or mental condition that causes or may cause a significant defect in the judgment or reliability of the individual, including that which may result from the use of illegal drugs or the use of alcohol habitually to excess.

(b) When performed. The medical assessment is performed initially upon applicants tentatively selected for PSAP positions and employees occupying PSAP positions who have not yet received a PSAP access authorization. The medical assessment shall be performed annually, or more often as may be required by the site Occupational Medical Director, for PSAP-cleared employees.

(c) Contents of medical assessment. The medical assessment shall include: A comprehensive medical examination; an examination for use of alcohol habitually to excess; a psychological assessment and/or psychiatric evaluation as provided for in any applicable DOE medical standards, and as permitted by Federal regulations; and an examination for the cause of any reported unusual conduct.

(d) Examination for use of alcohol habitually to excess. The use of alcohol habitually to excess represents a potential threat to national security and is inconsistent with access to a PSAP position. Accordingly, the medical assessment shall include:

(1) Diagnosis. Employees in, or applicants tentatively selected for, a PSAP position shall be evaluated for the use of alcohol habitually to excess. Those employees diagnosed currently to use alcohol habitually to excess shall be temporarily reassigned to non-PSAP duties and the PSAP Approving Official shall be notified immediately.

(2) Rehabilitation. Individuals reinstated to PSAP duties following treatment leading to rehabilitation from the use of alcohol habitually to excess shall be required to undergo evaluation as prescribed by the site Occupational Medical Director to ensure continued rehabilitation. Such evaluation shall be consistent with appropriate Departmental substance abuse programs.

(e) Examination for the cause of reported unusual conduct. Upon referral of
PSAP positions (management official) shall evaluate the information in these reports and forward his or her recommendation, including any security concern, to the PSAP Approving Official.

(b) Drug testing component. Drug testing for the use of illegal drugs, as required by the PSAP, shall be established to test all individuals in, or applicants tentatively selected for, PSAP positions. Testing shall be conducted in accordance with the DOE policies implementing Executive Order 12564, or part 707 of this chapter, which establish workplace substance abuse programs for DOE and contractor employees respectively. The program shall include unannounced annual drug testing and testing for occurrence or reasonable suspicion for all PSAP-cleared individuals. A PSAP-cleared individual who has been determined to have used illegal drugs based on a drug test shall be reassigned immediately to non-PSAP duties, and the PSAP Approving Official shall be notified immediately.

(c) Occurrence or reasonable suspicion testing component. When a PSAP-cleared employee is involved in or associated with an occurrence requiring notification to the DOE or whose behavior creates the basis for a reasonable suspicion of substance abuse, the employee shall be tested for the use of illegal drugs. Drug testing shall be conducted in accordance with the provisions of the DOE policies implementing Executive Order 12564, or part 707 of this chapter, which establish workplace substance abuse programs for DOE and contractor employees respectively.

(d) Rehabilitation. Individuals reinstated to PSAP duties following treatment leading to rehabilitation from the use of illegal drugs shall be required to undergo evaluation and testing as prescribed in DOE drug-free workplace and substance abuse policies and by the site Occupational Medical Director or other designated official, as appropriate, in order to ensure continued rehabilitation.

(e) Corporate policy. Nothing in this subpart is intended to interfere with or prohibit a contractor of the Department from conducting medical and other evaluations, including testing for the use of illegal drugs as a matter of corporate policy, so long as such policy is at least as effective as the requirements and procedures of this subpart.

§ 710.60 DOE security review and clearance determination.

(a) When performed. The final component of the PSAP process is a security review and clearance determination performed by the PSAP Approving Official upon receipt of the management evaluation and recommendation.

(b) The criteria. The PSAP access authorization and adjudication shall be conducted in accordance with the criteria and procedures contained in relevant sections of this part.

(c) Review for initial PSAP access authorization. An initial PSAP access authorization requires the applicant or employee to have a DOE Q access authorization, based upon a background investigation. The adjudication and determination for a PSAP access authorization shall be based upon a review of security information, including the results of the background investigation and the information provided by management and medical sources.

(d) Annual PSAP access authorization continuance. Once an employee has received the PSAP access authorization, he or she shall thereupon undergo an annual security evaluation by the PSAP Approving Official. The evaluation shall include a review of the individual’s DOE personnel security file, and an updated SF-86, OMB Control No. 3206-007, “Questionnaire for Sensitive Positions,” Part II. The determination to continue the PSAP access authorization shall be based upon a review and any necessary adjudication of the information resulting from the annual security evaluation, and the information provided by management and medical sources, in accordance with the criteria and procedures contained in relevant sections of this part.

(e) Periodic reinvestigation. The PSAP-cleared employee shall undergo periodic reinvestigation as required to maintain a Q access authorization. The determination to continue the PSAP access authorization shall be based upon a review of security information, including the results of the limited
(f) Processing under 10 CFR part 710, subpart A. Any matters of security concern raised to the attention of the PSAP Approving Official, such as confirmed use of illegal drugs or use of alcohol habitually to excess, shall be evaluated in accordance with the criteria under subpart A, §710.8 of this part. Any administrative review under the PSAP shall be conducted in accordance with the provisions and procedures in subpart A of this part.

PART 711—PERSONNEL ASSURANCE PROGRAM (PAP)

Subpart A—PAP Certification/Recertification, Temporary Removal/Reinstatement, and Revocation of PAP Certification

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

SOURCE: 63 FR 48066, Sept. 8, 1998, unless otherwise noted.

Subpart A—PAP Certification/Recertification, Temporary Removal/Reinstatement, and Revocation of PAP Certification

§ 711.1 Purpose.

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

§ 711.2 Applicability.

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

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

§ 711.3 Definitions.

The following definitions are used in this part:

Access means proximity to a nuclear explosive that affords a person the opportunity to tamper with it or to cause it to detonate.
Alcohol use disorder means a maladaptive pattern in which a person’s intake of alcohol is great enough to damage or adversely affect physical or mental health or personal, social, or occupational function; or when alcohol has become a prerequisite to normal function.

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

Contractor means the contractor and subcontractors at all tiers.

Designated physician means a licensed doctor of medicine or osteopathy who has been nominated by the SOMD and, with the concurrence of the Director, Office of Occupational Medicine and Medical Surveillance, approved by the operations office manager, to provide professional expertise in the area of occupational medicine as it relates to the PAP.

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

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

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

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

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

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

Illegal drug means a controlled substance, as specified in Schedules I through V of the Controlled Substances Act, 21 U.S.C. 811, 812. The term “illegal drug” does not apply to the use of a controlled substance in accordance with the terms of a valid prescription, or other uses authorized by Federal law.

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

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

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

Medical Review Officer (MRO) means a licensed doctor of medicine or osteopathy who has knowledge of illegal drug use and other substance abuse disorders and has appropriate medical training to interpret drug test results. The MRO may also be the designated physician and/or SOMD.

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

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

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

Occupational medical program means a DOE program that: (1) assists in the maintenance, monitoring, protection, and promotion of employee health through the skills of occupational medicine, psychology, and nursing; and (2)
§ 711.4 General.

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

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

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

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

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

§ 711.5 General requirements.

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

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

1. Have an active DOE Q access authorization based upon a background investigation;
2. Sign an acknowledgment and agreement to participate in the PAP on a form provided by DOE;
3. Be interviewed and briefed on the importance of the nuclear explosive duty assignment and PAP objectives and requirements.
4. Successfully complete an annual medical assessment for certification and recertification in accordance with Subpart B of this part;
5. Not have used any hallucinogen in the preceding 5 years and shall not have experienced a flashback resulting from the use of any hallucinogen more than 5 years before applying for certification or recertification;
6. If a DOE employee, be tested for illegal drugs at least once each calendar year in an unannounced and unpredictable manner under DOE Order 3792.3, “Drug-Free Federal Workplace Testing Implementation Program,” and be subject to testing for cause or reasonable suspicion or after an accident or an unsafe practice involving the individual;
(7) If a DOE contractor employee, be tested for illegal drugs at least once each calendar year in an unannounced and unpredictable manner under 10 CFR part 707, "Workplace Substance Abuse Programs at DOE Sites," and be subject to testing for cause or reasonable suspicion or after an accident or an unsafe practice involving the individual; and

(8) Be eligible for a polygraph examination under 10 CFR part 709.

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

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

(e) An individual whose PAP certification is revoked for the use of illegal drugs shall have his or her certification revoked, immediately, if use of an illegal drug is confirmed through drug testing, as provided in §711.42 of Subpart B.

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

§711.6 PAP certification process.

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

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

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

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

(3) Ensuring that the personnel security file (PSF) of each PAP individual is reviewed by a DOE employee trained to identify PAP concerns before the individual is certified or recertified;

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

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

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

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

§ 711.8 PAP training requirements.

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

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

1. A detailed explanation of nuclear explosive duties and nuclear explosive safety;

2. Instruction on PAP objectives, policies, and requirements;

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

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

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

1. A detailed explanation of nuclear explosive duties and nuclear explosive safety;

2. Instruction on PAP objectives, policies, and requirements;

3. An orientation on nuclear explosive duties and the work environment applicable to that of the PAP employee;

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

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

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

§ 711.9 Supervisor reporting.

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

(b) Behavior and conditions that could indicate unsuitability for the PAP include, but are not limited to, the following:
(1) Psychological or physical disorders that impair performance of assigned duties;
(2) Conduct that warrants referral for a criminal investigation or results in arrest or conviction;
(3) Indications of deceitful or delinquent behavior;
(4) Attempted or threatened destruction of property or life;
(5) Suicidal tendencies or attempted suicide;
(6) Use of illegal drugs or the abuse of legal drugs or other substances;
(7) Alcohol use disorder;
(8) Recurring financial irresponsibility;
(9) Irresponsibility in performing assigned duties;
(10) Inability to deal with stress, or the appearance of being under unusual stress;
(11) Failure to understand work directives, hostility or aggression toward fellow workers or authority, uncontrolled anger, violation of safety or security procedures, or repeated absenteeism; and
(12) Significant behavioral changes, moodiness, depression, or other evidence of loss of emotional control.

§ 711.12 Action following removal from duties.

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

(b) Evaluation. The PAP certifying official shall conduct an evaluation of the circumstances or information that led the supervisor to remove the individual from nuclear explosive duties. The PAP certifying official shall prepare a written report of the evaluation that includes the certifying official's determination regarding the individual's suitability for continuing PAP certification.

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

(i) Notify the operations office manager of the determination; and
(ii) Notify the individual’s supervisor of the determination and direct that the individual be allowed to return to nuclear explosive duties.

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

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

(1) Direct that the individual be reinstated in the PAP and, in writing, explain the reasons and factual basis for the action;
(2) Direct the revocation of the individual’s PAP certification and, in writing, explain the reasons and factual basis for the decision; or
(3) Direct continuation of the temporary removal pending completion of specified actions (e.g., medical assessment, security evaluation, treatment) to resolve the concerns about the individual’s suitability for the PAP.

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

(f) Reinstatement after completion of specified actions. An individual directed by the operations office manager to take specified actions to resolve PAP concerns shall be reevaluated by the certifying official after those actions have been completed. After considering the PAP certifying official’s evaluation report and recommendation, the operations office manager shall direct either:

(1) Reinstatement of the individual in the PAP; or
(2) Revocation of the individual’s PAP certification.

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

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

(1) Take no action;
(2) Submit a written request to the operations office manager for reconsideration of the decision to deny or revoke certification. The request shall include the individual’s response to any information that gave rise to a concern about the individual’s suitability for nuclear explosive duties. The statement shall be signed under oath or affirmation before a notary public, and must be sent by certified mail to the operations office manager within 20 working days after the individual received notice of the operations office manager’s decision; or
(3) Submit a written request to the operations office manager for a certification review hearing. The request for a hearing must be sent by certified mail to the operations office manager within 20 working days after the individual receives notice of the operations office manager’s decision.

(i) Operations office manager’s decision after reconsideration or hearing. (1) If an individual requests reconsideration by
§ 711.13 Appointment of a certification review hearing officer and legal counsel.

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

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

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

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

(1) Obtaining evidence;

(2)Arranging for the appearance of witnesses;

(3) Examining and cross-examining witnesses; and

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

§ 711.14 Certification review hearing.

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

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

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

(1) Receive all information relating to the individual’s fitness for PAP certification through witnesses or documentation;

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

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

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

(ii) The substance of the statement was contained in the individual’s personnel security file and the Assistant Secretary for Defense Programs or designee for that particular purpose has determined, after considering information furnished by the investigative agency concerning the reliability of
§ 711.15 Hearing officer’s report and recommendation.

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

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

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

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

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

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

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

(d) If an individual does not appeal to the Assistant Secretary for Defense Programs within the time specified in paragraph (a) of this section, the operations office manager’s decision shall be the final decision.

Subpart B—Medical Assessments for PAP Certification and Recertification

GENERAL PROVISIONS

§ 711.20 Applicability.

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

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

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

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

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

§ 711.30 Designated physician.

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

(b) The designated physician shall:

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

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

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

(c) The designated physician shall be responsible for the medical assessments of PAP individuals, including determining which components of the medical assessments may be performed by other qualified personnel. Although a portion of the assessment may be performed by another physician, physician’s assistant, or nurse practitioner, the designated physician remains responsible for:

(1) Supervising the evaluation process;

(2) Interpreting the results of evaluations;

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

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

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

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

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

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

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

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

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

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

§ 711.31 Designated psychologist.

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

(b) The designated psychologist shall:

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

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

(3) Have a valid, unrestricted state license to practice clinical psychology in the state where PAP medical assessments occur;

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

(5) Be eligible for DOE access authorization.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 711.32 Site Occupational Medical Director (SOMD).

(a) The SOMD shall nominate a physician to serve as the designated physician and a clinical psychologist to serve as the designated psychologist. The nominations shall be sent through the operations office to the Director, Office of Occupational Medicine and Medical Surveillance. Each nomination shall describe the nominee’s relevant training, experience, and licensure, and shall include a curriculum vitae and a copy of the nominee’s current state or district license.

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

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

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

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

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

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

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

(a) Develop policies, standards, and guidance related to the medical aspects of the PAP, including the psychological testing inventory to be used;
(b) Review the qualifications of designated physicians and designated psychologists, and concur or nonconcur in their designations by sending a statement to the responsible program office and the operations office, with an informational copy to the SOMD;
(c) Provide technical assistance on medical aspects of the PAP to all DOE elements and DOE contractors; and
(d) Concur or nonconcur with the medical bases of decisions rendered on appeals of PAP certification decisions.

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

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

MEDICAL ASSESSMENT PROCESS AND STANDARDS

§ 711.40 Medical standards for certification.

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

(a) Physical or medical disabilities such as visual acuity, defective color vision, impaired hearing, musculoskeletal deformities, and neuromuscular impairment;
(b) Mental disorders or behavioral problems, including substance use disorders, as defined in the Diagnostic and Statistical Manual of Mental Disorders;
(c) Use of illegal drugs or the abuse of legal drugs or other substances, as identified by self-reporting, or by medical or psychological evaluation or testing;
(d) Alcohol use disorder;
(e) Threat of suicide, homicide, or physical harm; or
(f) Cardiovascular disease, endocrine disease, cerebrovascular or other neurologic disease, or the use of drugs for the treatment of such conditions that may adversely affect the judgment or ability of an individual to perform assigned duties in a safe and reliable manner.

§ 711.41 Medical assessment process.

(a) The designated physician, under the supervision of the SOMD, shall be responsible for the medical assessment of PAP individuals. In carrying out this responsibility, the designated physician or the SOMD shall integrate the medical evaluations, available drug testing results, psychological evaluations, any psychiatric evaluations, and any other relevant information to determine an individual’s overall medical qualification for assigned duties.
(b) Employers shall provide a job task analysis or detailed statement of duties for each PAP individual to both the designated physician and the designated psychologist before each medical assessment and psychological evaluation. PAP medical assessments and psychological evaluations shall not be performed if a job task analysis or detailed statement of duties has not been provided.
(c) The designated physician shall consider a PAP individual’s fitness for nuclear explosive duties at the time of each medical contact, including:
(1) Medical assessments for initial certification, annual recertification, and evaluations for reinstatement following temporary removal from the PAP;
§ 711.42 Medical assessment for drug abuse.

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

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

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

(d) If an individual successfully completes an SOMD-approved drug rehabilitation program, DOE may reinstate the individual in the PAP based on the SOMD’s follow-up evaluation and recommendation. The individual reinstated will be subject to SOMD-directed unannounced tests for illegal drugs and relevant counseling for 3 years.

§ 711.43 Evaluation for hallucinogen use.

If DOE determines that a PAP individual has used any hallucinogen, the
individual shall not be eligible for certification or recertification unless:
(a) Five years have passed since the last use of the hallucinogen;
(b) A medical evaluation, including a psychological test, is performed to determine that the individual is reliable; and
(c) The individual has a record of acceptable job performance and observed behavior.

§ 711.44 Medical assessment for alcohol use disorder.
(a) If alcohol abuse is suspected, an individual shall be examined for evidence of alcohol use disorder. If the examination produces evidence of alcohol use disorder, additional evaluation shall be conducted, which may include psychological evaluation.
(b) Alcohol consumption is prohibited within an 8-hour period preceding scheduled work and during the performance of nuclear explosive duties.
(c) Individuals in the PAP, including individuals who report for unscheduled work, may be tested for cause or reasonable suspicion of alcohol use or after an accident or an unsafe practice involving the individual.
(d) DOE shall implement or require the contractor to implement procedures that will ensure that persons called in to perform unscheduled work are fit to perform the tasks assigned.
(e) Tests for alcohol must be administered by a certified Breath Alcohol Technician using an evidential-grade breath analysis device approved for use at the 0.02/0.04 cut-off levels that conforms to the Department of Transportation’s (DOT) National Highway Traffic Safety Administration (NHTSA) model specifications (58 FR 48703, September 17, 1993), and the most recent “Conforming Products List” issued by NHTSA which are available from the Office of Traffic Safety Programs, Washington, DC.
(f) An individual whose confirmatory breath alcohol test result is at or above an alcohol concentration of 0.02 percent shall not be allowed to perform nuclear explosive duties until the individual’s alcohol concentration is below 0.02 percent using an evidential-grade breath analysis device described in section 711.44(e).
(g) Individuals subject to alcohol testing under DOT regulations shall be subject to the sanctions promulgated by the Federal Highway Administration rule. Appropriate disciplinary action will be taken under DOE’s authority.
(h) Individuals refusing to submit to a breath alcohol test shall be immediately removed from nuclear explosive duties.
(i) The SOMD, in conjunction with the designated psychologist, shall evaluate each case of alcohol use disorder for evidence of psychological impairment and provide the PAP certifying official a recommendation as to the individual’s reliability.
(j) After successfully completing an SOMD-approved alcohol treatment program, DOE may reinstate an individual in the PAP based on the SOMD’s follow-up evaluation and recommendation.

§ 711.45 Maintenance of medical records.
(a) Medical records produced or used in the PAP certification process shall be collected and maintained on separate forms and in separate medical files, and be treated as a confidential medical record.
(b) The medical records of PAP individuals shall be maintained in accordance with the Privacy Act, 5 U.S.C. 552a and DOE implementing regulations in 10 CFR Part 1008; the Department of Labor’s regulations on access to employee exposure and medical records, 29 CFR 1910.1020; and applicable DOE directives. DOE contractors also may be subject to §503 of the Rehabilitation Act, 29 U.S.C. 793, and its implementing rules, including confidentiality provisions at 29 CFR 60741.23(d).
(c) The psychological record of a PAP individual shall be considered a component of the medical record. The psychological record shall:
(1) Contain any clinical reports, test protocols and data, notes of employee contacts and correspondence, and other information pertaining to an individual’s contact with a psychologist;
(2) Be stored in a secure location in the custody of the designated psychologist;
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(3) Be kept separate from other medical record documents, with access limited to the SOMD, the designated physician, the designated psychologist, or other persons who are authorized by law or regulation to have access; and

(4) Be retained indefinitely.

(d) The records of alcohol and drug testing shall be maintained in accordance with 42 CFR part 2, "Confidentiality of Alcohol and Drug Abuse Patient Records," and 10 CFR part 707, "Workplace Substance Abuse Programs at DOE Sites."

PART 715—DEFINITION OF NON—RECOUSE PROJECT—FINANCED

Sec.

715.1 Purpose and scope.

715.2 Definitions.

715.3 Definition of "Nonrecourse Project-Financed."


SOURCE: 56 FR 55064, Oct. 24, 1991, unless otherwise noted.

§ 715.1 Purpose and scope.

This part sets forth the definition of "nonrecourse project-financed" as that term is used to define "new independent power production facility," in section 416(a)(2)(B) of the Clean Air Act Amendments of 1990, 42 U.S.C. 7651o(a)(2)(B). This definition is for purposes of section 416(a)(2)(B) only. It is not intended to alter or impact the tax treatment of any facility or facility owner under the Internal Revenue Code and regulations.

§ 715.2 Definitions.

As used in this subpart—

Act means the Clean Air Act Amendments of 1990, 104 Stat. 2399.

Facility means a "new independent power production facility" as that term is used in the Act, 42 U.S.C. 7651o(a)(2).

§ 715.3 Definition of "Nonrecourse Project-Financed."

Nonrecourse project-financed means when being financed by any debt, such debt is secured by the assets financed and the revenues received by the facility being financed including, but not limited to, part or all of the revenues received under one or more agreements for the sale of the electric output from the facility, and which neither an electric utility with a retail service territory, nor a public utility as defined by section 201(e) of the Federal Power Act, as amended, 16 U.S.C. 824(e), if any of its facilities are financed with general credit, is obligated to repay in whole or in part. A commitment to contribute equity or the contribution of equity to a facility by an electric utility shall not be considered an obligation of such utility to repay the debt of a facility. The existence of limited guarantees, commitments to pay for cost overruns, indemnity provisions, or other similar undertakings or assurances by the facility’s owners or other project participants will not disqualify a facility from being “nonrecourse project-financed” as long as, at the time of the financing for the facility, the borrower is obligated to make repayment of the term debt from the revenues generated by the facility, rather than from other sources of funds. Projects that are 100 percent equity financed are also considered “nonrecourse project-financed” for purposes of section 416(a)(2)(B).

PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS

Subpart A—General Provisions

Sec.

719.1 What is the purpose of this part?

719.2 What are the definitions of terms used in this part?

719.3 What contracts are covered by this part?

719.4 Are law firms that are retained by the Department covered by this part?

719.5 What contracts are not covered by this part?

719.6 Are there any types of legal matters not included in the coverage of this part?

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Subpart B—Legal Management Plan

719.10 What information must be included in the legal management plan?

719.11 Who must submit a legal management plan?

719.12 When must the plan be submitted?

719.13 Who at the Department must receive and review the plan?

719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted plan?

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

For purposes of this part:

Alternative dispute resolution includes processes such as mediation, neutral evaluation, mini-trials and arbitration.

Contractor means any person or entity with whom the Department contracts for the acquisition of goods or services.

Covered contracts means those contracts described in §719.3.

Department means the Department of Energy, including the National Nuclear Security Administration.

Department counsel means the individual in the field office, or Headquarters’s office, designated as the contracting officer’s representative and point of contact for a contractor or Department retained legal counsel, for purposes of this part only, for submission and approval of the legal management plan, advance approval of certain costs, and submission of a staffing and resource plan, as addressed in this part.

Legal costs include, but are not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services of accountants, consultants, or others retained by the contractor or by retained legal counsel to assist retained legal counsel; and any similar costs incurred by or in connection with the services of retained legal counsel.

Legal management plan means a statement describing the contractor’s practices for managing legal costs and matters for which it procures the services of retained legal counsel.

Retained legal counsel means members of the bar working in the private sector, either individually or in law firms.
§ 719.3 What contracts are covered by this part?

(a) This part covers cost reimbursement contracts:
   (1) For an amount exceeding $100,000,000, and
   (2) Involving work performed at the facilities owned or leased by the Department.

(b) This part covers contracts otherwise not covered by paragraph 3(a) of this section containing a specialized clause requiring compliance with this part.

(c) This part also covers Department contracts with retained legal counsel where the legal costs are expected to exceed $100,000.

§ 719.4 Are law firms that are retained by the Department covered by this part?

Retained legal counsel under fixed rate or other type of contract with the Department itself to provide legal services must comply with the following where the legal costs over the life of the matter for which counsel has been retained are expected to exceed $100,000:

(a) Requirements related to staffing and resource plans in subpart B of this part,

(b) Engagement letter requirements if legal work is contracted out, and

(c) Cost guidelines in subpart D of this part.

§ 719.5 What contracts are not covered by this part?

This part does not cover:

(a) Fixed price contracts;

(b) Cost reimbursement contracts for an amount less than $100,000,000; or

(c) Contracts for an amount exceeding $100,000,000 involving work not performed at a government owned or leased site.

§ 719.6 Are there any types of legal matters not included in the coverage of this part?

Matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier;

(b) Routine intellectual property law support services;

(c) Routine workers and unemployment compensation matters and labor arbitrations; and

(d) Routine matters handled by counsel retained through a GSA supply schedule.

§ 719.7 Is there a procedure for exceptions or deviations from this part?

(a) Requests for exceptions or deviations from this part by contractors must be made in writing to Department counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor.

(b) The General Counsel may authorize exceptions based on a recommendation of Department counsel. The General Counsel may also establish exceptions to this part based on current field office and contractor practices which satisfy the purpose of these requirements.

(c) Exceptions to this part which are also a deviation from the cost principles (see subpart D of this part) must be approved by the Procurement Executive. See 48 CFR (FAR) 31.101. Written requests from contractors for a deviation to a cost principle must be submitted to the contracting officer, with a copy provided to Department counsel.

Subpart B—Legal Management Plan

§ 719.10 What information must be included in the legal management plan?

The legal management plan must include the following items:
(a) A description of the legal matters that may necessitate handling by retained legal counsel.

(b) A discussion of the factors the contractor must consider in determining whether to handle a particular matter utilizing retained legal counsel.

(c) An outline of the factors the contractor must consider in selecting retained legal counsel, including:
   (1) Competition;
   (2) Past performance and proficiency shown by previously retained counsel;
   (3) Particular expertise in a specific area of the law;
   (4) Familiarity with the Department’s activity at the particular site and the prevalent issues associated with facility history and current operations;
   (5) Location of retained legal counsel relative to:
      (i) The site involved in the matter,
      (ii) Any forum in which the matter will be processed, and
      (iii) Where a significant portion of the work will be performed;
   (6) Experience as an advocate in alternative dispute resolution procedures such as mediation;
   (7) Actual or potential conflicts of interest; and
   (8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees, etc.).

(d) A description of:
   (1) The system that the contractor will use to review each case to determine whether and when alternative dispute resolution is appropriate;
   (2) The role of in house counsel in cost management;
   (3) The contractor’s process for review and approval of invoices from outside law firms or consultants;
   (4) The contractor’s strategy for interaction with, and supervision of, retained legal counsel;
   (5) How appropriate interaction with the contracting officer and Department counsel will be ensured; and
   (6) The contractor’s corporate approach to legal decision making.

§ 719.11 Who must submit a legal management plan?

Contractors identified under paragraphs (a) and (b) in § 719.3 must submit a legal management plan.

§ 719.12 When must the plan be submitted?

Contractors identified under paragraphs (a) and (b) in § 719.3 must submit a legal management plan within 60 days following the execution of a contract with the Department.

§ 719.13 Who at the Department must receive and review the plan?

The contractors identified under paragraphs (a) and (b) in § 719.3 must file a legal management plan with Department counsel.

§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted plan?

(a) The Department will notify the contractor within 30 days of the contractor’s submission of the plan of any deficiencies relating to requirements in § 719.10.

(b) The contractor must either correct identified deficiencies within 30 days of notice of the deficiency or file a letter with the General Counsel disputing the determination of a deficiency.

§ 719.15 What are the requirements for a staffing and resource plan?

(a) For significant matters, the contractor must require retained legal counsel providing legal services to prepare a staffing and resource plan as provided in this section. The contractor must then forward the staffing and resource plan to Department counsel. Department retained counsel subject to this part must prepare a staffing and resource plan and forward it to Department counsel.

(b) A staffing and resource plan is a plan describing:
   (1) Major phases likely to be involved in the handling of the matter;
   (2) Timing and sequence of such phases;
   (3) Projected cost for each phase of the representation; and
   (4) Numbers and mix of resources, when applicable, that the retained legal counsel intends to devote to the representation.
§ 719.16 (c) For significant matters in litigation, in addition to the generalized annual budget required by § 719.17, a staffing and resource plan must include a budget, broken down by phases, including at a minimum:

1. Matter assessment, development and administration;
2. Pretrial pleadings and motions;
3. Discovery;
4. Trial preparation and trial; and
5. Appeal.

§ 719.16 When must the staffing and resource plan be submitted?

(a) For significant matters in litigation, the contractor or Department retained counsel must submit the staffing and resource within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, or 30 days after a determination that the cost is expected to exceed $100,000.

(b) For significant legal services matters, the contractor or Department retained counsel must submit the staffing and resource plan within 30 days following execution of an engagement letter.

(c) Contractors and Department retained counsel must submit updates to staffing and resource plans annually or sooner if significant changes occur in the matter.

(d) When it is unclear whether a matter is significant, the contractor must consult with Department counsel on the question.

(e) The purpose of the staffing and resource plan is primarily informational, but Department counsel may state objections within 30 days of the submission of a staffing and resource plan. When an objection is stated, the contractor has 30 days to satisfy the objection or dispute the objection in a letter to the General Counsel.

§ 719.17 Are there any budgetary requirements?

(a) Contractors required to submit a legal management plan must also submit an annual legal budget covering then pending matters to Department counsel.

(b) The annual legal budget must include cost projections for known or existing matters for which reimbursable legal costs are expected to exceed $100,000, at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the contractor and Department counsel, the contractor must report on its success on staying within budget at the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there will be departures from the annual budget beyond the control of the contractor.

Subpart C—Engagement Letters

§ 719.20 When must an engagement letter be used?

Contractors must submit an engagement letter to retained legal counsel expected to provide $25,000 or more in legal services for a particular matter and submit a copy of correspondence relating to § 719.21, including correspondence from retained legal counsel addressing any of the issues under § 719.21, to Department counsel.

§ 719.21 What are the required elements of an engagement letter?

(a) The engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

1. A process for review and documented approval of all billing by a contractor representative, including the timing and scope of billing reviews.

2. A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. (An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.)

3. A requirement that the contractor, the Department, and the General Accounting Office, have the right upon request, at reasonable times and locations, to inspect, copy, and audit all records documenting billable fees and costs.
§ 719.33

(4) A statement that all records must be retained for a period of three (3) years after the final payment.

(c) The contractor must obtain the following information from retained counsel:

(1) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(2) An initial assessment of the matter, along with a commitment to provide updates as necessary.

(3) A description of billing procedures, including frequency of billing and billing statement format.

(d) The contractor must obtain retained counsel’s agreement to the following:

(1) That in significant matters a staffing and resource plan for the conduct of the matter must be submitted by the retained legal counsel to the contractor in accordance with the requirements of §§ 719.15 and 719.16.

(2) That alternative dispute resolution must be considered at as early a stage as possible where litigation is involved.

(3) That retained counsel must comply with the cost guidelines in subpart D of this part.

(4) That retained counsel must provide a certification concerning the costs submitted for reimbursement that is consistent with the certification in the Attachment to Appendix A to this part.

(5) That professional conflicts of interest issues must be identified and addressed promptly.

(e) Additional requirements may be included in an engagement letter based on the needs of the contractor or the office requiring the Department retained counsel.

Subpart D—Reimbursement of Costs Subject to This Part

§ 719.30 Is there a standard for determining cost reasonableness?

The standard for cost reasonableness determinations, one of the criteria for an allowability determination, is contained in the Federal Acquisition Regulation (FAR), at 48 CFR 31.201-3.

§ 719.31 How does the Department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered;

(d) The complexity of the legal matter and the expertise of the law firm in this area; and

(e) The factors listed in § 719.10(c).

§ 719.32 For what costs is the contractor, or Department retained counsel, limited to reimbursement of actual costs only?

All costs determined to be allowable are reimbursable for actual costs only, with no overhead or surcharge adjustments.

§ 719.33 What categories of costs are unallowable?

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 970.31. See also 41 U.S.C. 256(e).

(b) The Department does not consider for reimbursement any costs incurred for entertainment or alcoholic beverages. See 48 CFR (FAR) 31.205-14 and 31.205-51 and 41 U.S.C. 256(e).

(c) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(d) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.
§ 719.34 What is the treatment for travel costs?

Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR (FAR) 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

§ 719.35 What categories of costs require advance approval?

Costs for the following require specific justification or advance written approval from Department counsel to be considered for reimbursement:

(a) Computers or general application software, or non-routine computerized databases specifically created for a particular matter;
(b) Charges for materials or non-attorney services exceeding $5,000;
(c) Secretarial and support services, word processing, or temporary support personnel;
(d) Attendance by more than one person at a deposition, court hearing, interview or meeting;
(e) Expert witnesses and consultants;
(f) Trade publications, books, treatises, background materials, and other similar documents;
(g) Professional or educational seminars and conferences;
(h) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;
(i) Food and beverages when the attorney or consultant is not on travel status and away from the home office; and
(j) Pro hac vice admissions.

§ 719.36 Who at the Department must give advance approval?

If advance approval is required under this part, the advance approval must be obtained from the Department counsel unless the Department counsel indicates that approval of a request may only be given by the contracting officer.

§ 719.37 Are there any special procedures or requirements regarding subcontractor legal costs?

(a) The contractor must have a monitoring system for subcontractor legal matters likely to reach $100,000 over the life of the matter. The purpose of this system is to enable the contractor to perform the same type of analysis and review of subcontractor legal management practices that the Department can perform of the contractor’s legal management practices. The monitoring is intended to enable the contractor to keep the Department informed about significant subcontractor legal matters, including significant matters in litigation. The burden is on the prime contractor to be responsive to questions raised by the Department concerning significant subcontractor legal matters.

(b) Contractors must submit information copies of subcontractor invoices for legal services to Department counsel.

§ 719.38 Are costs covered by this part subject to audit?

All costs covered by this part are subject to audit by the Department, its designated representative or the General Accounting Office. See §719.21.

§ 719.39 What happens when more than one contractor is a party to a matter?

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor persuasively shows that it was reasonable for the contractor to incur such expenses.
Subpart E—Department Counsel Requirements

§ 719.40 What is the role of Department counsel as a contracting officer’s representative?

(a) The individual selected as Department counsel for a contract subject to the requirements of this part must be approved by the contracting officer and the appropriate Chief Counsel, or General Counsel if at Headquarters. The Department counsel must receive written delegated authority from the contracting officer to serve as the contracting officer’s representative for legal matters. The contractor must receive a copy of this delegation of authority.

(b) Actions by Department counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority may not be construed to include the authority to execute or to agree to any modification of the contract nor to attempt to resolve any contract dispute concerning a question of fact arising under the contract.

§ 719.41 What information must be forwarded to the General Counsel’s Office concerning contractor submissions to Department counsel under this part?

Department counsel must submit through the General Counsel reporting system, the approved costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

§ 719.42 What types of field actions must be coordinated with Headquarters?

(a) Requests from contractors for exception from this entire part must be coordinated with Headquarters.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of significance to the Department nationwide or issues of broad applicability to the Govern-
2.0 Defense of Litigation

(A) In accordance with the Insurance-Litigation and Claims clause, the contractor must immediately notify Department counsel, acting in his/her capacity as contracting officer representative, of the initiation of litigation against the contractor. Department counsel will advise the contractor as to:

(1) Whether the defense of the litigation will be either approved or disapproved or approval deferred and any conditions to which approval is subject;
(2) Whether the contractor must authorize the Government to defend the action;
(3) Whether the Government will take charge of the action; and
(4) Whether the Government must receive an assignment of the contractor’s rights.

(B) When defensive litigation is approved at a later stage or at the conclusion of the matter, reimbursement can be made for only those expenses which would have been reimbursable as allowable costs if the Department had originally approved the defense of the litigation.

2.1 Disapproval of Defensive Litigation

If the Department disapproves in advance the costs of defense of the litigation, the contractor will be notified of the disapproval and that contract funds may not be used to fund the defense of the litigation. The contractor will also be informed if the Department changes its position. Contractor compliance with these policies and procedures does not itself obligate the Department to reimburse litigation costs or judgment costs when Departmental approval of the litigation cost has been denied or deferred.

3.0 Notice to the Department of Significant Matters and Litigation

The contractor’s procedures under its Legal Management Plan should include provisions for earliest possible notification to the Department of the likely initiation of any “significant matters” involving class actions, radiation or toxic substance exposure, problems concerning the safeguarding of classified information, and any other matters involving issues which the contractor has reason to believe are of general importance to the Department or the government as a whole.

4.0 Alternative Dispute Resolution

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, pre-discovery, after initial discovery and pre-trial. This evaluation should be done in coordination with the Department’s ADR liaison if one has been established or appointed or the Department counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department counsel are also encouraged to consult with the Department’s Director of the Office of Dispute Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. In exceptional circumstances, arbitration may be appropriate. However, agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

5.0 Cost Allowability Issues

A determination of cost reasonableness may depend on a variety of considerations and circumstances. In accordance with 48 CFR (FAR) 31.201-3, no presumption of reasonableness is attached to the incurrence of costs by a contractor. 10 CFR part 719 and this Appendix provide contractors guidelines for incurring legal costs to which adherence should result in a determination of allowability if the cost is otherwise allowable under the contract.

5.1 Underlying Cause for Incurrence of Costs

(A) While 10 CFR part 719 provides procedures for incurring legal costs, the determination of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate determination. This latter determination may involve, for example, a possible finding of willful misconduct.
or lack of good faith by contractor management in the case of third party liability, or a finding of violation of a statute or regulation by the contractor in a governmental proceeding. The reason for the contractor incurring costs may be determinative of the allowability of the contractor's legal costs. For example, legal costs incurred by a contractor in defending actions brought by governmental agencies may be covered by the Major Fraud Act, 41 U.S.C. 296(k), implemented as a cost principle at 48 CFR (FAR) 31.205-47. In such cases, the statute may restrict the Department's authority to reimburse legal costs incurred by the contractor regardless of the outcome of the action.

(B) In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. This is particularly true in the case of legal defense costs covered by the restrictions in the Major Fraud Act and is also a common problem in cases covered by various whistleblower statutes and regulations. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withhold any payment pending the outcome, legal costs ultimately reimbursed by the Department must satisfy the standards of cost reasonableness.

5.2 Fees and Other Charges

(A) Requests by retained legal counsel that are not in a direct contract with the Department for fee increases should be sent in writing to the contractor, who should review the request for reasonableness. If the contractor determines the request is reasonable, the contractor should seek approval for the request from Department counsel and the contracting officer before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two-year period.

(B) Costs listed in 10 CFR 719.33(c) are usually incorporated into the rate or fee structure. Consultants or experts hired by retained legal counsel who do not include any overhead or similar charges, such as computer time, in their base rate, must have those charges approved in advance by Department counsel and the contracting officer. Time charged by law students should be scrutinized for its efficiency and have prior authorization.

(C) Travel time may be reimbursed at a full rate for the portion of time during which retained legal counsel actually performs work for which it was retained; any remaining travel time during normal working hours shall be reimbursed at 50 percent, except that in no event is travel time for time during which work was performed for other clients reimbursable. Also, for long distance travel that could be completed by various methods of transportation, i.e., car, train, or plane, only the charge for the overall fastest travel time will be considered reasonable.

(D) For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Potential use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered and be coordinated with Department counsel.

6.0 Role of Department Counsel as the Contracting Officer's Representative

(A) An attorney from the field office or from Headquarters will be appointed a contracting officer's representative by the cognizant contracting officer. A contracting officer may designate other Government personnel to act as authorized representatives for functions not involving a change in the scope, price, terms or conditions of the contract. This designation is made in writing and contains specific instructions regarding the extent to which the representatives may take action for the contracting officer, and prohibits the representative from signing contractual documents. The contracting officer is the only person authorized to approve changes in any of the requirements under the contract.

(B) Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR (FAR) 1.602-1, and for contracting officer's representatives at 48 CFR (DEAR) 942.270-1. The clause, Technical Direction, 48 CFR (DEAR) 952.242-70, also discusses the responsibilities and limitations of a contracting officer's representative.

7.0 Future Amendments to Guidance

The Office of the General Counsel may by memorandum provide additional guidance to contractors. These memoranda will serve as guidance for "safe harbor" practices for contractors procuring outside legal services.

ATTACHMENT—CONTRACTOR LITIGATION AND LEGAL COSTS, MODEL BILL CERTIFICATION AND FORMAT

1. Certification

Bills or invoices should contain a certification signed by a representative of the retained legal counsel to the effect that:

"Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge
and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy’s regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are necessary.”

2. Model Bill Format

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<thead>
<tr>
<th>I.—FOR FEES</th>
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<tbody>
<tr>
<td>Date of service</td>
<td>Description of service</td>
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<td>(See Note 1 to this table).</td>
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<thead>
<tr>
<th>II.—FOR DISBURSEMENTS</th>
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<tbody>
<tr>
<td>Date</td>
<td>Description of disbursement</td>
</tr>
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<td>(See Note 2 to this table).</td>
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</table>

**NOTE 1—DESCRIPTION OF SERVICE:** All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

**NOTE 2—DESCRIPTION OF DISBURSEMENT:** Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times a maximum of 10 cents per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (i.e., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

**NOTE 3—RECEIPTS:** Receipts for all expenses equal to or above $75 must be attached.

**PART 725—PERMITS FOR ACCESS TO RESTRICTED DATA**

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**APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE**

**APPENDIX B TO PART 725—DOE’S OPERATIONS OFFICES AND GEOGRAPHICAL AREAS OF RESPONSIBILITIES**

**AUTHORITY:** Sec. 161 of the Atomic Energy Act, as amended, 68 Stat. 943, 42 U.S.C. 2201.

**SOURCE:** 41 FR 56778, Dec. 30, 1976, unless otherwise noted.

**EDITORIAL NOTE:** Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.
GENERAL PROVISIONS

§ 725.1 Purpose.
This part establishes procedures and standards for the issuance of an Access Permit to any person subject to this part who requires access to Restricted Data applicable to civil uses of atomic energy for use in his business, trade or profession; provides for the amendment, renewal, suspension, termination and revocation of an Access Permit; and specifies the terms and conditions under which the Administrator will issue the Permit.

§ 725.2 Applicability.
The regulations in this part apply to any person within or under the jurisdiction of the United States who desires access to Restricted Data for use in his business, profession or trade.

§ 725.3 Definitions.
As used in this part:
(a) Access Permit means a permit, issued by the Administrator authorizing access by the named permittee to Restricted Data applicable to civil uses of atomic energy in accordance with the terms and conditions stated on the permit.
(b) Act means the Atomic Energy Act of 1954 (68 Stat. 919), including any amendments thereto.
(c) Category means a category of Restricted Data designated in appendix A to the regulations in this part.
(d) Administrator means the Administrator of the Department of Energy or his duly authorized representatives.
(e) DOE means the Department of Energy.
(f) Permittee means the holder of a permit issued pursuant to the regulations in this part.
(g) Person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than DOE, any state or any political subdivision of, or any political entity within a state, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.
(h) Restricted Data means all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Act.
(i) Government Confidential Commercial Information means sensitive commercial information not including Restricted Data, generated by the government, the release of which could put the government at a competitive disadvantage in providing enrichment services.

§ 725.4 Interpretations.
Except as specifically authorized by the Administrator in writing no interpretation of the meaning of the regulations in this part by any officer or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

§ 725.5 Communications.
Communications concerning rulemaking, i.e., petition to change part 725, should be addressed to Administrator of Energy Research and Development, Department of Energy, Washington DC 20545. Except with respect to category C–24, all other communications concerning the regulations in this part and applications filed under them, should be addressed to the DOE Operations Office listed in appendix B of this part responsible for the geographical area in which (a) the applicant’s principal place of business is located, or (b) the principal place where the applicant will use the restricted data is located.

§ 725.6 Categories of available information.
For administrative purposes DOE has categorized Restricted Data which will be made available to permittees in the categories as set forth in appendix A to this part. Top Secret information; information pertaining to the design, manufacture or utilization of atomic weapons; and defense information other than Restricted Data are not included in these categories and will not be made available under this part.
§ 725.7 Specific waivers.

The Administrator may, upon application of any interested party, grant such waivers from the requirements of this part as he determines are authorized by law and will not constitute an undue risk to the common defense and security.

§ 725.11 Applications.

(a) Any person desiring access to Restricted Data pursuant to this part should submit an application (Form DOE 378), in triplicate, for an access permit to the DOE Operations Office, listed in appendix B to this part, responsible for the area in which (1) the applicant’s principal place of business is located, or (2) the principal place where the applicant will use the Restricted Data is located. Applications for access to Restricted Data in category C–24 isotope separation, should be submitted to the Oak Ridge Operations Office.

(b) Where an individual desires access to Restricted Data for use in the performance of his duties as an employee, the application for an access permit must be filed in the name of his employer.

(c) Self-employed private consultants, desiring access to Restricted Data, must file the application in their own name for an individual access permit.

(d) Each application should contain the following information:

(1) Name of applicant (unincorporated subsidiaries or divisions of a corporation must apply in the name of the corporation);
(2) Address of applicant;
(3) Description of business or occupation of applicant; and
(4)(i) If applicant is an individual, state citizenship.
( ii) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.
(iii) If applicant is a corporation or an unincorporated association, state:
(A) The state where it is incorporated or organized and the principal location where it does business;
(B) The names, addresses and citizenship of its directors and of its principal officers;
(C) Whether it is owned, controlled or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.
(iv) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this subparagraph with respect to such principal;
(5) Total number of full-time employees;
(6) Classification of Restricted Data (Confidential or Secret) to which access is requested;
(7) Potential use of the Restricted Data in the applicant’s business, profession or trade. If access to Secret Restricted Data is requested, list the specific categories by number and furnish detailed reasons why such access within the specified categories is needed by the applicant. The need for Secret information should be stated by describing its proposed use in specific research, design, planning, construction, manufacturing, or operating projects; in activities under licenses issued by Nuclear Regulatory Commission; in studies or evaluations planned or under way; or in work or services to be performed for other organizations. In addition, if access to secret restricted data in category C–65, plutonium production, or restricted data in category C–24, isotope separation, is requested, the application should also include sufficient information to satisfy the requirements of §725.15(b) (2) or (3), as the case may be;"
(8) Principal Location(s) at which Restricted Data will be used.

(e) Applications should be signed by a person authorized to sign for the applicant.

(f) Each application shall contain complete and accurate disclosure with respect to the real party or parties in interest and as to all other matters and things required to be disclosed.

§ 725.12 Noneligibility.

The following persons are not eligible to apply for an access permit:
(a) Corporations not organized under the laws of the United States or a political subdivision thereof.

(b) Any individual who is not a citizen of the United States.

(c) Any partnership not including among the partners one or more citizens of the United States; or any other unincorporated association not including one or more citizens of the United States among its principal officers.

(d) Any organization which is owned, controlled or dominated by the Government of, a citizen of, or an organization organized under the laws of a country or area listed as a Subgroup A country or destination in §371.3 (15 CFR 371.3) of the Comprehensive Export Schedule of the United States Department of Commerce.

(e) Persons subject to the jurisdiction of the United States who are not doing business within the United States.

§ 725.13 Additional information.

The Administrator may, at any time after the filing of the original application and before the termination of the permit, require additional information in order to enable the Administrator to determine whether the permit should be granted or denied or whether it should be modified or revoked.

§ 725.14 Public inspection of applications.

Applications and documents submitted to DOE in connection with applications may be made available for public inspection in accordance with the regulations contained in part 702 of this chapter.

§ 725.15 Requirements for approval of applications.

(a) An application for an access permit authorizing access to confidential restricted data in the categories set forth in appendix A of this part (except C–91 and C–24) will be approved only if the application has a potential use or application for such data in his business, trade, or profession and has filed a complete application form.

(b)(1) An application for an access permit authorizing access to restricted data in category C–24 or secret restricted data in other categories will be approved only if the applicant has a need for such data in his business, trade, or profession and has filed a complete application form.

(2) An application for an access permit authorizing access to Secret Restricted Data in category C–65 Plutonium Production will be approved only if the application demonstrates also that the applicant:

(i) Is directly engaged in a substantial effort to develop, design, build or operate a chemical processing plant or other facility related to his participation in the peaceful uses of atomic energy for which such production rate and cost data are needed; or

(ii) Is furnishing to a permittee having access to C–65 under paragraph (b)(2)(i) of this section, substantial scientific, engineering or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to category C–65.

(3) An application for an access permit authorizing access to Restricted Data in category C–24, isotope separation—subcategory A or B—will be approved only if the application demonstrates also that the applicant:

(i) Possesses technical, managerial and financial qualifications demonstrating that the applicant is potentially capable of undertaking or participating significantly in the construction and/or operation of production or manufacturing facilities and offers reasonable assurance of adequacy of resources to carry on, alone or with others, uranium enrichment on a production basis or the large-scale manufacture or assembly of precision equipment systems, or is potentially capable of utilizing centrifuge machines in its business for uranium enrichment or for purposes other than uranium enrichment; and is not subject to foreign ownership, control, or influence; and

(A) For subcategory A, desires to determine its interest in participating significantly in a substantial effort to develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment.

(B) For subcategory B, proposes to (i) participate significantly in, or is directly participating significantly in, a
substantial effort to evaluate alternative processes, develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment, or (2) utilize centrifuge machines and related equipment in its business for uranium enrichment or for purposes other than uranium enrichment, or

(ii) Furnishing to a permittee having access to Category C–24 under the paragraph (b)(3)(i) of this section substantial scientific, engineering, or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to Category C–24.

(4) An application for an access permit authorizing access to Confidential and Secret Restricted Data in C–91, Nuclear Reactors for Rocket Propulsion, will be approved only if the application demonstrates also that the applicant:

(i) Possesses qualifications demonstrating that he is capable of making a contribution to research and development in the field of nuclear reactors for rocket propulsion and is directly engaged in or proposes to engage in a substantial research and development program in such field of work; or

(ii) Is engaged in or proposes to engage in a substantial study program in the field of nuclear reactors for rocket propulsion preparatory to the submission of a research and development proposal to DOE; or

(iii) Is furnishing to a permittee having access under paragraph (b)(4)(i) or (ii) of this section substantial scientific, engineering or other professional services to be used by that permittee in a study or research and development program for which said permittee received access.

§ 725.22 Scope of permit.

(a) All access permits will as a minimum authorize access, subject to the terms and conditions of the access permit to confidential restricted data in all of the categories set forth in appendix A to this part, except C–91 and C–24.

(b) In addition, access permits may authorize access, subject to the terms and conditions of the access permit to such Secret Restricted Data as is included within the particular category or categories specified in the permit.

(c) In addition, access permits may authorize access, subject to the terms and conditions of the access permit, to such government confidential commercial information as is included within the particular category or categories specified in the permit.

§ 725.23 Terms and conditions of access.

(a) Neither the United States, nor DOE, nor any person acting on behalf of DOE makes any warranty or other representation, expressed or implied, (1) with respect to the accuracy, completeness or usefulness of any information made available pursuant to an access permit, or (2) that the use of any such information may not infringe privately owned rights.

(b) The Administrator, on behalf of DOE, hereby waives such rights with respect to any invention or discovery as it may have pursuant to section 152 of the Act by reason of such invention or discovery having been made or conceived in the course of, in connection with, or resulting from access to Restricted Data received under the terms of an access permit. (Note provisions of §725.23(d).)

(c) Each permittee shall:

(1) Comply with all applicable provisions of the Atomic Energy Act of 1954, as amended, and with parts 795 and 810 of this chapter and with all other applicable rules, regulations, and orders of DOE, including such rules, regulations, and orders as DOE may adopt or issue to effectuate the policies specified in

§ 725.21 Issuance.

(a) Upon a determination that an application meets the requirements of this regulation, the Administrator will issue to the applicant an access permit on Form DOE 379.

(b) An Access Permit is not an access authorization. It does not authorize any individual not having an appropriate DOE access authorization to receive Restricted Data. See §725.24 and part 795 of this chapter.
§ 725.23

the act directing DOE to strengthen free competition in private enterprise and avoid the creation or maintenance of a situation inconsistent with the antitrust laws.

(2) Be deemed to have waived all claims for damages under section 183 of title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or as a result of access to Restricted Data received under the terms of the access permit;

(3) Be deemed to have waived any and all claims against the United States, DOE and all persons acting on behalf of DOE that might arise in connection with the use, by the applicant, of any and all information supplied by them pursuant to the access permit;

(4) Obtain and preserve in his files written agreements from all individuals who will have access to Restricted Data under his access permit. The agreement shall be as follows:

In consideration for receiving access to Restricted Data under the access permit issued by the Administrator of Energy Research and Development, I hereby agree to:

(a) Waive all claims for damages under section 183 of title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application, and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or resulting from access to Restricted Data received under the terms of the access permit issued to (insert the name of the holder of the access permit);

(b) Waive any and all claims against the United States, DOE, and all persons acting on behalf of DOE that might arise in connection with the use, by me, of any and all information supplied by them pursuant to the access permit issued to (insert the name of the holder of the access permit).

In case of an access permit authorizing access to restricted data in category C-24, isotope separation, the agreement shall also provide for such requirements as the permittee considers necessary for purposes of fulfilling its obligations under paragraph (d) of this section.

(5) Pay all established charges for personnel access authorizations, DOE consulting services, publication and reproduction of documents, and such other services as DOE may furnish in connection with the access permit.

(d) The following terms and conditions are applicable to an access permit authorizing access to restricted data in category C-24, isotope separation irrespective of whether access to DOE’s restricted data information is desired:

(1) The permittee agrees to grant a nonexclusive license at reasonable royalties to the United States and, at the request of DOE, to domestic and foreign persons, to use in the production or enrichment of special nuclear material any U.S. patent or any U.S. patent application (otherwise in condition for allowance except for a secrecy order thereon) on any invention or discovery made or conceived by the permittee, its employees, or others engaged by the permittee in the course of the permittee’s work under the access permit, or as a result of access to data or information made available by DOE.

(2) The permittee agrees to grant to the United States, and, at the request of DOE, to domestic and foreign persons, the right at reasonable royalties to use for research, development, or manufacturing programs for the production or enrichment of special nuclear material, any technical information or data, including economic evaluations thereof, of a proprietary nature developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee’s work under the access permit or as a result of access to data or information made available by DOE.

If DOE disseminates any such proprietary technical information or data in its possession to any of its contractors for use in any DOE research, development, production, or manufacturing programs, it will do so under contractual provisions pursuant to which the contractor would undertake to use this information only for the work under the pertinent DOE contract. Notwithstanding the foregoing provisions of this subparagraph, the
§ 725.23 - Permittee reports and submissions

The permittee waives any claim against DOE for compensation or otherwise, in connection with any use or dissemination of information or data not specifically identified and claimed by the permittee as proprietary in a written notice to DOE at the time of the furnishing of the information or data to DOE. As used in this subparagraph, the term "technical information or data, including economic evaluations thereof, of a proprietary nature" means information or data which:

(i) Is not the property of the Government by virtue of any agreement;

(ii)(A) Concerns the details of trade secrets or manufacturing processes which the permittee has protected from us by others; and

(iii)(A) Is specifically identified as proprietary at the time it is made available to DOE.

(b) Technical information or data shall not be deemed proprietary in nature whenever substantially the same technical information is available to DOE which has been prepared, developed or furnished as nonproprietary information by another source independently of the proprietary information and data furnished by the permittee.

(3) If the amount of reasonable royalties provided for in paragraphs (d)(1) and (2) of this section cannot be agreed upon, the permittee agrees that such amount shall be determined by the Administrator under the provisions of section 157c of the Atomic Energy Act of 1954, as amended.

(4) In the event domestic commercial uranium enriching services are provided for in paragraphs (d)(1) and (2) of this section the permittee or DOE considers may be of interest to DOE, including reports of patent applications on inventions or discoveries and of technical information and data of a proprietary nature. These reports will cover the results of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provisions of this subparagraph shall be subject to the provisions of paragraphs (d)(1) and (2) of this section.

(7) The permittee agrees to make available to DOE, at all reasonable times during the term of the access permit, for inspection by DOE personnel, or by mutual agreement, others on behalf of DOE, all experimental equipment and technical information or data developed by the permittee, its employees, or others engaged by the permittee, in the course of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provision of this subparagraph shall be subject to the provisions of paragraphs (d)(1) and (2) of this section.

(8) The permittee agrees to pay such reasonable compensation as DOE may elect to charge for the commercial use of its inventions and discoveries including related data and technology and, except for an applicant qualifying for a permit pursuant to § 725.15(b)(3)(ii), agrees to pay $25,000 for an access permit authorizing access to restricted data in subcategory B.

(9) Except as may be otherwise authorized by DOE, the permittee agrees not to disseminate to persons not granted access by DOE, restricted data or government confidential commercial information made available to the permittee by DOE or restricted data developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit or as a result of data or information made available by DOE.

(10) The granting of an access permit does not constitute any assurance, direct or implied, that the Nuclear Regulatory Commission will grant the permittee a license for a production facility or any other license.
§ 725.31 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any regulation or order issued thereunder. Any person who willfully violates any
provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be punished by fine or imprisonment or both, as provided by law.

APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

C-24 Isotope separation.—This category is divided into subcategories A and B.

Subcategory A includes information in summary form concerning the status and potential of the gaseous diffusion and gas centrifuge processes for the separation of uranium isotopes.

Subcategory B includes information on the following:

a. Any aspect of separating one or more isotopes of uranium from a composition containing a mixture of isotopes of that element by the gas centrifuge or gaseous diffusion processes.

b. Design, construction, and operation of any plant, facility or device capable of separating by the gas centrifuge or gaseous diffusion processes one or more isotopes of uranium from a composition containing a mixture of isotopes of that element, including means and methods of transporting materials from one to another device.

C-44 Nuclear Technology. This category includes classified technical information concerning nuclear technology. It may contain information on the following:

a. Materials, including metals, ceramics, organic and inorganic compounds. Included are such technical areas as the technology and fabrication of fuel elements, corrosion studies, cladding techniques and radiation studies.

b. Chemistry, chemical engineering and radiochemistry of all the elements and their compounds. Included are techniques and processes of chemical separations, radioactive waste handling and feed material processing.

c. Reactor physics, engineering and technology including theory, design, criticality studies and operation of reactors, reactor systems and reactor components.

d. Reserved.

e. Lithium isotope separation technology. This subcategory includes classified technical information on the separation of lithium isotopes by using counter-current flows of lithium amalgam and aqueous lithium hydroxide solution in packed columns. Not included is information regarding plant design and operating conditions from which total production rates or design capacity of the lithium isotope separation plant (Coley) in Oak Ridge, Tennessee, can be inferred. In addition to the other requirements of this part, access permits for Restricted Data in this subcategory will be approved, provided the permittee:

1. Demonstrates that it is not a corporation or entity owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, and

2. Agrees to insertion in his access permit of the terms and conditions:

   (i) Set forth in paragraphs (a) and (b) of §725.23 of this part;

   (ii) Set forth in paragraph (c) of §725.23 of this part, amended by deleting the phrase “category C-24, isotope separation,” and inserting in lieu thereof the phrase “subcategory C-44e, lithium isotope separation technology”;

   (iii) Set forth in paragraph (d) of §725.23 of this part, amended by:

   (A) Deleting the phrases “production or enrichment of special nuclear material” and “separation of isotopes” wherever they appear, and inserting in lieu thereof the phrase “separation of isotopes of lithium”;

   (B) Deleting the phrase “domestic commercial uranium enriching services are provided by,” and inserting in lieu thereof the phrase “domestic lithium isotope separation capacity becomes available to.”

   This category does not include information which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the plutonium production program.

C-65 Plutonium Production. This category includes information on reactor, fuel element and separations technology which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the Hanford and Savannah River production facilities.

Technology which does not reveal or enable calculation of production rates and unit costs of Hanford or Savannah River production facilities is categorized in C-44 Nuclear Technology.

C-90 Nuclear Reactors for Ram-Jet Propulsion. This category includes information on:

a. Programs pertaining to the development of nuclear reactors for application to ram-jet propulsion systems including theory and/or design, test philosophy procedures and/or results.

b. Fabrication technology and evaluation of performance or characteristics of materials or components for such reactors.

c. Controls, control systems and instrumentation relating to the design or technology of such reactors.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of materials under conditions of high temperature,
high gas flows or other environmental conditions characteristic of ram-jet propulsion systems.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of nuclear ram-jet missiles, such as payload, aerodynamic characteristics, guidance systems, physical size, gross weight, thrust and information of this kind which is associated with utilization of a nuclear ram-jet propulsion system.

C-91 Nuclear Reactors for Rocket Propulsion. This category includes information on:

a. Programs pertaining to nuclear reactors for rocket propulsion, i.e., missile propulsion, theory and design, test philosophy procedures and/or results.

b. Design, fabrication technology and evaluation of performance or characteristics of material, components, or subsystems or nuclear rocket reactors.

c. Controls, control systems and instrumentation relating to the design or technology of rocket reactor systems.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of rocket reactor system materials under conditions of high temperature, high gas flows, or other environmental conditions characteristic of rocket reactors.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of payload and aerodynamic characteristics.

d. Design details and development, information of components and subsystems of the nuclear rocket engine other than that associated with the reactor system.

C-92 Systems for Nuclear Auxiliary Power (SNAP). This category includes information on:

a. Isotopic SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the device, including power conversion device and the fuels used.

b. Reactor SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the reactor, including the directly associated power conversion device when developed by DOE.

This category does not include that technical and scientific data developed under the SNAP Advanced Concept Program which should be reported in C-93.

C-93 Advanced Concepts for Future Application.

C-93a Reactor Experiments. This category includes classified technical information developed in the pursuit of work on new or advanced concepts of reactors or components which DOE considers essential for future growth or for general application to future generations of reactors. Classified information developed in the pursuit of work on the lithium cooled reactor experiment is an example of the type of information to be reported in this category, i.e., information resulting from an experimental reactor project or component development which may have many future applications but which is not currently being pursued to meet the specific needs of an approved requirement for which other information categories have been provided. For example, classified technical information developed in the pursuit of work on Naval, Ram-Jet or Rocket nuclear reactors would not be reported here but under their respective specific categories. This category will include classified technical information on the following:

a. Theory, design, and performance, either estimated or actual.

b. Design details, composition and performance characteristics of major components (e.g., fuel media, reflectors, moderators, heat exchangers, pressure shells or containment devices, control rods, conversion devices, instrumentation and shielding).

c. Material (metals, ceramics and compounds) development, alloying, cladding, corrosion, erosion, radiation studies and fabrication techniques.

d. Chemistry, including chemical engineering, processes and techniques. Reactor physics, engineering and criticality studies.

C-93b Conversion Devices. This category includes classified technical information developed in the pursuit of studies, designs, research and development, fabrication and operation of any energy conversion device to be used with nuclear energy sources which is not being applied to a specific system development project.

C-94 Military Compact Reactor (MCR). This category includes classified technical information on the actual or planned Military Compact Reactor and its components developed in the pursuit of studies, designs, research and development, fabrication, and operation of the reactor system or its components.

Examples of the areas of information included are:

a. Reactor core physics.

b. Fuel elements and fuel element components.

c. Moderator and reflector details.

d. Data on primary coolant system.

e. Radiation shield.

f. Controls and instrumentation.
This category does not include information on military operational characteristics or techniques.

(App 725—DOE’s Operations Offices and Geographical Areas of Responsibilities)


Oak Ridge Operations Office, U.S. Department of Energy, P.O. Box E, Oak Ridge, Tennessee 37830: Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Panama Canal Zone, Puerto Rico, Tennessee, Virginia, Virgin Islands, and West Virginia.


APPENDIX B TO PART 725

745.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(b) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in §745.102(e), must comply with all sections of this policy.

745.102 Definitions.

745.103 Assuring compliance with this policy—research conducted or supported by any federal department or agency.

745.104-745.106 [Reserved]

745.107 IRB membership.

745.108 IRB functions and operations.

745.109 IRB review of research.

745.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

745.111 Criteria for IRB approval of research.

745.112 Review by institution.

745.113 Suspension or termination of IRB approval of research.

745.114 Cooperative research.

745.115 IRB records.

745.116 General requirements for informed consent.

745.117 Documentation of informed consent.

745.118 Applications and proposals lacking definite plans for involvement of human subjects.

745.119 Research undertaken without the intention of involving human subjects.

745.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.

745.121 [Reserved]

745.122 Use of Federal funds.

745.123 Early termination of research support: Evaluation of applications and proposals.

745.124 Conditions.


745.126 SOURCE: 56 FR 28012, 28018, June 18, 1991, unless otherwise noted.

§745.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(b) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in §745.102(e), must comply with all sections of this policy.
by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and
(ii) any disclosure of the human subjects’ responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects’ financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or (ii) federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs;
(ii) Procedures for obtaining benefits or services under those programs;
(iii) Possible changes in or alternatives to those programs or procedures; or
(iv) Possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries,
§ 745.102 Definitions.

(a) Department or agency head means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) Institution means any public or private entity or agency (including federal, state, and other agencies).

(c) Legally authorized representative means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject’s participation in the procedure(s) involved in the research.

(d) Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) Research subject to regulation, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department’s or agency’s broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) Human subject means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures for the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the Federal Register or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Protection from Research Risks, Department of Health and Human Services (HHS), and shall also publish them in the Federal Register or in such other manner as provided in department or agency procedures.1

1Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A-D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners, fetuses, pregnant women, or human in vitro fertilization, subparts B and C. The exemption at 45 CFR 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.
Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. "Private information" includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) IRB means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) IRB approval means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) Minimal risk means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) Certification means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

§ 745.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Protection from Research Risks, HHS, and approved for Federal wide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Protection from Research Risks, HHS.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under §745.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB’s review and recordkeeping duties.
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(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member’s chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with §745.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Protection from Research Risks, HHS.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head’s evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution’s research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under §745.101(b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by §745.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by §745.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the
application or proposal may be returned to the institution.
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[56 FR 28012, 28018, June 18, 1991; 56 FR 29756, June 28, 1991]

§§ 745.104–745.106 [Reserved]

§ 745.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution’s consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB’s initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 745.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in §745.103(b)(4) and, to the extent required by, §745.103(b)(5).

(b) Except when an expedited review procedure is used (see §745.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

§ 745.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with §745.116. The IRB may require that information, in addition to that specifically mentioned in §745.116, be given to the subjects when in the IRB’s judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with §745.117.
§ 745.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the Federal Register, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the Federal Register. A copy of the list is available from the Office for Protection from Research Risks, National Institutes of Health, Bethesda, Maryland 20892.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk.

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in §745.108(b).

§ 745.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable.

In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women,
mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject’s legally authorized representative, in accordance with, and to the extent required by §745.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by §745.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 745.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 745.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB’s requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB’s action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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§ 745.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

§ 745.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described in §745.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in §745.103(b)(4) and §745.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by §745.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of
§ 745.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject’s legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject’s legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject’s participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects’ rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject’s participation may be terminated by the investigator without regard to the subject’s consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject’s decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject’s willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.
(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

1. The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:
   (i) Public benefit of service programs;
   (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

2. The research could not practically be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

1. The research involves no more than minimal risk to the subjects;

2. The waiver or alteration will not adversely affect the rights and welfare of the subjects;

3. The research could not practically be carried out without the waiver or alteration; and

4. Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

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which written consent is normally re-
required outside of the research context.

In cases in which the documentation
requirement is waived, the IRB may re-
quire the investigator to provide sub-
jects with a written statement regard-
ving the research.

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Budget under control number 9999–0020)

§ 745.118 Applications and proposals
lacking definite plans for involve-
ment of human subjects.

Certain types of applications for
grants, cooperative agreements, or con-
tracts are submitted to departments or
agencies with the knowledge that sub-
jects may be involved within the period
of support, but definite plans would not
normally be set forth in the applica-
tion or proposal. These include activi-
ties such as institutional type grants
when selection of specific projects is
the institution’s responsibility; re-
search training grants in which the ac-
tivities involving subjects remain to be
selected; and projects in which human
subjects’ involvement will depend upon
completion of instruments, prior ani-
mal studies, or purification of com-
pounds. These applications need not be
reviewed by an IRB before an award
may be made. However, except for re-
search exempted or waived under
§ 745.101 (b) or (i), no human subjects
may be involved in any project sup-
ported by these awards until the
project has been reviewed and approved
by the IRB, as provided in this policy,
and certification submitted, by the in-
stitution, to the department or agency.

§ 745.119 Research undertaken with-
out the intention of involving
human subjects.

In the event research is undertaken
without the intention of involving
human subjects, but it is later pro-
posed to involve human subjects in the
research, the research shall first be re-
viewed and approved by an IRB, as pro-
vided in this policy, a certification sub-
mitted, by the institution, to the de-
partment or agency, and final approval
given to the proposed change by the de-
partment or agency.

§ 745.120 Evaluation and disposition
of applications and proposals for re-
search to be conducted or sup-
ported by a Federal department or
agency.

The department or agency head will
evaluate all applications and proposals
involving human subjects submitted to
the department or agency through such
officers and employees of the depart-
ment or agency and such experts and
consultants as the department or agen-
cy head determines to be appropriate.
This evaluation will take into consid-
eration the risks to the subjects, the
adequacy of protection against these
risks, the potential benefits of the re-
search to the subjects and others, and
the importance of the knowledge
gained or to be gained.

(b) On the basis of this evaluation,
the department or agency head may
approve or disapprove the application
or proposal, or enter into negotiations
to develop an approvable one.

§ 745.121 [Reserved]

§ 745.122 Use of Federal funds.

Federal funds administered by a de-
partment or agency may not be ex-
pended for research involving human
subjects unless the requirements of
this policy have been satisfied.

§ 745.123 Early termination of re-
search support; Evaluation of appli-
cations and proposals.

(a) The department or agency head
may require that department or agency
support for any project be terminated
or suspended in the manner prescribed
in applicable program requirements,
when the department or agency head
finds an institution has materially
failed to comply with the terms of this
policy.

(b) In making decisions about sup-
porting or approving applications or
proposals covered by this policy the de-
partment or agency head may take
into account, in addition to all other
eligibility requirements and program
criteria, factors such as whether the
applicant has been subject to a termi-
nation or suspension under paragraph
(a) of this section and whether the ap-
plicant or the person or persons who
would direct or have directed the
scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to Federal regulation).

§ 745.124 Conditions.
With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

PART 760—DOMESTIC URANIUM PROGRAM

§ 760.1 Uranium leases on lands controlled by DOE. (Domestic Uranium Program Circular No. 760.1, formerly (AEC) Domestic Uranium Program Circular 8, 10 CFR 60.8).

(a) What this section does. This section sets forth regulations governing the issuance of leases to permit the exploration for and mining of deposits containing uranium in public lands withdrawn from entry and location under the general mining laws for use of DOE, and in certain other lands under DOE control.

(b) Statutory authority. The Atomic Energy Act of 1954, as amended (68 Stat. 919, 42 U.S.C. 2011 et seq.) is the authority for this section.

(c) Who may hold leases. Only parties who are (1) citizens of the United States; (2) associations of such citizens; or (3) corporations organized under the laws of the United States or territories thereof, are eligible lessees under this section. Persons under 21 years of age or employees of DOE are not eligible.

(d) Issuance of leases through competitive bidding. Except under special circumstances as provided in paragraph (u) of this section, each lease will be offered through competitive bidding and, except as otherwise provided in this paragraph (d), will be issued to the acceptable bidder offering the highest bid. The bid may be on a cash bonus, royalty bonus, or other basis as specified in the invitation to bid. Invitations to bid on some of the lands may be limited to small business concerns as defined by the Small Business Administration, and such invitations may limit the number of leases to be awarded to each bidder. In such cases DOE will accept those bids which, in relation to other bids received pursuant to the invitation, are most advantageous to the Government. Before any lease is awarded, DOE may require high bidders to submit a detailed statement of the facts as to such matters as their experience, organization, and financial resources. DOE reserves the right to reject any and all bids.

(e) Solicitation of bids. Announcements of the availability of invitations to bid for a lease will be publicly posted and published. Copies of such announcements will also be mailed to parties who submit to DOE’s Grand Junction, Colorado, Office subsequent to publication in the Federal Register of this (DOE) Domestic Uranium Program Circular 760.1, written requests that their names be placed on a mailing list for receipt of such announcements. The invitations containing information for preparation and submission of bids will be available at the Grand Junction Office, and will be mailed only on specific written request, following announcement of their availability. Invitations will specify the land to be leased, the basis on which bids are to be submitted, the amount of the monetary deposit which must be transmitted with the bid, the place and time the bids will be publicly opened, the term, royalty and other payments, performance requirements, and other conditions which will become a part of the lease. In addition, data which have been assembled pertaining to the lands to be leased will be available for public inspection at the Grand Junction Office; copies will also be available for purchase.

(f) Bidding requirements; deposits. All bids must be filed at the place and prior to the time set forth in the invitation. Each bid must be sealed and accompanied by a deposit, in the form of a certified check, cashier’s check, or bank draft, in an amount as specified
in the invitation to bid. Deposits of unsuccessful bidders will be returned. If the bidder is an individual, he must submit with his bid a statement of his citizenship and age. If the bidder is an association (including a partnership), the bid shall be accompanied by a certified copy of the articles of association together with a statement as to the citizenship and age of its members. If the bidder is a corporation, evidence that the officer signing the bid had authority to do so and a statement as to the State of incorporation shall also be submitted.

(g) Awarding of lease. Following public opening of the bids, DOE, subject to the right to reject any and all bids, will determine the successful bidder. In the event the highest acceptable bids are tie bids, a public drawing will be held by DOE to determine the successful bidder. After notice of award and within the time period prescribed in the invitation, the successful bidder shall execute and return to DOE three (3) copies of the lease and shall remit payments due as prescribed in the invitation. Should the successful bidder fail to execute the lease, or make payments as required, in accordance with the terms of the invitation, or fail to otherwise comply with applicable regulations, he may be required to forfeit any payments previously made, and lose any further right or interest in the lease. In such event, DOE may offer the lease to the next highest acceptable bidder, reoffer the lease for bidding, or take such other action as appropriate. If the awarded lease is executed by the bidder through an agent, evidence of authorization must be submitted.

(h) Dating of lease. A lease issued under this section will ordinarily be effective as of the date it is signed on behalf of DOE.

(i) Term of lease. A lease shall be for the period specified in the invitation to bid. When deemed desirable by DOE, the lease will provide that the lease term may be extended at the option of the lessee for a specified period and upon stipulated conditions.

(j) Payments to DOE under lease. Royalty payments shall be specified in the invitation to bid; base royalty, minimum royalty, advance royalty, and rental payments, or a combination thereof may be required.

(k) Title to unshipped ore. DOE, unless it approves otherwise, reserves all right and title to property in and to all ores and other uranium- or vanadium-bearing material not removed from the leased premises within 60 days after expiration or other termination of the lease. Unless DOE approves otherwise, all material mined from the leased premises and not marketed by the lessee shall remain on the leased premises.

(l) Environmental controls. Each lease will contain such provisions as may be deemed necessary by DOE with respect to the lessee’s use of the leased lands. DOE may require periodic submission of plans for exploration and mining activities including provisions for control of environmental impact. The lessee will be required to conduct operations so as to minimize adverse environmental effects, to comply with all applicable State and Federal statutes and regulations and to the extent stipulated in the lease agreement, will be held responsible for maintenance or rehabilitation of affected areas in accordance with plans submitted to and approved by DOE.

(m) Performance requirements. A lease shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased premises with reasonable diligence, skill, and care as required to achieve and maintain production of uranium ore at rates consistent with good and safe mining practice and with market conditions.

(n) Health and safety requirements. A lease (1) shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased premises with due regard for the health and safety of those involved, and (2) shall include appropriate measures for the control of radiation exposure in the mines.

(o) Lessee’s records. Leases shall provide that the lessee keep and make available to DOE such records as DOE deems necessary for the administration of the lease and its leasing program.

(p) Rights of DOE. DOE reserves the right to enter upon the leased property
and into all parts of the mine for inspection and other purposes. DOE also reserves the right to grant to other persons easements or rights of way upon, through, or in the leased premises. DOE and the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after termination or expiration of lease, have access to and the right to examine any directly pertinent books, papers, and records of the lessee involving transactions related to the lease.

(q) Relinquishment of leases. A lease may be surrendered by the lessee upon filing with and approval by DOE of a written application for relinquishment. Approval of the application shall be contingent upon the delivery of the leased premises to DOE in a condition determined to be satisfactory to DOE. The lessee shall continue to be liable for the payment of all royalty and other debts due DOE.

(r) Assignment of leases. Any transfer of a lease or any interest therein or claim thereunder, will not be recognized unless and until approved by DOE in writing. Ordinarily, DOE will not approve any transfer of a lease which involves overriding royalties or deferred payments of any kind to the transferor.

(s) Cancellation. Any lease may be cancelled by DOE whenever the lessee fails to comply with the provisions of the lease. Failure of DOE to exercise its right to cancel shall not be deemed a waiver thereof.

(t) Form of lease. Leases will be issued on forms prescribed by DOE.

(u) Noncompetitive leases. Under special circumstances, where DOE believes it to be in the best interest of the Government, DOE at its discretion may award or extend leases on the basis of negotiation.

(v) DOE decisions. All matters connected with the issuance and administration of leases will be determined by DOE whose decisions shall be final and conclusive.

(w) Definitions. DOE as used in this section means the United States Department of Energy or its duly authorized representative or representatives.

(x) Multiple use of land. Leases issued under this section shall provide that operations under them will be conducted so as not to interfere with the lawful operations of any third party having a lease, permit, easement, or other right or interest in the premises.

(y) Compliance with State and Federal regulations. Every lease shall provide that the lessee is required to comply with all applicable State and Federal statutes and regulations.
Subpart A—General

§ 765.1 Purpose.

The provisions of this part establish regulatory requirements governing reimbursement for certain costs of remedial action at active uranium or thorium processing sites as specified by Subtitle A of Title X of the Energy Policy Act of 1992. These regulations are authorized by section 1002 of the Act (42 U.S.C. 2296a–1), which requires the Secretary to issue regulations governing the reimbursements.

§ 765.2 Scope and applicability.

(a) This part establishes policies, criteria, and procedures governing reimbursement of certain costs of remedial action incurred by licensees at active uranium or thorium processing sites as a result of byproduct material generated as an incident of sales to the United States.

(b) Costs of remedial action at active uranium or thorium processing sites are borne by persons licensed under section 62 or 81 of the Atomic Energy Act (42 U.S.C. 2092, 2111), either by NRC or an Agreement State pursuant to a counterpart to section 62 or 81 of the Atomic Energy Act, under State law, subject to the exceptions and limitations specified in this part.

(c) The Department shall, subject to the provisions specified in this part, reimburse a licensee, of an active uranium or thorium processing site for the portion of the costs of remedial action as are determined by the Department to be attributable to byproduct material generated as an incident of sales to the United States in accordance with a plan for subsequent remedial action approved by the Department.

(d) Costs of remedial action are reimbursable under Title X for decontamination, decommissioning, reclamation, and other remedial action, provided that claims for reimbursement are supported by reasonable documentation as specified in subpart C of this part.

(e) Except as authorized by §765.32, the total amount of reimbursement paid to any licensee of an active uranium processing site shall not exceed $5.50 multiplied by the number of Federal-related dry short tons of byproduct material. This total amount shall be adjusted for inflation pursuant to section 765.12.

(f) The total amount of reimbursement paid to all active uranium processing site licensees shall not exceed $270 million. This total amount shall be adjusted for inflation by applying the CPI–U, as provided by §765.12.

(g) The total amount of reimbursement paid to the licensee of the active thorium processing site shall not exceed $40 million, as adjusted for inflation by applying the CPI–U as provided by §765.12.

(h) Reimbursement of licensees for costs of remedial action will only be made for costs that are supported by reasonable documentation as required by §765.20 and claimed for reimbursement by a licensee in accordance with the procedures established by subpart C of this part.

(i) The $310 million aggregate amount authorized to be appropriated under section 1003(a) of the Act (42 U.S.C. 2296a-2(a)) shall be adjusted for inflation by applying the CPI–U as provided by §765.12, and shall be provided from the Fund.

§ 765.3 Definitions.

For the purposes of this part, the following terms are defined as follows:

Active uranium or thorium processing site or active processing site means:

(1) any uranium or thorium processing site, including the mill, containing byproduct material for which a license, issued either by NRC or by an Agreement State, for the production at a site of any uranium or thorium derived from ore—

(i) Was in effect on January 1, 1978;
(ii) Was issued or renewed after January 1, 1978; or

(iii) For which an application for renewal or issuance was pending on, or after January 1, 1978; and

(2) Any other real property or improvement on such real property that is determined by the Secretary or by an Agreement State to be:

(i) In the vicinity of such site; and

(ii) Contaminated with residual byproduct material.
Agreement State means a State that is or has been a party to a discontinuance agreement with NRC under section 274 of the Atomic Energy Act (42 U.S.C. 2021) and thereafter issues licenses and establishes remedial action requirements pursuant to a counterpart to section 62 or 81 of the Atomic Energy Act under state law.


Byproduct material means the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

Claim for reimbursement means the submission of an application for reimbursement in accordance with the requirements established in subpart C of this part.

Costs of remedial action means costs incurred by a licensee prior to or after enactment of UMTRCA to perform decontamination, decommissioning, reclamation, and other remedial action. These costs may include but are not necessarily limited to expenditures for work necessary to comply with applicable requirements to conduct groundwater remediation, treatment or containment of contaminated soil, disposal of process wastes, removal actions, air pollution abatement measures, mill and equipment decommissioning, site monitoring, administrative activities, expenditures required to meet necessary regulatory standards, or other requirements established by NRC, or an Agreement State. Costs of remedial action must be supported by reasonable documentation in accordance with the requirements of subpart C of this part.

Decontamination, decommissioning, reclamation, and other remedial action means work performed which is necessary to comply with all applicable requirements of UMTRCA or, where appropriate, with applicable requirements established by an Agreement State.

Department means the United States Department of Energy or its authorized agents.

Dry short tons of byproduct material means the quantity of tailings generated from the extraction and processing of 2,000 pounds of uranium or thorium ore-bearing rock.

Federal reimbursement ratio means the ratio of Federal-related dry short tons of byproduct material to total dry short tons of byproduct material present at an active uranium or thorium processing site on October 24, 1992. The ratio shall be established by comparing Federal-related dry short tons of byproduct material to total dry short tons of byproduct material present at the site on October 24, 1992, or by another means of attributing costs of remedial action to byproduct material generated as an incident of sales to the United States which the Department determines is more accurate than a ratio established using dry short tons of byproduct material.

Federal-related dry short tons of byproduct material means dry short tons of byproduct material that was present at an active uranium or thorium processing site on October 24, 1992, and was generated as an incident of uranium or thorium sales to the United States.

Generally accepted accounting principles means those principles established by the Financial Accounting Standards Board which encompass the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time.

Inflation index means the consumer price index for all urban consumers (CPI-U) as published by the Department of Commerce's Bureau of Labor Statistics.

Licensee means a site owner licensed under section 62 or 81 of the Atomic Energy Act (42 U.S.C. 2092, 2111) by NRC, or an Agreement State, for any activity at an active uranium or thorium processing site which results, or has resulted, in the production of byproduct material.

Maximum reimbursement amount or maximum reimbursement ceiling means the smaller of the following two quantities:

1. The amount obtained by multiplying the total cost of remedial action at the site, as determined in the approved plan for subsequent remedial action, by the Federal reimbursement ratio established for the site; or
2. $5.50, as adjusted for inflation, multiplied by the number of Federal-
§ 765.10  Eligibility for reimbursement.

(a) Any licensee of an active uranium or thorium processing site that has incurred costs of remedial action for the site that are attributable to byproduct material generated as an incident of sales to the United States shall be eligible for reimbursement of these costs, subject to the procedures and limitations specified in this part.

(b) Prior to reimbursement of costs of remedial action incurred by a licensee, the Department shall make a determination regarding the total quantity of dry short tons of byproduct material present on October 24, 1992 at the licensee’s active processing site. A claim for reimbursement from a site for which a determination is made will be evaluated individually. If a licensee does not concur with the Department’s determination regarding the quantity of dry short tons of byproduct material present at the site, the licensee may appeal the Department’s determination in accordance with §765.22 of this part. The Department’s determination shall be used to determine that portion of an approved claim for reimbursement submitted by the licensee which shall be related dry short tons of byproduct material.

NRC means the United States Nuclear Regulatory Commission or its predecessor agency.

Offsite disposal means the disposal, and activities that contribute to the disposal, of byproduct material in a location that is not contiguous to the West Chicago Thorium Mill Site located in West Chicago, Illinois, in accordance with a plan approved by, or other written authorization from, the State of Illinois or NRC provided the activities are consistent with the ultimate removal of byproduct material from the West Chicago Thorium Mill Site.

Plan for subsequent remedial action means a plan approved by the Department which includes an estimated total cost and schedule for remedial action, and all applicable requirements of remedial action established by NRC or an Agreement State to be performed after December 31, 2002 at an active uranium or thorium processing site.

Reclamation plan or site reclamation plan means a plan, which has been approved by NRC or an Agreement State, for remedial action at an active processing site that establishes the work necessary to comply with applicable requirements of UMTRCA, or where appropriate with requirements established by an Agreement State.

Remedial action means decontamination, decommissioning, reclamation, and other remedial action at an active uranium or thorium processing site.

Secretary means the Secretary of Energy or her designee.

Site owner means a person that presently holds, or held in the past, any interest in land, including but not limited to a fee simple absolute, surface or subsurface ownership of mining claims, easements, and a right of access for the purposes of cleanup, or any other legal or equitable interest.

Tailings means the remaining portion of a metal-bearing ore after some or all of the metal, such as uranium, has been extracted.

The Fund means the Uranium Enrichment Decontamination and Decommissioning Fund established at the United States Department of Treasury pursuant to section 1801 of the Atomic Energy Act (42 U.S.C. 2297g).


UMTRCA means the Uranium Mill Tailings Radiation Control Act of 1978, as amended (42 U.S.C. 7901 et seq.).

United States means any executive department, commission, or agency, or other establishment in the executive branch of the Federal Government.

Written Authorization means a written statement from either the NRC or an Agreement State that a licensee has performed in the past, or is authorized to perform in the future, a remedial action that is necessary to comply with the requirements of UMTRCA or, where appropriate, the requirements of an Agreement State.
§ 765.20 Procedures for submitting reimbursement claims.

(a) All costs of remedial action for which reimbursement is claimed must be supported by reasonable documentation as specified in this subpart. The Department reserves the right to deny any claim for reimbursement, in whole or in part, that is not submitted in accordance with the requirements of this subpart.

(b) The licensee shall provide a copy of the approved site reclamation plan or other written authorization from NRC or an Agreement State upon which claims for reimbursement are

§ 765.12 Inflation index adjustment procedures.

(a) The amounts of $5.50 (as specified in §765.2(e) of this rule) $270 million (as specified in §765.2(f) of this rule), $40 million (as specified in §765.2(g) of this rule) and $310 million (as specified in §765.2(h) of this rule) shall be adjusted for inflation as provided by this section.

(b) To make adjustments for inflation to the amounts specified in paragraph (a) of this section, the Department shall apply the CPI-U to these amounts annually, beginning in 1994, using the CPI-U as published by the Bureau of Labor Statistics within the Department of Commerce for the preceding calendar year.

(c) The Department shall adjust annually, using the CPI-U as defined in this part, amounts paid to an active uranium processing site licensee for purposes of comparison with the $5.50 per dry short ton limit on reimbursement as adjusted for inflation.

Subpart C—Procedures for Submitting and Processing Reimbursement Claims

§ 765.20 Procedures for submitting reimbursement claims.

(a) All costs of remedial action for which reimbursement is claimed must be supported by reasonable documentation as specified in this subpart. The Department reserves the right to deny any claim for reimbursement, in whole or in part, that is not submitted in accordance with the requirements of this subpart.

(b) The licensee shall provide a copy of the approved site reclamation plan or other written authorization from NRC or an Agreement State upon which claims for reimbursement are

§ 765.11 Reimbursable costs.

(a) Costs for which a licensee may be reimbursed must be for remedial action that a licensee demonstrates is attributable to byproduct material generated as an incident of sales to the United States, as determined by the Department. These costs are equal to the total costs of remedial action at a site multiplied by the Federal reimbursement ratio established for the site. These costs must be incurred in the performance of activities, prior to or after enactment of UMTRCA, and required by a plan, portion thereof, or other written authorization, approved by NRC or by an Agreement State. Costs of remedial action shall be reimbursable only if approved by the Department in accordance with the provisions of this part.

(b) In addition, costs of remedial action incurred by a licensee after December 31, 2002 must be in accordance with a plan for subsequent remedial action approved by the Department as specified in §765.30.

(c) Total reimbursement of costs of remedial action incurred at an active processing site that are otherwise reimbursable pursuant to the provisions of this part shall be limited as follows:

(1) Reimbursement of costs of remedial action to active uranium processing site licensees shall not exceed $5.50, as adjusted for inflation, multiplied by the number of Federal-related dry short tons of byproduct material.

(2) Aggregate reimbursement of costs of remedial action incurred at all active uranium processing sites shall not exceed $270 million. This aggregate amount shall be adjusted for inflation pursuant to §765.12; and

(3) Reimbursement of costs of remedial action at the active thorium processing site shall be limited to costs incurred for offsite disposal and shall not exceed $40 million. This amount shall be adjusted for inflation pursuant to §765.12.

(d) Notwithstanding the Title X requirement that byproduct material must be located at an active processing site on October 24, 1992, byproduct material moved from the Edgemont Mill in Edgemont, South Dakota, to a disposal site as a result of remedial action, shall be eligible for reimbursement in accordance with all applicable requirements of this part.
based, with the initial claim submitted. Any revision or modification made to the plan or other written authorization, which is approved by NRC or an Agreement State, shall be included by the licensee in the next claim submitted to the Department following that revision or modification. This reclamation plan or other written authorization, as modified or revised, shall serve as the basis for the Department’s evaluation of all claims for reimbursement submitted by a licensee.

(c) Each submitted claim shall provide a summary of all costs of remedial action for which reimbursement is claimed. This summary shall identify the costs of remedial action associated with each major activity or requirement established by the site’s reclamation plan or other written authorization. In addition, each claim shall provide a summary of the documentation relied upon by the licensee in support of each cost category for which reimbursement is sought.

(d) Documentation used to support a reimbursement claim must demonstrate that the costs of remedial action for which reimbursement is claimed were incurred specifically for activities specified in the site’s reclamation plan, or otherwise authorized by NRC or an Agreement State. Summary documentation used in support of a claim must be cross-referenced to the relevant page and activity of the licensee’s reclamation plan, or other written authorization approved by NRC or an Agreement State.

(1) Documentation prepared contemporaneous to the time the cost was incurred should be used when available. The documentation should identify the date or time period for which the cost was incurred, the activity for which the cost was incurred, and the reclamation plan provision or other written authorization to which the cost relates. Where available, each claim should be supported by receipts, invoices, pay records, or other documents that substantiate that each specific cost for which reimbursement is claimed was incurred for work that was necessary to comply with UMTRCA or applicable Agreement State requirements.

(2) Documentation not prepared contemporaneous to the time the cost was incurred, or not directly related to activities specified in the reclamation plan or other written authorization, may be used in support of a claim for reimbursement provided that the licensee determines the documentation is the only means available to document costs for which reimbursement is sought.

(e) The Department may audit, or require the licensee to audit, any documentation used to support a claim on a case-by-case basis and may approve, approve in part, or deny reimbursement of any claim in accordance with the requirements of this part. Documentation relied upon by a licensee in support of a claim for reimbursement shall be made available to the Department and retained by the licensee until 4 years after final payment of a claim is made by the Department.

(f) Each licensee should utilize generally accepted accounting principles consistently throughout the claim. These accounting principles, underlying assumptions, and any other information necessary for the Department to evaluate the claim shall be set forth in each claim.

(g) Following each annual appropriation by Congress, the Department will issue a Federal Register Notice announcing:

(1) A claim submission deadline for that fiscal year;
(2) Availability of funds for reimbursement of costs of remedial action;
(3) Whether the Department anticipates that approved claims for that fiscal year may be subject to pro-rated payment;
(4) Any changes in the Federal reimbursement ratio or maximum reimbursement ceiling for any active uranium or thorium processing site;
(5) Any revision in the per dry short ton limit on reimbursement for all active uranium processing sites; and
(6) Any other relevant information.

(h) A licensee shall certify, with respect to any claim submitted by it for reimbursement, that the work was completed as described in an approved
reclamation plan or other authorization. In addition, the licensee shall certify that all costs for which reimbursement is claimed, all documentation relied upon in support of its costs, and all statements or representations made in the claim are complete, accurate, and true. The certification shall be signed by an officer or other official of the licensee with knowledge of the contents of the claim and authority to represent the licensee in making the certification. Any knowingly false or frivolous statements or representations may subject the individual to penalties under the False Claims Act, sections 3729 through 3731 of title 31 United States Code, or any other applicable statutory authority; and criminal penalties under sections 286, 287, 1001 and 1002 of title 18, United States Code, or any other applicable statutory authority.

(i) All claims for reimbursement submitted to the Department shall be sent by registered or certified mail, return receipt requested. The Department reserves all rights under applicable law to recover any funds paid to licensees which an audit finds to not meet the requirements of this part.

§ 765.21 Procedures for processing reimbursement claims.

(a) The Department will conduct a preliminary review of each claim within 60 days after the claim submission deadline announced in the Federal Register Notice specified in § 765.20(g) to determine the completeness of each claim. Payments from the Fund to active uranium or thorium processing site licensees for approved costs of remedial action will be made simultaneously by the Department within 1 year of the claim submission deadline.

(b) After completing the preliminary review specified in paragraph (a) of this section, the Department may audit, or require the licensee to audit, any documentation used in support of such claim, request the licensee to provide additional information, or request the licensee to provide other clarification determined by the Department to be necessary to complete its evaluation of the claim. In addition, the Department reserves the right to conduct an inspection of the site to verify any information provided by the licensee in a claim for reimbursement, or in support thereof. Any information requested by the Department, if provided, must be submitted by the claimant within 60 days of receipt of the request unless the Department specifies in writing that additional time is provided.

(c) At any time during the review of a claim, the Department may request an informal conference with a licensee to obtain further information or clarification on any unresolved issue pertaining to the claim. While the licensee is not required to provide additional clarification requested by the Department, a failure to do so may result in the denial of that portion of the claim for which information is requested.

(d) Based upon the claim submitted and any additional information received by the Department, including any audit or site inspection if conducted, the Department shall complete a final review of all relevant information prior to making a reimbursement decision. When the Department determines it is not clear that an activity for which reimbursement is claimed was necessary to comply with UMTRCA or where appropriate, with applicable Agreement State requirements, the Department may consult with the appropriate regulatory authorities.

(e) A written decision regarding the Department’s determination to approve, approve in part, or deny a claim will be provided to the licensee within 10 days of completion of the final review.

(f) If the Department determines that insufficient funds are available at any time to provide for complete payment of all outstanding approved claims, reimbursements of approved claims will be made on a prorated basis. A prorated payment of all outstanding approved claims for reimbursement, or any unpaid portion thereof, shall be made on the basis of the total amount of all outstanding approved claims, regardless of when the claims were submitted or approved.

(g) Notwithstanding the provisions of paragraph (f) of this section, or any
§ 765.22 Appeals procedures.

(a) Any appeal by a licensee of any Department determination subject to the requirements of this part, shall invoke the appeals process specified in paragraph (b) of this section.

(b) A licensee shall file an appeal of any Department determination subject to the requirements of this part with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Any appeal must be filed within 45 days from the date the licensee received notice, actual or constructive (i.e., publication in the FEDERAL REGISTER), of the Department’s determination. Appeals must comply with the procedures set forth in 10 CFR part 1003, subpart C. The decision of the Office of Hearings and Appeals shall be the final decision of the Department. A licensee must file an appeal in order to exhaust its administrative remedies, and the receipt of an appellate decision is a prerequisite to seeking judicial review of any determination made under this part.

[59 FR 26726, May 23, 1994, as amended at 60 FR 15017, Mar. 21, 1995]

§ 765.23 Annual report.

The Department shall prepare annually a report summarizing pertinent information concerning claims submitted in the previous calendar year, the status of the Department’s review of the claims, determinations made regarding the claims, amounts paid for claims approved, and other relevant information concerning this reimbursement program. The report will be available to all interested parties upon written request to the Department’s Uranium Mill Tailings Remedial Action Project Office, 2155 Louisiana NE., suite 10000, Albuquerque, NM 87110 and will also be available in the Department’s Freedom of Information Reading room, 1000 Independence Avenue SW., Washington, DC.

Subpart D—Additional Reimbursement Procedures

§ 765.30 Reimbursement of costs incurred in accordance with a plan for subsequent remedial action.

(a) This section establishes procedures governing reimbursements of costs of remedial action incurred in accordance with a plan for subsequent remedial action approved by the Department as provided in this section. Costs otherwise eligible for reimbursement in accordance with the provisions of this part and incurred in accordance with the plan shall be reimbursed in accordance with the provisions of subpart D and subpart C. In the event there is an inconsistency between the requirements of subpart D and subpart C, the provisions of subpart D shall govern reimbursement of such costs of remedial action.

(b) A licensee who anticipates incurring costs of remedial action after December 31, 2002 may submit a plan for subsequent remedial action. This plan may be submitted at any time after January 1, 2000, but no later than December 31, 2001. Reimbursement of costs of remedial action incurred after December 31, 2002 shall be subject to the approval of this plan by the Department. This plan shall describe:

(1) All applicable requirements established by NRC pursuant to UMTRCA, or where appropriate, by the requirements of an Agreement State, included in a reclamation plan approved by NRC or an Agreement State which have not yet been satisfied in full by the licensee, and

(2) The total cost of remedial action required at the site, together with all necessary supporting documentation, segregated into actual costs incurred to date, costs incurred or expected to be incurred prior to December 31, 2002 but not yet approved for reimbursement, and anticipated future costs.

(c) The Department shall review the plan for subsequent remedial action to verify conformance with the NRC- or Agreement State-approved reclamation plan or other written authorization, and to determine the reasonableness of
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§ 765.32 Reimbursement of excess funds.

(a) No later than July 31, 2005, the Department shall determine if the aggregate amount authorized for appropriation pursuant to section 1003 of the Act (42 U.S.C. 2296a-2), as adjusted for inflation pursuant to $765.12, exceed as of that date the combined total of all anticipated future costs, and shall approve, approve with suggested modifications, or reject the plan. During its review, the Department may request additional information from the licensee to clarify or provide support for any provision or estimate contained in the plan. The Department may also consult with NRC or an Agreement State concerning any provision or estimate contained in the plan. Upon approval, approval with modifications, or rejection of a plan, the Department shall inform and explain to the licensee its decision.

(d) If the Department rejects a plan for subsequent remedial action submitted by a licensee, the licensee may appeal the Department’s rejection or prepare and submit a revised plan. The licensee may continue to submit revised plans for subsequent remedial action until the Department approves a plan, or September 30, 2002, whichever occurs first. A failure by a licensee to receive approval from the Department of a plan prior to December 31, 2002 will preclude that licensee from receiving any reimbursement for costs of remedial action incurred after that date.

(e) The Department shall determine, in approving a plan for subsequent remedial action, the maximum reimbursement amount for which the licensee may be eligible. This maximum reimbursement amount shall be the smaller of the following two quantities:

(1) The amount obtained by multiplying the total cost of remedial action at the site, as determined in the approved plan for subsequent remedial action, by the Federal reimbursement ratio established for such site; or

(2) §5.50, as adjusted for inflation, multiplied by the number of Federal-related dry short tons of byproduct material. The Department shall subtract from the maximum reimbursement amount any reimbursement already approved to be paid to the licensee. The resulting sum shall be the potential additional reimbursement to which the licensee may be entitled.

§ 765.31 Designation of funds available for subsequent remedial action.

(a) Upon the Department’s approval of each plan for subsequent remedial action submitted by a licensee, the Department will designate specific amounts on deposit in the Fund for reimbursement, subject to the availability of appropriated funds as specified in §765.21(g). If insufficient funds are available at the time of approval of a plan for subsequent remedial action to provide for reimbursement of the total estimated costs, the designation of specific amounts on deposit in the Fund for reimbursement will be made on a prorated basis. Any remaining balance will be designated for reimbursement at the time additional funds become available.

(b) The Department shall authorize reimbursement of costs of remedial action, incurred in accordance with an approved plan for subsequent remedial action and approved by the Department as specified in subpart C to this part, to be made from the Fund. These costs are reimbursable until:

(1) This remedial action has been completed, or

(2) The licensee has been reimbursed its maximum reimbursement amount as determined by the Department pursuant to paragraph (e) of §765.30.

(c) A licensee shall submit any claim for reimbursement of costs of remedial action incurred pursuant to an approved plan for subsequent remedial action in accordance with the requirements of subpart C of this part. The Department shall approve, approve in part, or deny any claims in accordance with the procedures specified in subpart C of this part. The Department shall authorize the disbursement of funds upon approval of a claim for reimbursement.

(d) After all remedial actions have been completed by affected Agreement State or NRC licensees, the Department will issue a Federal Register notice announcing a termination date beyond which claims for reimbursement will no longer be accepted.
reimbursements which have been paid to licensees under this part, any amounts approved for reimbursement and owed to any licensee, and any anticipated additional reimbursements to be made in accordance with approved plans for subsequent remedial action.

(b) If the Department determines that the amount authorized pursuant to section 1003 of the Act (42 U.S.C. 2296a–2), as adjusted for inflation, exceed the combined total of all reimbursements (as indicated in paragraph (a) of this section), the Department may establish procedures for providing additional reimbursement to uranium licensees for costs of remedial action, subject to the availability of appropriated funds. If the amount of available excess funds is insufficient to provide reimbursement of all eligible costs of remedial action, then reimbursement shall be paid on a prorated basis.

(c) Each eligible uranium licensee’s prorated share will be determined by dividing the total excess funds available by the total number of Federal-related dry short tons of byproduct material present at the site where costs of remedial action exceed $5.50 per dry short ton, as adjusted for inflation pursuant to §765.12. The resulting number will be the maximum cost per dry short ton, over $5.50, that may be reimbursed. Total reimbursement for each licensee that has incurred approved costs of remedial action in excess of $5.50 per dry short ton will be the product of the excess cost per dry short ton multiplied by the number of Federal-related dry short tons of byproduct material at the site or the actual costs incurred and approved by the Department, whichever is less.

(d) Any costs of remedial action for which reimbursement is sought from excess funds determined by the Department to be available is subject to all requirements of this part except the per dry short ton limit on reimbursement established by paragraph (d) of §765.11.
CPI–U means the Consumer Price Index for all-urban consumers published by the Department of Labor.

Commercial electricity generation means the production of electricity for sale to consumers.

DOE means the United States Department of Energy and its predecessor agencies.

Domestic utility means any utility in the United States that has purchased SWUs produced by DOE for the purpose of commercial electrical generation during the period beginning in 1945 to October 23, 1992.

Fund means an account in the U.S. Treasury referred to as the Uranium Enrichment Decontamination and Decommissioning Fund, established by section 1801 of the Atomic Energy Act of 1954, as amended.


Special Assessment means the Special Assessment levied on domestic utilities for payments into the Fund.

SWU means a separative work unit, the common measure by which uranium enrichment services are sold.

TESS means the Toll Enrichment Services System, which is the database that tracks uranium enrichment services transactions of the DOE Oak Ridge Operations Office for the purpose of planning, toll transaction processing, customer invoicing and historical tracking of SWU deliveries.

Use and burnup charges mean lease charges for the consumption of SWUs and natural uranium.

Subpart B—Procedures for Special Assessment

§ 766.100 Scope.

This subpart sets forth the procedures for the Special Assessment of domestic utilities for funds to be deposited in the Fund.

§ 766.101 Data utilization.

DOE shall use the records from the Toll Enrichment Services System (TESS) and other records maintained by the Oak Ridge Operations Office in order to determine the total SWUs purchased from DOE for all purposes. DOE shall use records from TESS, relevant records of domestic utilities, and such other information as DOE deems to be reliable and probative in determining the number of SWUs that were purchased by each domestic utility prior to October 24, 1992. A domestic utility shall be considered to have purchased a SWU from DOE if the SWU was produced by DOE but purchased by the domestic utility from another source. DOE shall consider a purchase to have occurred upon the delivery of a SWU to the domestic utility purchasing the SWU. A domestic utility shall not be considered to have purchased a SWU from DOE if the SWU was purchased by the domestic utility but subsequently sold to another source.

§ 766.102 Calculation methodology.

(a) Calculation of Domestic Utilities’ Annual Assessment Ratio to the Fund. Domestic utilities shall be assessed annually for their share of the Fund. The amount of the assessment shall be determined by the ratio of SWUs produced by DOE and purchased by domestic utilities prior to October 24, 1992, to the total number of SWUs produced by DOE for all purposes (including SWUs produced for defense purposes). All calculations will be carried out to the fifth significant digit. This ratio is expressed by the following hypothetical example:

\[
\text{SWUs purchased by all domestic utilities} \div \text{Total SWUs produced—all purposes} = \text{Special assessment ratio}
\]

(b) Calculation of the Baseline Total Annual Special Assessment for Domestic Utilities. The Annual Special Assessment ratio calculated in paragraph (a) of this section shall be multiplied by $480 million, yielding the total amount of the Baseline Total Annual Special Assessment as of October 1992. In the event that this amount is in excess of $150 million, the Baseline Total Annual Special Assessment shall be capped at $150 million. All calculations will be carried out to the fifth significant digit. The Baseline Total Annual Special Assessment is determined as shown in the following hypothetical example:

<table>
<thead>
<tr>
<th>SWUs purchased by all domestic utilities</th>
<th>Total SWUs produced—all purposes</th>
<th>Special assessment ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>12345</td>
<td>45678</td>
<td>27026</td>
</tr>
</tbody>
</table>
§ 766.103 Special Assessment invoices.

(a) DOE shall issue annually a Special Assessment invoice to each domestic utility. This invoice will specify itemized quantities of enrichment services by reactor. In each Special Assessment invoice, DOE shall require payment, on or before 30 days from the date of each invoice, of that utility’s prorated share of the Baseline Total Annual Special Assessment, as adjusted for inflation using the most recently published monthly CPI-U data.

(b) DOE shall enclose with the Fiscal Year 1993 Special Assessment invoice a sealed, business confidential, summary SWU transaction statement including:

(1) TESS information which documents, by reactor, the basis of the utility’s assessment;

(2) A list of domestic utilities subject to the Special Assessment;

(3) The total number of SWUs purchased from DOE by all domestic utilities for all purposes prior to October 24, 1992.

(4) The total number of SWUs purchased from DOE for all purposes prior to October 24, 1992, including SWUs purchased or produced for defense purposes; and

(5) Such other information as may be appropriate.

(c) With regard to any fiscal year after Fiscal Year 1993, DOE shall enclose a summary SWU transaction statement with Special Assessment invoices that will include updated information regarding adjustments to Special Assessments resulting from the reconciliation and appeals process under Section 766.104.

(d) The date of each Annual Special Assessment invoicing will be set on or about October 1 with payment due 30 calendar days from the date of invoice starting with the Fiscal Year 1995 Special Assessment.

§ 766.104 Reconciliation, adjustments and appeals.

(a) A domestic utility requesting an adjustment shall, within 30 days from the date of a Special Assessment invoice, file a notice requesting an adjustment. Such notice shall include an explanation of the basis for the adjustment and any supporting documents, and may include a request for a meeting with DOE to discuss its invoice. If more time is needed to gather probative information, DOE will consider utility requests for up to 90 days additional time, providing that the initial
notice requesting an adjustment was timely filed. The notice shall be filed at the address set forth in the Special Assessment invoice, and filing of this notice is complete only upon receipt by DOE. Domestic utilities are considered to have met the filing requirements upon DOE’s receipt of the notice requesting an adjustment without regard to DOE’s acceptance of supporting documentation. The filing of a notice for an adjustment shall not stay the obligation to pay.

(b) DOE may request additional information from domestic utilities and may acquire data from other sources.

(c) After reviewing a notice submitted under paragraph (a) of this section and other relevant information, and after making any necessary adjustment to its records in light of reliable and adequately probative records submitted in connection with the request for adjustment or otherwise obtained by DOE, DOE shall make a written determination granting or denying the requested adjustment. As appropriate, DOE shall modify the application of TESS data for any discrepancies or further transactions raised during the reconciliation process.

(d) Any domestic utility that wishes to dispute a written determination under paragraph (c) of this section shall have the right to file an appeal with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue S.W., Washington, DC 20585. Except for the Fiscal Year 1993 Special Assessment, any appeal must be filed on or before 30 days from the date of the written determination and should contain information of the type described in 10 CFR part 1003, subpart C. With regard to a written determination under paragraph (c) of this section concerning a Fiscal Year 1993 Special Assessment, any appeal must be filed on or before 30 days from the date of the written determination and should contain information of the type described in 10 CFR part 1003, subpart C. The decision of the Office of Hearings and Appeals shall be the final decision of DOE. Upon completion of the reconciliation process, all records of SWU transactions shall be finalized and shall become the basis of subsequent Special Assessment invoices.

These records shall be revised to reflect any decisions from the Office of Hearings and Appeals and any applicable court rulings.

(e) Refunds of Special Assessments shall be provided in cases where DOE has determined, as a result of reconciliation, that an overpayment has been made by a domestic utility, and that the domestic utility has no further current obligation to DOE.

[59 FR 41963, Aug. 15, 1994, as amended at 60 FR 15017, Mar. 21, 1995]

§ 766.105 Payment procedures.

DOE shall specify payment details and instructions in all Special Assessment invoices. Each domestic utility shall make payments to the Fund by wire transfer to the Department of Treasury.

§ 766.106 Late payment fees.

In the case of a late payment by a domestic utility of its Special Assessment, the domestic utility shall pay interest at the per annum rate (365-day basis) established by DOE for general application to monies due DOE and not received by DOE on or before a designated due date. Interest shall accrue beginning the date of the designated payment except that, whenever the due date falls on a Saturday, Sunday, or a United States legal holiday, interest shall commence on the next day immediately following which is not a Saturday, Sunday, or a United States legal holiday. Late payment provisions for the Special Assessment to the Fund shall be based on the Treasury Current Value of Funds Rate (which is published annually by the Treasury and used in assessing interest charges for outstanding debts on claims owed to the United States Government), plus six (6) percent pro rata on a daily basis. Late payment fees shall be invoiced within two days of receipt of utility payment of the special assessment when delinquency is less than 30 days. For longer periods of delinquency, DOE will submit additional invoices, as appropriate. Late payment fees will be due 30 days from the date of invoice.
§ 766.107 Prepayment of future Special Assessments

DOE shall accept prepayment of future Special Assessments upon request by a domestic utility. A domestic utility’s liability for the future assessments shall be satisfied to the extent of the prepayments. DOE shall use the pro rata share of prepayments attributable to a given fiscal year plus the Special Assessments collected from utilities who did not prepay for that fiscal year, in order to determine that the total amount of Special Assessments collected from domestic utilities in a given fiscal year does not exceed $150 million, annually adjusted for inflation.

PART 770—TRANSFER OF REAL PROPERTY AT DEFENSE NUCLEAR FACILITIES FOR ECONOMIC DEVELOPMENT

Sec.
770.1 What is the purpose of this part?
770.2 What real property does this part cover?
770.3 What general limitations apply to this part?
770.4 What definitions are used in this part?
770.5 How does DOE notify persons and entities that defense nuclear facility real property is available for transfer for economic development?
770.6 May interested persons and entities request that real property at defense nuclear facilities be transferred for economic development?
770.7 What procedures are to be used to transfer real property at defense nuclear facilities for economic development at less than fair market value?
770.8 May DOE transfer real property at defense nuclear facilities for economic development at less than fair market value?
770.9 What conditions apply to DOE indemnification of claims against a person or entity based on the release or threatened release of a hazardous substance or pollutant or contaminant attributable to DOE?
770.10 When must a person or entity, who wishes to contest a DOE denial of request for indemnification of a claim, begin legal action?
770.11 When does a claim “accrue” for purposes of notifying the Field Office Manager under §770.9(a) of this part?

A U.S.C. 7274q.

SOURCE: 65 FR 10689, Feb. 29, 2000, unless otherwise noted.
§ 770.6 May interested persons and entities request that real property at defense nuclear facilities be transferred for economic development?

Any person or entity may request that specific real property be made available for transfer for economic development pursuant to procedures in §770.7. A person or entity must submit such a request in writing to the Field Office Manager who is responsible for the real property.
§ 770.7 What procedures are to be used to transfer real property at defense nuclear facilities for economic development?

(a) Proposal. The transfer process starts when a potential purchaser or lessee submits to the Field Office Manager a proposal for the transfer of real property that DOE has included on a list of available real property, as provided in §770.5 of this part.

(1) A proposal must include (but is not limited to):
   (i) A description of the real property proposed to be transferred;
   (ii) The intended use and duration of use of the real property;
   (iii) A description of the economic development that would be furthered by the transfer (e.g., jobs to be created or retained, improvements to be made);
   (iv) Information supporting the economic viability of the proposed development; and
   (v) The consideration offered and any financial requirements.

(2) The person or entity should state in the proposal whether it is or is not requesting indemnification against claims based on the release or threatened release of a hazardous substance or pollutant or contaminant resulting from DOE activities.

(3) If a proposal for transfer does not contain a statement regarding indemnification, the Field Office Manager will notify the person or entity by letter of the potential availability of indemnification under this part, and will request that the person or entity either modify the proposal to include a request for indemnification or submit a statement that it is not seeking indemnification.

(b) Decision to transfer real property. Within 90 days after receipt of a proposal, DOE will notify, by letter, the person or entity that submitted the proposal whether (1) a transfer of the real property by sale or lease is in the best interest of the Government.

(1) Finalizes negotiations of a transfer agreement, which must include a provision stating whether indemnification is or is not provided;

(2) Ensures that any required environmental reviews have been completed; and

(3) Executes the documents required for the transfer of property to the buyer or lessee.

§ 770.8 May DOE transfer real property at defense nuclear facilities for economic development at less than fair market value?

DOE generally attempts to obtain fair market value for real property transferred for economic development, but DOE may agree to sell or lease such property for less than fair market value if the statutory transfer authority used imposes no market value restriction, and:

(a) The real property requires considerable infrastructure improvements to make it economically viable, or

(b) A conveyance at less than market value would, in DOE's judgment, further the public policy objectives of the laws governing the downsizing of defense nuclear facilities.

§ 770.9 What conditions apply to DOE indemnification of claims against a person or entity based on the release or threatened release of a hazardous substance or pollutant or contaminant attributable to DOE?

(a) If an agreement for the transfer of real property for economic development contains an indemnification provision, the person or entity requesting indemnification for a particular claim must:

(1) Notify the Field Office Manager in writing within two years after such claim accrues under §770.11 of this part;

(2) Furnish the Field Office Manager, or such other DOE official as the Field Office Manager, a final and complete description of the property and the scope of the release or threatened release.

(b) The consideration offered and any financial requirements.
Office Manager designates, with evidence or proof of the claim:

(3) Furnish the Field Office Manager, or such other DOE official as the Field Office Manager designates, with copies of pertinent papers (e.g., legal documents) received by the person or entity;

(4) If requested by DOE, provide access to records and personnel of the person or entity for purposes of defending or settling the claim; and

(5) Provide certification that the person or entity making the claim did not contribute to any such release or threatened release.

(b) DOE will enter into an indemnification agreement if DOE determines that indemnification is essential for the purpose of facilitating reuse or redevelopment.

(c) DOE may not indemnify any person or entity for a claim if the person or entity contributed to the release or threatened release of a hazardous substance or pollutant or contaminant that is the basis of the claim.

(d) DOE may not indemnify a person or entity for a claim made under an indemnification agreement if the person or entity refuses to allow DOE to settle or defend the claim.

§ 770.10 When must a person or entity, who wishes to contest a DOE denial of request for indemnification of a claim, begin legal action?

If DOE denies the claim, DOE must provide the person or entity with a notice of final denial of the claim by DOE by certified or registered mail. The person or entity must begin legal action within six months after the date of mailing.

§ 770.11 When does a claim “accrue” for purposes of notifying the Field Office Manager under § 770.9(a) of this part?

For purposes of § 770.9(a) of this part, a claim “accrues” on the date on which the person asserting the claim knew, or reasonably should have known, that the injury to person or property was caused or contributed to by the release or threatened release of a hazardous substance, pollutant, or contaminant as a result of DOE activities at the defense nuclear facility on which the real property is located.
§ 780.1 Scope.

The regulations in this part establish the procedures, terms, and conditions for Patent Compensation Board:

(a) Proceedings to declare a patent affected with the public interest pursuant to section 153a of the Atomic Energy Act of 1954 (Pub. L. 83–703; 42 U.S.C. 2183);

(b) Proceedings to determine a reasonable royalty fee pursuant to section 157 of the Atomic Energy Act of 1954;

(c) Proceedings for the grant of an award pursuant to section 157 of the Atomic Energy Act of 1954;

(d) Proceedings to obtain compensation pursuant to section 173 of the Atomic Energy Act of 1954 and the Invention Secrecy Act (35 U.S.C. 183);

And for applications to the Department of Energy (DOE) for a patent license pursuant to sections 153b(2) and 153c of the Atomic Energy Act of 1954.

§ 780.2 Definitions.


(b) Application means the application filed by an applicant; for a patent license, for the determination of a reasonable royalty fee, for an award, or for compensation under this part.

(c) Board means the Patent Compensation Board.

(d) Chairman means the Chairman of the Patent Compensation Board.

(e) Department, or DOE, or Department of Energy means the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7151).

(f) Party means the applicant, patent owner, Department representative, and any person admitted as a party by the Board for any proceeding under this part.

(g) Patent Owner means the owner of record in the United States Patent and Trademark Office.

(h) Secretary means the Secretary of the Department of Energy or the delegate of the Secretary of Energy.

§ 780.3 Jurisdiction of the Patent Compensation Board.

The Patent Compensation Board was established by section 157 of the Atomic Energy Act of 1954. It was transferred to the Energy Research and Development Administration pursuant to section 104(d) of the Energy Reorganization Act of 1974 (42 U.S.C. 5814) and subsequently to the Department of Energy by section 301 of the Department of Energy Organization Act (42 U.S.C. 7151). Under section 157, the Board is given authority to determine reasonable royalty fees or resolve issues involving the grant of awards. In addition, the Board has authority:

(a) To hear and make decisions as to compensation under section 173 of the Act (42 U.S.C. 2223) and the Invention Secrecy Act (35 U.S.C. 183);

(b) To hear and make decisions as to whether a specific patent is affected with the public interest pursuant to section 153a of the Act;

(c) To hear and make decisions as to whether a specific patent license should be granted under sections 153b(2) and 153c of the Act;

(d) To give notices, hold hearings and take such other actions as may be necessary under section 153; and

(e) To exercise all powers available under the Act and necessary for the performance of these duties, including the issuance of such rules of procedure as may be necessary.

§ 780.4 Filing and service of documents.

(a) All communications regarding proceedings subject to this part should
be addressed to: Chairman, Patent Compensation Board, U.S. Department of Energy, Webb Building, Room 1006, 4040 N. Fairfax Drive, Arlington, Virginia 22203. All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law, rule, or order of the Department. Service on the Department shall be by mail, telegram, or delivery to: Office of the Assistant General Counsel for Patents, U.S. Department of Energy, Washington, DC 20585.

§ 780.5 Applications—General form, content, and filing.

(a) Each application shall be signed by the applicant and shall state the applicant’s name and address. If the applicant is a corporation, the application shall be signed by an authorized officer of the corporation, and the application shall indicate the state of incorporation. Where the applicant elects to be represented by counsel, a signed notice to that effect shall be filed with the Board.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required. Each application shall be verified by the applicant or by the person having the best knowledge of such facts. In the case of facts stated on information and belief, the source of such information and grounds of belief shall be given.

(c) Each application must identify any person whose interest the applicant believes may be affected by the proceeding before the Board.

(d) Three copies of each application shall be filed with the Board. However, only one copy of the accompanying exhibits need be filed.

(e) The Board will acknowledge the receipt of the application in writing and advise the applicant of the docket number assigned to the application.

§ 780.6 Department participation.

The Department shall be a party to all proceedings under this part, and the Office of the General Counsel will represent the Department’s interests before the Board.

§ 780.7 Designation of interested persons as parties.

In any proceeding under this part, the Board shall admit as a party any person, upon application of such person or on the Board’s own initiative, whose interest may be affected by the proceeding.

§ 780.8 Security.

In any proceeding under this part, the Board shall take such steps as necessary pursuant to chapter 12 of the Act and section 181 of the Act to assure compliance with Department security regulations and the common defense.

§ 780.9 Rules of procedure before the Board.

Except as set forth in this part, all Board proceedings, including the hearing and decision, shall be conducted pursuant to the rules of practice of the Department of Energy Board of Contract Appeals, 10 CFR part 1023, modified as the Board may determine to be necessary and appropriate.

§ 780.10 Decision of the Board.

The decision of the Board in any proceeding under this part shall constitute the final action of the Department on the matter.

§ 780.11 Records of the Board.

The records of the Board in cases filed before it, including the pleadings, the transcript, and the final decision, shall be open to public inspection, except to the extent that such records or portions thereof are withheld from disclosure by the Board pursuant to 10 CFR part 1004.

Subpart B—Declaring Patents Affected With the Public Interest Under Section 153a of the Atomic Energy Act of 1954

§ 780.20 Initiation of proceeding.

When any person in the Department believes that the Department should declare a patent affected with the public interest pursuant to section 153a of
§ 780.21 Notice.

The Board will serve upon the patent owner and all other parties a written notice of the Department’s proposed action to declare the patent affected with the public interest, and the notice shall identify the patent and state the basis for the proposed declaration.

§ 780.22 Opposition, support and request for hearing.

(a) Any party may, within thirty (30) days after service of the notice or such other time as may be provided by the terms of the notice, file with the Board a written statement in opposition to or in support of the Department’s proposed action. Such statement may also include a request for hearing. The statement shall contain a concise description of the facts, law, or any other relevant matter which the party believes should be reviewed by the Board during its consideration of the proposed declaration. If the request for a hearing is timely received, the Board shall call a hearing and provide notice of the time and place to all parties.

(b) Failure of all parties to oppose the proposed action or to request a hearing within the time specified in the notice shall be deemed an acquiescence to that action and may result in a declaration by the Board that the patent is affected with the public interest.

§ 780.23 Hearing and decision.

If a timely request for a hearing is made by any party, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall prepare and issue its decision on the record.

§ 780.24 Criteria for declaring a patent affected with the public interest.

A patent shall be declared to be affected with the public interest pursuant to section 153a of the Act upon the Board’s final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy; and

(b) The licensing of such invention or discovery under section 153 of the Act is of primary importance to effectuate the policies and purposes of the Act.

Subpart C—Application for a License Pursuant to Section 153b(2) of the Atomic Energy Act of 1954

§ 780.30 Filing of application.

An applicant for a license pursuant to section 153b(2) of the Act, under a patent which the Department has declared to be affected with the public interest, shall file an application with the Board in accordance with §780.5. The Board will docket the application and serve notice of the docketing upon all parties.

§ 780.31 Contents of application.

Each application shall contain, in addition to the requirements specified in §780.5, the following information:

(a) The activities in the production or utilization of special nuclear material or atomic energy to which applicant proposes to apply the patent license;

(b) The nature and purpose of the applicant’s intended use of the patent license;

(c) The relationship of the invention or discovery to the authorized activities to which it is to be applied, including an estimate of the effect on such activities stemming from the grant or denial of the license;

(d) Efforts made by the applicant to obtain a patent license from the owner of the patent;

(e) Terms, if any, on which the owner of the patent proposes to grant the applicant a patent license;

(f) The terms the applicant proposes for the patent license; and
(g) A request for either a hearing or a decision on the record.

§ 780.32 Response and request for hearing.

Any party within thirty (30) days after service of the notice of docketing of the application:

(a) May file with the Board a response containing a concise statement of the facts or law or any other relevant information which that party believes should be considered by the Board in opposition to or in support of the proposed application; and

(b) May file a request for a hearing or for a decision on the record.

§ 780.33 Hearing and decision.

If any party requests a hearing, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall on the basis of the record prepare and issue its decision.

§ 780.34 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent declared to be affected with the public interest pursuant to subsection 153b(2) of the Act upon a final decision that:

(a) The activities to which the patent license is proposed to be applied are of primary importance to the applicant’s conduct of an activity authorized under the Act; and

(b) The applicant has made efforts to obtain reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time. The requirement to make such efforts may be waived by the Board in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Where this requirement is waived due to national emergency or other circumstances of extreme urgency, the owner of the patent shall be notified as soon as reasonably practicable. Where this requirement is waived for a public non-commercial use, the owner of the patent shall be notified promptly.


§ 780.35 Communication of decision to General Counsel.

Following a determination to issue a patent license under section 153b(2) of the Act, the Board shall send the decision to the General Counsel and instruct the General Counsel to issue the license on terms deemed equitable by the Department and generally not less fair than those granted by the patentee or by the Department to similar licensees for comparable use.

§ 780.36 Conditions and issuance of license.

(a) Upon receipt of the Board’s decision and instruction to issue a patent license, the General Counsel shall issue a license which complies with the following:

(1) The scope and durations of such use shall be limited to the purpose for which it was authorized;

(2) Such use shall be non-exclusive;

(3) Such use shall be non-assignable, except with that part of the enterprise or goodwill that enjoys such use;

(4) Any such use shall be authorized predominantly for the supply of the U.S. market; and,

(5) Authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances that led to it cease to exist and are unlikely to recur.

(b) The Board shall have the authority to review, on motivated request, the continued existence of these circumstances. The parties will propose and agree on a reasonable royalty fee within a reasonable time as determined by the General Counsel. A reasonable royalty shall provide adequate remuneration for the circumstances of each case, taking into account the economic value of the authorization. If a party does not agree with the terms and conditions of the license as determined by the General Counsel or if a royalty fee cannot be agreed upon within the reasonable time period established by the General Counsel, any party may, within 30 days after the expiration of such
§ 780.40 Filing of application.

An application to the Department, pursuant to section 153c of the Act, for the issuance of a license to use the invention or discovery covered by a patent useful in the production or utilization of special nuclear material or atomic energy shall be filed with the Board in accordance with requirements of §780.5.

§ 780.41 Contents of application.

In addition to the information specified in §780.5, each application shall contain the following:

(a) The applicant’s contention, with supporting data, that the invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy;

(b) The applicant’s contention, with supporting data, that the licensing of such invention or discovery is of primary importance to the conduct of the activities of the applicant, including information concerning:

(1) The activities in the production or utilization of special nuclear material or atomic energy to which the applicant proposes to apply the license;

(2) The nature and purpose of the applicant’s intended use of the patent license; and

(3) The relationship of the invention or discovery to the activities to which it is to be applied, including an estimate of the effect of such activities stemming from the grant or denial of the license.

(c) The applicant’s contention, with supporting data, that the activities to which the patent license are proposed to be applied are of primary importance to the furtherance of policies and purposes of the Act;

(d) The applicant’s contention, with supporting data, that such applicant cannot otherwise obtain a patent license from the owner of the patent on terms which are reasonable for the applicant’s intended use of the patent, including information concerning:

(1) Efforts made by applicant to obtain a patent license from the owner of the patent; and

(2) Terms, if any, on which the owner of the patent proposed to grant applicant a patent license.

(e) The terms the applicant proposes as reasonable for the patent license; and

(f) A copy of any license, permit, or lease obtained by the applicant under the procedures outlined in section 153(c) of the Act.

§ 780.42 Notice of hearing.

Within thirty (30) days after the filing of the application, the Board will serve on all parties a notice of hearing to be held not later than sixty (60) days after the filing of the application.

§ 780.43 Response.

Any party may file a response with the Board containing a concise statement of the facts or law or any other relevant information in opposition to or in support of the application which that party believes should be considered by the Board. Such response must be filed by a party within twenty (20) days after being served a copy of the application.

§ 780.44 Hearing and decision.

In accordance with section 153d of the Act, the Board shall hold a hearing and issue a final decision on the application.

§ 780.45 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent for the purposes stated in the application upon a final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy to which the applicant proposes to apply the license; and

(b) The nature and purpose of the applicant’s intended use of the patent license; and

(c) The relationship of the invention or discovery to the activities to which it is to be applied, including an estimate of the effect of such activities stemming from the grant or denial of the license.

(d) The applicant’s contention, with supporting data, that the activities to which the patent license are proposed to be applied are of primary importance to the furtherance of policies and purposes of the Act; and

(e) The terms the applicant proposes as reasonable for the patent license; and

(f) A copy of any license, permit, or lease obtained by the applicant under the procedures outlined in section 153(c) of the Act.
§ 780.50 Applicants.

(a) Any owner or licensee of a patent licensed under section 158 or subsections b or e of section 153 of the Act may file an application with the Board for the determination of a reasonable royalty fee.
§ 780.51 Form and content.

(a) Each application shall contain a statement of the applicant’s interest in the patent, patent application, invention or discovery and identify any other claimants of whom the applicant has knowledge.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required, but it will facilitate consideration of the application if the following specific data accompany the application:

1. In the case of an issued patent, a copy of the patent.
2. In the case of a patent application, a copy of the application and of all Patent and Trademark Office actions and responses thereto.
3. In the case of an invention or discovery as to which a report has been filed with the Department pursuant to subsection c of section 151 of the Act, a copy of such report.
4. In the case of an award, the date relied upon as the date of invention.
5. In all cases, a statement of the extent to which the invention or discovery was developed through federally financed research or with other Federal support.
6. In all cases, the degree of the utility, novelty, and importance of the invention or discovery.
7. In all cases, a statement of the actual use by the Federal Government or others of such invention or discovery, to the extent known to the applicant.
8. In all cases, the cost of developing the invention or discovery and acquiring the patent or patent application.
9. The royalty fee proposed, the proposed terms and conditions of a license agreement, or the amount sought as compensation or award, as well as the basis used in calculating such fee, compensation or award and whether a lump sum or periodic payments are sought.
10. In an application for just compensation pursuant to section 173 of the Act, the ownership of the invention that is the subject matter of the patent application at the time the Department communicated the restricted data shall be set forth, and any restricted data contained in the application shall be specifically identified.
11. In an application for compensation under the authority provided in the Invention Secrecy Act (35 U.S.C. 183), for the damage caused by imposition of a secrecy order on a patent application and/or for the use of the invention by the Government, the date of the secrecy order, the date of the notice that the patent application is in condition for allowance, and, if known to the applicant, the date of the first use of the invention by the Government.

§ 780.52 Notice and hearing.

The Board shall, in its discretion, afford the applicable party an opportunity for a hearing for the presentation of relevant evidence. Thirty (30) days notice shall be given of the time and place of such hearing. After expiration of the notice period, the Board
§ 780.53 Criteria for decisions for royalties, awards and compensation.

(a) In deciding a reasonable royalty fee for a patent licensed under section 158 or sections 153b or 153e of the Act, the Board shall consider:

(1) The economic value of the compulsory license and the Board shall strive to provide adequate remuneration for the circumstances of each case;

(2) Any defense, general or special, that a defendant could plead in an action for infringement;

(3) The extent to which such patent was developed through federally financed research or with other Federal support;

(4) The degree of utility, novelty, and importance of the invention or discovery; and

(5) The cost to the owner of the patent of developing such invention or discovery or of acquiring such patent.

(b) In deciding whether or not to grant an award, under section 157 of the Act, for the making of an invention or discovery useful in the production or utilization of special nuclear material or atomic energy, the Board shall take into account the considerations set forth in §780.53(a) of this part and the actual use of such invention or discovery.

(c) In deciding whether or not to provide compensation, pursuant to section 173 of the Act, to a person who owns a patent application that contains restricted data not belonging to the United States which the Department has communicated to a foreign nation, the Board shall take into account the considerations set forth in §780.53(b) of this part and the damage to the applicant resulting from such communication.

(d) In the course of its review of an application to provide compensation, pursuant to 35 U.S.C. 183, to an applicant whose patent was withheld because of a secrecy order issued at the request of the Department, the Board shall take into account the considerations set forth in §780.53(b) of this part and:

(1) The damage sustained by the applicant as a result of the secrecy order; and

(2) The use of the invention by the Government resulting from the disclosure of such invention to the Department.

§ 781.2 Policy.

(a) The inventions covered by the patents and patent applications, both foreign and domestic, vested in the Government of the United States of America, as represented by or in the custody of the Department, normally will best serve the public interest when they are developed to the point of practical or commercial application and made available to the public in the shortest possible time. This may be accomplished by the granting of express nonexclusive, exclusive, or partially exclusive licenses for the practice of these inventions. However, it is recognized that there may be inventions as to which the Department deems dedication to the public by publication the preferable method of accomplishing these objectives.

(b) Although DOE encourages the nonexclusive licensing of its inventions to promote competition and to achieve their widest possible utilization, the commercial development of certain inventions may require a substantial capital investment that private manufacturers may be unwilling to risk under a nonexclusive license. Thus, DOE may grant exclusive or partially exclusive licenses where the granting of such exclusive or partially exclusive licenses is consistent with §781.5.

(c) Decisions as to grants or denials of any license application will, in the discretion of the Secretary, be based on the Department’s view of what is in the best interests of the United States and the general public under the provisions of these regulations. Decisions of the Department under these regulations may be made on the Secretary’s behalf by the General Counsel or the General Counsel’s delegate, except where otherwise delegated to the Invention Licensing Appeal Board. When the Department determines that it is appropriate to grant a license, the license will be negotiated on terms and conditions most favorable to the interests of the United States and the general public.

(d) No license shall be granted or implied under a DOE invention except as provided for in these regulations, in patent rights articles under Department procurement regulations (41 CFR part 9-9), in agreements between DOE and other Government bodies, or in any existing or future treaty or agreement between the United States and any foreign government or intergovernmental organization.

(e) No grant of a license under this part shall be construed to confer upon any licensee any immunity from the antitrust laws or from liability for patent misuse, and the acquisition and use of rights pursuant to this part shall not be immunized from the operation of State or Federal law by reason of the source of the grant.

§ 781.3 Definitions.

(a) Board means the Invention Licensing Appeal Board.

(b) Department of Energy, Department, or DOE mean the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95-91; 42 U.S.C. 7101).

(c) DOE invention means an invention covered by a U.S. or foreign patent or patent application that is vested in the Government of the United States, as represented by or in the custody of the Department or any of its predecessors, and which is designated by the Department as appropriate for the grant of an express nonexclusive, exclusive, or partially exclusive license.

(d) Exclusive license means (1) an exclusive license where the exclusive right granted is limited to making or using or selling the invention, or is limited to specified fields of use or use in specified geographic locations; or (2) a license where the number of licenses under the particular invention is limited.

(e) Partially exclusive license means (1) an exclusive license where the exclusive right granted is limited to making or using or selling the invention, or is limited to specified fields of use or use in specified geographic locations; or (2) a license where the number of licenses under the particular invention is limited.

(f) Person means any individual, partnership, corporation, association, or institution, or other entity.

(g) Predecessor means the Energy Research and Development Administration, the Atomic Energy Commission, and any of the Government entities or parts thereof whose functions were transferred to the Department of Energy pursuant to title III of the Department of Energy Organization Act.
(h) Responsible applicant means an applicant who, in the discretion of the Department, has the intention, plans, and ability expeditiously to bring the invention to the point of practical or commercial application.

(i) Secretary means the Secretary of Energy or the delegate of the Secretary of Energy.

(j) To the point of practical or commercial application means to manufacture in the case of composition or product, to practice in the case of a process, or to operate in the case of a machine, under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(k) United States and the general public means the United States Government, United States citizens, and United States organizations.

(l) United States Organization means any partnership, corporation, association, or institution where 75 percent or more of the voting interest is owned by United States citizens.

§ 781.4 Communications.

All communications concerning the regulations in this part, including applications for licenses, should be addressed or delivered to the General Counsel, Attention: Assistant General Counsel for Patents, U.S. Department of Energy, Washington, DC 20545.

TYPES OF LICENSES AND CONDITIONS FOR LICENSING

§ 781.51 Nonexclusive licenses.

(a) Availability of licenses. Except as provided in §781.52, DOE inventions will be made available for the grant of nonexclusive, revocable licenses to responsible applicants. However, when in the best interests of the United States and the general public, licenses may be restricted to manufacture in the United States. Factors which the Department will consider in so restricting a license include, but are not limited to, the following:

1. The nature of the invention;
2. The effect of the license upon the policies of the United States Government;
3. The effect of the license upon domestic and international commerce and competition;
4. The effect of the license upon the balance of payments of the United States; and
5. The effect of the license upon the overall posture of the United States in world markets.

(b) Terms of grant. Nonexclusive licenses shall contain such terms and conditions as the Department may determine appropriate for the protection of the interests of the United States and the general public, including but not limited to the following:

1. The duration of the license will be negotiated and may be extended upon application therefor, provided the licensee complies with all the terms of the license and shows that substantial utilization has been, or within a reasonable time will be, achieved.
2. The license shall require the licensee to bring the invention to the point of practical or commercial application in the geographic area of the license, within a period of time specified in the license or such period as may be extended by the Department, upon request in writing to the General Counsel, for good cause shown. The license shall further require the licensee to continue to make the benefits of the invention reasonable accessible in the geographic area of the license.
3. The license may be granted for all or less than all fields of use of the invention and in any one or all of the countries, or any lesser geographic area thereof, in which the invention is covered by a patent or a patent application.
4. Reasonable royalties may be charged for nonexclusive licenses on DOE inventions. Factors to be considered in determining whether to charge royalties, or the amount thereof, include but are not limited to, the following:

   i. The nature of the invention;
   ii. Applicant's status as a small business, minority business, or business in an economically depressed, low-income or labor surplus area;
   iii. The extent of U.S. Government contribution to the development of the invention;
§ 781.52 Exclusive and partially exclusive licenses.

(a) Availability of licenses. The Department may grant exclusive or partially exclusive licenses in any invention only if:

1. The invention has been published as available for licensing pursuant to §781.61 for a period of at least six (6) months;

2. It does not appear that the desired practical or commercial application has been or will be achieved on a non-exclusive basis, and that exclusive or partially exclusive licensing is a reasonable and necessary incentive to call forth the risk capital and expenses necessary to bring the invention to the point of practical or commercial application;

3. A sixty (60) day notice of a proposed exclusive or partially exclusive licensee has been provided, pursuant to §781.63(a), advising of an opportunity for a hearing; and

4. After termination of the sixty (60) day notice period, the Secretary has determined that:

   i. The interests of the United States and the general public will best be served by the proposed license, in view of the license applicant’s intention, plans, and ability to bring the invention to the point of practical or commercial application;

   ii. The desired practical or commercial application has not been achieved, or is not likely expeditiously to be achieved, under any nonexclusive license which has been granted, or which may be granted, on the invention;

   iii. Exclusive or partially exclusive licensing is a reasonable and necessary incentive to call forth the risk capital and expenses necessary to bring the invention to the point of practical or commercial application;

   iv. The proposed terms and scope of exclusivity are not substantially greater than necessary to provide the incentive for bringing the invention to the point of practical or commercial application and to permit the licensee to recoup its costs and a reasonable profit thereon;

   v. Any determination pursuant to paragraph (a)(4) of this section regarding the practical or commercial application of an invention may be limited to the making, using or selling of an invention, a specific field of use, or a geographic location, provided that the
grant of such license will not tend substantially to lessen competition or result in undue concentration in any section of the United States in any line of commerce to which the technology to be licensed relates.

(b) Limited number of partially exclusive licenses. In appropriate circumstances, and only after compliance with the requirements of paragraph (a) of this section, the Department may offer a limited number of partially exclusive licenses under a particular invention, when limitation of the number of licenses is found to be in the public interest and consistent with the purpose of these regulations. Factors to be considered in a determination to offer a limited number of licenses under a particular invention include, but are not limited to, the following: (1) The nature of the invention; (2) the projected market size; (3) the need for limitation of licenses to attract risk capital; and (4) the need for limitation of licenses to achieve expeditious commercialization of the invention. When such a determination is made, a Notice of Intent to limit the number of licenses shall be published in the Federal Register, identifying the invention and advising that the Department will entertain no further applications for license under the subject invention unless, within 60 days of the publication of the notice, the General Counsel receives, in writing, responses in accordance with §781.63.

(c) Selection of exclusive licensee or partially exclusive licensee among multiple applicants. When a determination is made by the Department that grant of an exclusive license or partially exclusive license under a particular invention is a reasonable and necessary incentive, in accordance with paragraphs (a) and (b) of this section, to call forth the risk capital and expenses required to bring the invention to the point of practical or commercial application, and there is more than one applicant in a particular jurisdiction seeking an exclusive license, and no applicant will accept either a nonexclusive or a partially exclusive license, the Department shall make a written determination selecting an exclusive licensee. Similarly, when a determination is made to grant a limited number of.partially exclusive licenses under a particular invention and there are more applicants for such licenses than acceptable, the Department shall make a written determination selecting a limited number of partially exclusive licenses. Factors to be considered in making these determinations include, but are not limited to, the following:

1. The relative intentions, plans, and abilities of the applicants to further the technical and market development of the invention and to bring the invention to the point of practical or commercial application;

2. The projected impact on competition in the U.S.;

3. Projected market size;

4. The benefit to the U.S. Government, U.S. organizations, and the U.S. public;

5. Assistance to small business and minority business enterprises and economically depressed, low-income, and labor-surplus areas; and

6. Whether the applicant is a U.S. citizen or U.S. organization.

(d) Terms of grant. Exclusive or partially exclusive licenses shall contain such terms and conditions as the Secretary may determine to be appropriate for the protection of the interests of the United States and the general public, including but not limited to the following:

1. The duration of the license will be negotiated, and the terms and scope of exclusivity shall not be substantially greater than necessary to provide the incentive for bringing the invention to the point of practical or commercial application and to permit the licensee to recoup its costs and a reasonable profit thereon. Extensions are permissible only through reapplication for an exclusive or partially exclusive license under procedures established in these regulations. The license shall be subject to any compulsory license provision required by law in a particular jurisdiction.

2. The license shall require the licensee to bring the invention to the point of practical or commercial application in the geographic area of the license, within a period of time specified in the license or such period as may be
extended by the Department, upon request in writing to the General Counsel, for good cause shown. The license shall further require the licensee to continue to make the benefits of the invention reasonably accessible in the geographic area of the license. In specifying the period for bringing the invention to the point of practical or commercial application, the license shall specify the minimum sum to be expended by the licensee and/or other specific actions to be taken by it within the time periods indicated in the license.

(3) The license may be granted for all or less than all fields of use of the invention and in any one or all of the countries, or any lesser geographic area thereof, in which the invention is covered by a patent or a patent application.

(4) Reasonable royalties shall be charged by the Department unless the Department determines that charging of royalties would not be in the best interests of the United States and the general public.

(5) In the jurisdiction of the license, the license may extend to the licensee’s subsidiaries and to affiliates within the corporate structure of which the licensee is a part, if any. However, the license shall not be assignable or include the right to grant sublicenses without the approval of the Department in writing.

(6) The licensee shall be required to submit written reports annually, and when specifically requested by the Department, on its efforts to bring the invention to the point of practical or commercial application and the extent to which the licensee continues to make the benefits of the invention reasonably accessible to the public. The reports shall contain information within the licensee’s knowledge, or which the licensee may acquire under normal business practices, pertaining to the commercial use being made of the invention.

(7) The license shall reserve at least an irrevocable, nonexclusive, paid-up license to make, use and sell the invention throughout the world by or on behalf of the United States (including any Government agency), the States, and domestic municipal governments, unless the Secretary determines that it would not be in the public interest to reserve such a license for the States and domestic municipal governments.

(8) The license shall reserve in the United States the right to sublicense the licensed invention to any foreign government pursuant to any existing or future treaty or agreement, if the Secretary determines it would be in the national interest to acquire this right.

(9) The license shall reserve in the Secretary the right to require the granting of a nonexclusive or partially exclusive sublicense to a responsible applicant or applicants, upon terms reasonable under the circumstances, (i) to the extent that the invention is required for public use by governmental regulations, (ii) as may be necessary to fulfill health, safety, or energy needs, or (iii) for such other purposes as may be stipulated in the license.

(10) The license shall reserve in the Secretary the right to terminate such license, in whole or in part, subject to the provisions of §§781.64 and 781.65, unless the licensee demonstrates to the satisfaction of the Secretary that he has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(11) The license shall reserve in the Secretary the right, commencing three years after the grant of the license, to terminate the license, in whole or in part, subject to the provisions of §781.66 and following a publicly-noticed hearing, initiated pursuant to a petition by an interested person justifying such hearing—

(i) If the Secretary determines, upon review of such material as he deems relevant and after the licensee or other interested person has had the opportunity to provide such relevant and material information as the Secretary may require, that such license has tended substantially to lessen competition or to result in undue concentration in any section of the United States in any line of commerce to which the technology relates; or

(ii) If the licensee fails to demonstrate to the satisfaction of the Secretary at such hearing that he has
taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

§ 781.53 Additional licenses.

Subject to any outstanding licenses, nothing in this part shall preclude the Department from granting additional nonexclusive, or exclusive, or partially exclusive licenses for inventions covered by this part when the Department determines that to do so would provide for an equitable exchange of patent rights. The following circumstances are examples in which such licenses may be granted:
(a) In consideration of the settlement of interferences;
(b) In consideration of a release of any claims;
(c) In exchange for or as a part of the consideration for a license under adversely held patents; or
(d) In consideration for the settlement or resolution of any proceeding under the Department of Energy Organization Act or other law.

PROCEDURES

§ 781.61 Publication of DOE inventions available for license.

(a) The Department will publish periodically in the FEDERAL REGISTER a list of the DOE inventions available for licensing under this part. In addition, a list of those DOE inventions that are protected in the United States will be published in the U.S. Patent and Trademark Office Official Gazette and in the National Technical Information Service (NTIS) publication “Government Inventions for Licensing.”

(b) Interested persons may obtain copies of such lists by contacting the General Counsel, Attention: Assistant General Counsel for Patents, U.S. Department of Energy, Washington, DC 20545. Copies of U.S. patents may be obtained from the U.S. Patent and Trademark Office, Washington, DC 20231. Copies of U.S. patent applications, specifications, or microfiche reproductions thereof may be secured at reasonable cost from the National Technical Information Service (NTIS), Springfield, Virginia 22151.

§ 781.62 Contents of a license application.

An application for a license under a DOE invention must be accompanied by a processing fee of $25 for each patent or patent application under which a license is desired, which shall be credited towards royalty if royalties are charged, and must include the following information:
(a) Identification of the invention for which the license is desired, including the title of the invention and the patent application serial number or the patent number of the invention;
(b) Name and address of the person applying for a license and whether the applicant is a U.S. citizen or U.S. organization;
(c) Name and address of a representative of the applicant to whom correspondence should be sent and any notices served;
(d) Nature and type of the applicant’s business;
(e) Applicant’s status, if any, as a small business firm, minority business firm, or business firm located in a labor surplus area, low-income area, or economically depressed area;
(f) Identification of the source of the applicant’s information concerning the availability of a license on the invention;
(g) A statement of the field or fields of use in which the applicant intends to practice the invention;
(h) A statement of the geographic area or areas in which the applicant proposes to practice the invention, including a statement of any foreign countries in which the applicant proposes to practice the invention;
(i) A description of the applicant’s technical and financial capability and plan for bringing the invention to a point of practical or commercial application, and the applicant’s offer to implement that plan, if the license is granted.
(j) The amount of royalty fees or other consideration, if any, that the applicant would be willing to pay the Government for the license;
(k) Applicant’s knowledge of the extent to which the invention is being practiced by private industry and the Government; and
§ 781.63 Published notices.

(a) A notice of a proposed exclusive license or partially exclusive licenses shall be published in the Federal Register, and a copy of the notice shall be sent to the Attorney General. The notice shall include:

(1) Identification of the invention;

(2) Identification of the proposed exclusive licensee or partially exclusive licensees;

(3) Duration and scope of the proposed license;

(4) A statement that the license will be granted unless:

(i) An application for a nonexclusive license, submitted by a responsible applicant pursuant to §781.62, is received by the Department within sixty (60) days from the publication of the notice in the Federal Register, and the Department determines that the applicant has established that it has already achieved, or is likely expeditiously to achieve, practical or commercial application under a nonexclusive license; or

(ii) The Department determines, based upon evidence and argument submitted in writing by a third party, that it would not be in the interest of the United States and the general public to grant the exclusive or partially exclusive licenses; and

(5) A statement advising that applicants or third parties participating in response to the Federal Register notice shall have the right to appeal any adverse decision, including the right to request an oral hearing, in accordance with §781.65.

(b) In situations where the Department intends to limit the number of partially exclusive licenses under a particular invention pursuant to §781.52(b), the notice in paragraph (a) of this section will be modified to reflect that intent and to invite applicants to apply for such partially exclusive licenses by a date specified in the notice.

(c) If an exclusive or partially exclusive license has been granted or, in whole or in part, terminated pursuant to this regulation, notice thereof shall be published in the Federal Register. Such notice shall include:

(1) Identification of the invention;

(2) Identification of the licensee; and

(3) If a license grant, the duration and scope of the license; or

(4) If a termination in whole or in part, the effective date of the termination and whether it is in whole or in part.

§ 781.64 Termination.

(a) The Department may terminate, in whole or in part, a license:

(1) For failure, within the time specified in the license, to take steps necessary to accomplish substantial utilization of the invention;

(2) For failure of the licensee, upon bringing the invention to the point of practical or commercial application, to continue to make the benefits of the invention reasonably accessible to the public;

(3) If an exclusive or partially exclusive license, for failure of the licensee to expend the minimum sum or to take any other action specified in the license agreement;

(4) For failure of the licensee to make any payments or periodic reports required by the license;

(5) For a false statement or omission of a material fact in the license application submitted pursuant to §781.62 or in any required report;

(6) For failure to grant a nonexclusive or partially exclusive license when required by the Secretary in accordance with this regulation; or

(7) For breach of any other term or condition on which the license was issued.

(b) Before terminating, in whole or in part, any license granted pursuant to this part, the Department shall mail to the licensee and any sublicensee of...
§ 781.66 Third-party termination proceedings.

(a) Any interested person may petition the Secretary to terminate, in whole or in part, an exclusive or partially exclusive license three years after such license was granted. The petition shall be sent to the Secretary, ATTN: Invention Licensing Appeal Board, and shall be verified and accompanied by any supporting documents or affidavits that the petitioner believes demonstrates that either:

(1) The license has tended substantially to lessen competition or to result in undue concentration; or

(2) The licensee has not taken effective steps, or within a reasonable time thereafter is not expected to take such steps, necessary to accomplish substantial utilization of the invention.

(b) Upon receipt of such a petition, the Board shall forward a copy of the petition and supporting documents to the General Counsel, ATTN: Assistant General Counsel for Patents. The General Counsel shall then forward a copy of the petition and supporting documents to the licensee, who shall have thirty (30) days from receipt of the petition to submit a response thereto together with any supporting documents and affidavits. The General Counsel shall have the burden of proving by a preponderance of evidence, based upon the administrative record as supplemented by evidence and argument submitted by the parties to the appeal, that the decision appealed from should be reversed or modified.

(c) The Board shall offer to the applicant, or to any other party who has participated under §781.63, an opportunity to join as a party to the appeal.

(d) A hearing may be requested by any party to the appeal within a time period set by the Board.

(e) Except as set forth in this part, all Board proceedings shall be conducted pursuant to the Rules of Practice of the Department of Energy Board of Contract Appeals, 10 CFR part 1023, modified as the Board may determine to be necessary or appropriate.

(f) The decision of the Board shall constitute the final action of the Department on the matter.

§ 781.65 Appeals.

(a) The following parties have the right to appeal under this part:

(1) A person whose application for a license has been denied;

(2) A licensee or sublicensee whose license has been terminated, in whole or in part, pursuant to §781.64; and

(3) A third party who has participated under §781.63 of this regulation.

(b) Appeal under paragraph (a) of this section shall be initiated by filing a Notice of Appeal with the Secretary, ATTN: Invention Licensing Appeal Board, with a copy to the General Counsel ATTN: Assistant General Counsel for Patents, within thirty (30) days from the date of receipt of a written notice by the Department. The Notice of Appeal shall specify the portion of the decision from which the appeal is taken. A statement of fact and argument in the form of a brief in support of the appeal shall be submitted with the notice of appeal or within thirty (30) days thereafter. Upon receipt of a Notice of Appeal, the General Counsel shall have thirty (30) days to transmit a copy of the administrative record of the decision to the Board with a copy to appellant. The General Counsel shall respond to appellant within thirty days from receipt of appellant’s brief.
§ 781.71  Litigation.

(a) An exclusive or partially exclusive licensee may be granted the right to sue at his own expense any party who infringes the rights set forth in his license and covered by the licensed patent. Upon a determination that the Government is a necessary party, the licensee may join the Government of the United States, upon consent of the Attorney General, as a party complainant in such suit. The licensee shall pay costs and any final judgment or decree that may be rendered against the Government in such suit. The Government shall have the absolute right to intervene in any such suit at its own expense.

(b) The licensee shall be obligated to furnish promptly to the Government, upon request, copies of all pleadings and other papers filed in any such suit and of evidence adduced in proceedings.
relating to the licensed patent, including but not limited to, negotiations, agreements settling claims by a licensee based on a licensed patent, and all other books, documents, papers and records pertaining to such suit. If, as a result of any such litigation, the patent shall be declared invalid, the licensee shall have the right to surrender his license and be relieved from any further obligation thereunder.

§ 781.81 Transfer of custody.

The Department may enter into an agreement to transfer custody of any patent to another Government agency for purposes of administration, including the granting of licenses pursuant to this part.

PART 782—CLAIMS FOR PATENT AND COPYRIGHT INFRINGEMENT

Subpart A—General

§ 782.1 Purpose.

The purpose of this regulation is to set forth policies and procedures for the filing and disposition of claims asserted against the Department of Energy of infringement of privately owned rights in patented inventions or copyrighted works.

§ 782.2 Objectives.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against the Department of Energy, all necessary steps shall be taken to investigate and to settle administratively, to deny, or otherwise to dispose of such claim prior to suit against the United States.

§ 782.3 Authority.

The General Counsel or the General Counsel’s delegate is authorized to investigate, settle, deny, or otherwise dispose of all claims of patent and copyright infringement pursuant to 42 U.S.C. 2201(g), 2223, 5817(d) and 7261; the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 183; and 28 U.S.C. 1498.

Subpart B—Requirements and Procedures

§ 782.5 Contents of communication initiating claim.

(a) Requirements for claim. A patent or copyright infringement claim for compensation, asserted against the United States as represented by the Department of Energy under any of the applicable statutes cited in §782.3, must be actually communicated to and received by an agency, organization, office, or field establishment within the Department of Energy. Claims must be in writing and must include the following:

(1) An allegation of infringement;
(2) A request, either expressed or implied, for compensation;
(3) A citation of the patents or copyrighted items alleged to be infringed;
(4) In the case of a patent infringement claim, a sufficiently specific designation to permit identification of the items or processes alleged to infringe the patents, giving the commercial designation if known to the claimant, or, in the case of a copyright infringement claim, the acts alleged to infringe the copyright;
(5) In the case of a patent infringement claim, a designation of at least one claim of each patent alleged to be infringed or, in the case of a copyright
§ 782.6 Processing of administrative claims.

(a) Filing and forwarding of claims. All communications regarding claims should be addressed to:


If any communication relating to a claim or possible claim of patent or copyright infringement is received by an agency, organization, office, or field establishment within the Department of Energy, it should be forwarded to the Assistant General Counsel for Patents.

(b) Additional information for patent infringement claims. In addition to the information listed in paragraph (a) of this section the following material and information generally is necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit rapid processing and resolution of the claim.

(1) A copy of the asserted patents and identification of all claims of the patents alleged to be infringed.

(2) Identification of all procurements known to claimant that involve the accused items or processes, including the identity of the vendors or contractors and the Government acquisition activity or activities.

(3) A detailed identification and description of the accused articles or processes, particularly where the articles or processes relate to components or subcomponents of the item acquired, and an element-by-element comparison of representative claims with the accused articles or processes. If available, the identification and description should include documentation and drawings to illustrate the accused articles or processes in sufficient detail to enable verification that the claims of the asserted patents read on the accused articles or processes.

(4) Names and addresses of all past and present licensees under the patents and copies of all license agreements and releases involving the patents.

(5) A brief description of all litigation in which the patents have been or are now involved, and their present status.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the status or ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventors or patent owner.

(8) A list of all contracts between the Government and inventors, patent owner, or anyone in privity with them that were in effect at the time of conception or actual reduction to practice of the inventions covered by the patents.

(9) Evidence of title to the asserted patents or other right to make the claim.

(10) If it is available to claimant, a copy of the Patent Office file of each patent.

(11) Pertinent prior art of which the claimant has become aware after issuance of the asserted patents.

In addition to the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific acquisition (e.g., identified contracts), it may speed disposition of the claim.

(c) Denial for refusal to provide information. In the course of investigating a claim, it may become necessary for the Department of Energy to request information in the control and custody of claimant that is relevant to the disposition of the claim. Failure of the claimant to respond to a request for such information may be sufficient reason alone for denying a claim.
(b) Disposition and notification. The General Counsel shall investigate and administratively settle, deny, or otherwise dispose of each claim by denial or settlement. When a claim is denied, the Department shall so notify the claimant or his authorized representative and provide the claimant with the reasons for denying the claim. Disclosure of information shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

§ 783.2 Limitations.

The Department of Energy, hereinafter “DOE”, waives its rights under section 152 of the Atomic Energy Act of 1954 (66 Stat. 944) with respect to inventions and discoveries resulting from the use of the following materials and services:

(a) Source materials, special nuclear materials, and heavy water distributed by DOE in accordance with the "Schedules of Base Charges for Materials Sold of Leased by DOE for Use in Private Atomic Energy Development and Base Prices Which DOE Will Pay for Certain Products From Private Reactors."

(b) Radioactive and stable isotopes, irradiation services (this waiver does not include inventions or discoveries made by DOE or DOE contractor personnel in the course of or in connection with the performance of an irradiation service), and radioactive material resulting from the performance of an irradiation service sold or distributed by DOE in accordance with the prices and charges established by:

1. Oak Ridge National Laboratory Inventory and Price List of electromagnetically enriched and other stable isotopes.
2. Oak Ridge National Laboratory Catalog and Price List of radioisotopes, special materials, and services.
3. Idaho National Engineering Laboratory Catalog of Price and charges on irradiation services at the materials testing reactor. The waiver does include inventions or discoveries made by sponsor personnel in the course of their use of the Gamma Irradiation Facility at the Idaho National Engineering Laboratory.
4. Argonne National Laboratory schedule of charges for irradiation services at its irradiation facilities.
5. Brookhaven National Laboratory schedule of prices and charges for irradiation services and radioisotopes.

§ 783.2 Limitations.

(a) Except with regard to the use of the Gamma facility at the Idaho National Engineering Laboratory, nothing contained in this part shall be deemed to waive any rights in inventions or discoveries where a person or a group of persons acting on behalf of the
person requesting the irradiation service works at the DOE facility in connection with the irradiation service. In such event, special arrangements are made.

(b) Nothing contained in this part shall be construed to affect the provisions of any written agreement to which DOE has or may become a party.

PART 784—PATENT WAIVER REGULATION

Sec.
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SOURCE: 61 FR 36614, July 12, 1996, unless otherwise noted.

§ 784.1 Scope and applicability.

(a) This part states the policy and establishes the procedures, terms and conditions governing waiver of the Government’s rights in inventions made under contracts, grants, agreements, understandings or other arrangements with the Department of Energy (DOE).

(b) This part applies to all inventions conceived or first actually reduced to practice in the course of or under any contract, grant, agreement, understanding, or other arrangement entered into with or for the benefit of DOE (including any subcontract, subgrant, or subagreement), the patent rights disposition of which is governed by section 152 of the Atomic Energy Act of 1954, 42 U.S.C. 2182, or section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5908. In funding agreements with nonprofit organizations or small business firms, when title or other rights are reserved to the Government under the authority of 35 U.S.C. 202(a), this part will apply to any waiver of such rights. The patent waiver provisions in this part supersede the patent waiver regulations previously included with patent regulations at 41 CFR part 9-9.100.

§ 784.2 Definitions.

As used in this part:

Contract means procurement contracts, grants, agreements, understandings and other arrangements (including Cooperative Research and Development Agreements [CRADAs], Work for Others and User Facility agreements, which includes research, development, or demonstration work, and includes any assignment or substitution of the parties, entered into, with, or for the benefit of DOE.

Contractor means entities performing under contracts as defined above.

Patent Counsel means the DOE Patent Counsel assisting the contracting activity.

§ 784.3 Policy.

(a) Section 6 of Public Law 96–517 (the Bayh-Dole patent and trademark amendments of 1980), as amended, as codified at 35 U.S.C. 200–212, provides that title to inventions conceived or first actually reduced to practice in the course of or under any contract, grant, agreement, understanding, or other arrangement entered into with or for the benefit of the Department of Energy (DOE) vests in the United States, except where 35 U.S.C. 202 provides otherwise for nonprofit organizations or small business firms. However, where title to such inventions vests in the United States, the Secretary of Energy (hereinafter Secretary) or designee may waive all or any part of the rights of the United States, subject to required terms and conditions, with respect to any invention or class of inventions made or which may be made by any person or class of persons in the course of or under any contract of DOE if it is determined that the interests of the United States and the general public will best be served by such waiver. In making such determinations, the Secretary or designee shall have the following objectives:
(1) Making the benefits of the energy research, development, and demonstration program widely available to the public in the shortest practicable time;

(2) Promoting the commercial utilization of such inventions;

(3) Encouraging participation by private persons in DOE’s energy research, development, and demonstration programs; and

(4) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

(b) If it is not possible to attain the objectives in paragraphs (a)(1) through (4) immediately and simultaneously for any specific waiver determination, the Secretary or designee will seek to reconcile these objectives in light of the overall purposes of the DOE patent waiver policy, as set forth in section 152 of the Atomic Energy Act of 1954, 42 U.S.C. 2182, section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5908, Public Law 99–661, 42 U.S.C. 7261a, and, where not inconsistent therewith, the Presidential Memorandum to the Heads of Executive Departments and Agencies on Government Patent Policy issued February 18, 1983 and Executive Order No. 12591 issued April 10, 1987.

(c) The policy set forth in this section is applicable to all types of contracts as defined in §784.2 of this part.

§784.4 Advance waiver.

This section covers inventions that may be conceived or first actually reduced to practice in the course of or under a particular contract. In determining whether an advance waiver will best serve the interests of the United States and the general public, the Secretary or designee (currently the Assistant General Counsel for Technology Transfer and Intellectual Property) shall, at a minimum, specifically include as considerations the following:

(a) The extent to which the participation of the contractor will expedite the attainment of the purposes of the program;

(b) The extent to which a waiver of all or any part of such rights in any or all fields of technology is needed to secure the participation of the particular contractor;

(c) The extent to which the work to be performed under the contract is useful in the production or utilization of special nuclear material or atomic energy;

(d) The extent to which the contractor’s commercial position may expedite utilization of the research, development, and demonstration results;

(e) The extent to which the Government has contributed to the field of technology to be funded under the contract;

(f) The purpose and nature of the contract, including the intended use of the results developed thereunder;

(g) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor’s private expense which will directly benefit the work to be performed under the contract;

(h) The extent to which the field of technology to be funded under the contract has been developed at the contractor’s private expense;

(i) The extent to which the Government intends to further develop to the point of commercial utilization the results of the contract effort;

(j) The extent to which the contract objectives are concerned with the public health, public safety, or public welfare;

(k) The likely effect of the waiver on competition and market concentration;

(l) In the case of a domestic nonprofit educational institution under an agreement not governed by Chapter 18 of Title 35, United States Code, the extent to which such institution has a technology transfer capability and program approved by the Secretary or designee as being consistent with the applicable policies of this section;

(m) The small business status of the contractor under an agreement not governed by Chapter 18 of Title 35, United States Code, and

(n) Such other considerations, such as benefit to the U.S. economy, that the Secretary or designee may deem appropriate.
§ 784.5 Waiver of identified inventions.

This section covers the relinquishing by the Government to the contractor or inventor of title rights in a particular identified subject invention. In determining whether such a waiver of an identified invention will best serve the interests of the United States and the general public, the Secretary or designee shall, at a minimum, specifically include as considerations the following:

(a) The extent to which such waiver is a reasonable and necessary incentive to call forth private risk capital for the development and commercialization of the invention;

(b) The extent to which the plans, intentions, and ability of the contractor or inventor will obtain expeditious commercialization of such invention;

(c) The extent to which the invention is useful in the production or utilization of special nuclear material or atomic energy;

(d) The extent to which the Government has contributed to the field of technology of the invention;

(e) The purpose and nature of the invention, including the anticipated use thereof;

(f) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor’s private expense which will directly benefit the commercialization of the invention;

(g) The extent to which the field of technology of the invention has been developed at the contractor’s expense;

(h) The extent to which the Government intends to further develop the invention to the point of commercial utilization;

(i) The extent to which the invention is concerned with the public health, public safety, or public welfare;

(j) The likely effect of the waiver on competition and market concentration;

(k) In the case of a domestic nonprofit educational institution under an agreement not governed by Chapter 18, Title 35, United States Code, the extent to which such institution has a technology transfer capability and program approved by the Secretary or designee as being consistent with the applicable policies of this section;

(l) The small business status of the contractor, under an agreement not governed by Chapter 18 of Title 35, United States Code; and,

(m) Such other considerations, such as benefit to the U.S. economy that the Secretary or designee may deem appropriate.

§ 784.6 National security considerations for waiver of certain sensitive inventions.

(a) Whenever, in the course of or under any Government contract or subcontract of the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy, a contractor makes an invention or discovery to which title vests in the Government pursuant to statute, the contractor may request waiver of any or all of the Government’s rights.

(b) In making a decision under this section, the Secretary or designee shall consider, in addition to the objectives of DOE waiver policy as specified in §784.3(a)(1) through (4), and the considerations specified in §784.4 for advance waivers, and §784.5 for waiver of identified inventions, the following:

(1) Whether national security will be compromised;

(2) Whether sensitive technical information (whether classified or unclassified) under the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy for which dissemination is controlled under Federal statutes and regulations will be released to unauthorized persons;

(3) Whether an organizational conflict of interest contemplated by Federal statutes and regulations will result, and

(4) Whether waiving such rights will adversely affect the operation of the Naval Nuclear Propulsion Program or the nuclear weapons programs or other atomic energy defense activities of the Department of Energy.
(c) A decision under this §784.6 shall be made within 150 days after the date on which a complete request for waiver, as described by paragraph (d) of this section, has been submitted to the Patent Counsel by the contractor.

(d) In addition to the requirements for content which apply generally to all waiver requests under paragraph (a) of this section, a requestor must include a full and detailed statement of facts, to the extent known by or available to the requestor, directed to the considerations set forth in paragraphs (b)(1) through (4) of this section, as applicable. To be considered complete, a waiver request must contain sufficient information, in addition to the content requirements under paragraphs (a) and (b) of this section, to allow the Secretary or designee to make a decision under this section. For advance waiver requests, such information shall include, at a minimum:

1. An identification of all of the requestor’s contractual arrangements involving the Government (including contracts, subcontracts, grants, or other arrangements) in which the technology involved in the contract was developed or used and any other funding of the technology by the Government, whether direct or indirect, involving any other party, of which the requestor is aware;

2. A description of the requestor’s past, current, and future private investment in and development of the technology which is the subject of the contract. This includes expenditures not reimbursed by the Government on research and development which will directly benefit the work to be performed under the instant contract, the amount and percentage of contract costs to be shared by the requestor, the out-of-pocket costs of facilities or equipment to be made available by the requestor for performance of the contract work which are not charged directly or indirectly to the Government under contract, and the contractor’s plans and intentions to further develop and commercialize the technology at private expense;

3. A description of competitive technologies or other factors which would ameliorate any anticompetitive effect of granting the waiver.

(4) Identification of whether the contract pertains to work that is classified, or sensitive, i.e., unclassified but controlled pursuant to section 148 of the Atomic Energy Action of 1954, as amended (42 U.S.C. 2168), or subject to export control under Chapter 17 of the Military Critical Technology List (MCTL) contained in Department of Defense Directive 5230.25 including identification of all principal uses of the subject matter of the contract, whether inside or outside the contractor program, and an indication of whether any such uses involve classified or sensitive technologies.

(5) Identification of all DOE and DOD programs and projects in the same general technology as the contract for which the requestor intends to be providing program planning advice or has provided program planning advice within the last three years.

(e) For identified invention requests under this section, such requests shall include at a minimum:

1. A brief description of the intentions of the requestor (or its present or intended licensee) to commercialize the invention. This description should include:
   (i) Estimated expenditures,

   (ii) Anticipated steps,

   (iii) The associated time periods to bring the invention to commercialization, and

   (iv) A statement that requestor (or its present or intended licensee) has the capability to carry out its stated intentions.

2. A description of any continuing Government funding of the development of the invention (including investigation of materials or processes for use therewith), from whatever Government source, whether direct or indirect, and, to the extent known by the requestor, any anticipated future Government funding to further develop the invention.

3. A description of competitive technologies or other factors which would ameliorate any anticompetitive effects of granting the waiver.

(4) A statement as to whether or not the requestor would be willing to reimburse the Department of Energy for any and all costs and fees incurred by the Department in the preparation and
§ 784.7 prosecution of the patent applications covering the invention that is the subject of the waiver request.

(5) Where applicable, a statement of reasons why the request was not timely filed in accordance with the applicable patent rights clause of the contract, or why a request for an extension of time to file the request was not filed in a timely manner.

(6) Identification of whether the invention pertains to work that is classified, or sensitive, i.e., unclassified but controlled pursuant to section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168), or subject to export control under Chapter 17 of the Military Critical Technology List (MCTL) contained in Department of Defense Directive 5230.25, including identification of all principal uses of the invention inside or outside the contractor program, and an indication of whether any such uses involve classified or sensitive technologies.

(7) Identification of all DOE and DOD programs and projects in the same general technology as the invention for which the requestor intends to be providing program planning advice or has provided program planning advice within the last three years.

(8) A statement of whether a classification review of the invention disclosure, any resulting patent application(s), and/or any reports and other documents disclosing a substantial portion of the invention, has been made, together with any determinations on the existence of classified or sensitive information in either the invention disclosure, the patent application(s), or reports or other documents disclosing a substantial portion of the invention; and

(9) Identification of any and all proposals, work for other activities, or other arrangements submitted by the requestor, DOE, or a third party, of which requestor is aware, which may involve further funding of the work on the invention at either the contractor facility where the invention arose or another facility owned by the Government.

(f) Patent Counsel will notify the requestor promptly if the waiver request is found not to be a complete request and, in that event, will provide the requestor with a reasonable period, not to exceed 60 days, to correct any such incompleteness. If requestor does not respond within the allotted time period, the waiver request will be considered to be withdrawn. If requestor responds within the allotted time period, but the submittal is still deemed incomplete or insufficient, the waiver request may be denied.

(g) As set forth in paragraph (c) of this section, waiver decisions shall be made within 150 days after the date on which a complete request for waiver of such rights, as specified in this section, has been submitted by the requestor to the DOE Patent Counsel. If the original waiver request does not result in a communication from DOE Patent Counsel indicating that the request is incomplete, the 150-day period for decision commences on the date of receipt of the waiver request. If the original waiver request results in a communication from DOE Patent Counsel indicating that the request is incomplete, the 150-day period for decision commences on the date on which supplementary information is received by Patent Counsel sufficient to make the waiver request complete. For advance waiver requests, if requestor is not notified that the request is incomplete, the 150-day period for decision commences on the date of receipt of the request, or on the date on which negotiation of contract terms is completed, whichever is later.

(h) Failure of DOE to make a patent waiver decision within the prescribed 150-day period shall in no way be construed as a grant of the waiver.

§ 784.7 Class waiver.

This section covers relinquishing of patent title rights by the Government to a class of persons or to a class of inventions. The authorization for class waivers is to be found at 42 U.S.C. 5908(c). Class waivers may be appropriate in situations where all members of a particular class would likely qualify for an advance or identified invention waiver. Normally, class waivers are originated by the Department. However, any person with a direct and substantial interest in a DOE program may request a class waiver by forwarding a written request therefor to
the Patent Counsel. While no particular format for requesting a class waiver is prescribed, any request for a class waiver and any resulting determination by the Secretary or designee must address the pertinent objectives and considerations set forth in §§784.3(a), 784.4, 784.5, and 784.6.

§ 784.8 Procedures.

(a) All requests for waivers shall be in writing. Each request for a waiver other than a class waiver shall include the information set forth in §784.9. Such requests may be submitted by existing or prospective contractors in the case of requests for an advance waiver and by contractors, including successor contractors at a facility, or employee-inventors in the case of requests for waiver of identified inventions.

(b) A request for an advance waiver should be submitted to the Contracting Officer (subcontractors may submit through their prime contractors) at any time prior to execution of the contract or subcontract, or within thirty days thereafter, or within such longer period as may be authorized by Patent Counsel for good cause shown in writing. If the purpose, scope, or cost of the contract is substantially altered by modification or extension after the waiver is granted, a new waiver request will be required. When advance waivers are granted, the provisions of the “Patent Rights—Waiver” clause set forth in §784.12 shall be used in contracts which are the subject of the waivers, unless modified with the approval of the Patent Counsel to conform to the scope of the waiver granted. (See §784.12.) Advance waivers may be requested for all inventions which may be conceived or first actually reduced to practice under a DOE contract. An advance waiver may also be requested for an identified invention conceived by the contractor before the contract but which may be first actually reduced to practice under the contract. Such waiver request must include a copy of any patent or patent application covering the identified invention, or if no patent application has been filed, a complete description of the invention.

(c) A request for waiver (other than an advance or class waiver) for an identified invention must be submitted to the Patent Counsel at the time the invention is to be reported to DOE or not later than eight months after conception and/or first actual reduction to practice, whichever occurs first in the course of or under the contract, or such longer period as may be authorized by Patent Counsel for good cause shown in writing by the requestor. The time for submitting a waiver request will not normally be extended past the time the invention has been advertised for licensing by DOE. If the Government has already filed a patent application on the invention, the requestor should indicate whether or not it is willing to reimburse the Government for the costs of searching, prosecution, filing and maintenance fees, in the event the waiver is granted.

(d) If the request for waiver contains insufficient information, the Patent Counsel may seek additional information from the requestor and from other sources. The Patent Counsel will thoroughly analyze the request in view of each of the objectives and considerations and shall also consider the overall rights obtained by the Government in the patent, copyright, and data clauses of the contract. Where it appears that a waiver of a lesser part of the rights of the United States than requested would be more appropriate in view of the policies set forth, the Patent Counsel should attempt to negotiate a compromise acceptable to both the requestor and DOE. If approval of a waiver is recommended, Patent Counsel shall obtain an indication of agreement by the requestor to the proposed waiver scope, terms and conditions.

(e) The Patent Counsel will prepare a Statement of Considerations setting forth the rationale for either approving or denying the waiver request and will forward the Statement to the General Counsel or designee for review thereof. While the Statement need not provide specific findings as to each and every consideration of §784.4 or §784.5 of this part, it will cover those that are decisive, and it will explain the basis for the recommended determination. There may be occasions when the application of the various individual considerations of §784.4 or §784.5 of this part to a particular case could conflict, and in those instances the conflict will
§ 784.9

be reconciled giving due regard to the overall policies set forth in 784.3(a) (1) through (4).

(f) The Patent Counsel will also obtain comments from the appropriate DOE program organization to assist the Patent Counsel in the waiver determination. Additionally, if any other Federal Government entity has provided funding or will be providing funding, or if a subject invention has been made in whole or in part by an employee of that entity, Patent Counsel shall obtain permission to waive title to the undivided interest in the invention from the cognizant official of that entity. In situations where time does not permit a delay in contract negotiations for the preparation and mailing of a full written statement, field Patent Counsel may submit a recommendation on the waiver orally to the Assistant General Counsel for Technology Transfer and Intellectual Property, who upon verbal consultation with the appropriate DOE program organization, shall provide a verbal decision to field Patent Counsel. All oral actions shall be promptly confirmed in writing. In approving waiver determinations, the Secretary or designee shall objectively review all requests for waiver in view of the objectives and considerations set forth in §§ 784.3 through 784.6. If the determination and the rationale therefor is not accurately reflected in the Statement of Considerations which has been submitted for approval, a new Statement of Considerations shall be prepared.

(g) In the event that a request for advance waiver is approved after the effective date of the contract, the Patent Counsel shall promptly notify the requestor by letter of the determination and the basis therefor. The letter shall state the scope, terms and conditions of such waiver. If the terms and conditions of an approved advance waiver were not incorporated in the contract when executed, the letter shall inform the requestor that the advance waiver shall be effective as of the effective date of the contract for an advance waiver of inventions identified, i.e., conceived prior to the effective date of the contract, or as of the date the invention is reported with an election by the contractor to retain rights therein, i.e., for an invention conceived or first actually reduced to practice after the effective date of the contract; provided a copy of the letter is signed and returned to the Contracting Officer by the requestor acknowledging the acceptance of the scope, terms and conditions of the advance waiver. After acceptance by the contractor of an advance waiver, the Contracting Officer shall cause a unilateral no-cost modification to be made to the contract incorporating the terms and conditions of the waiver in lieu of previous patent rights provisions.

(h) In the event that a waiver request is denied, the requestor may, within thirty days after notification of the denial, request reconsideration. Such a request shall include any additional facts and rationale not previously submitted which support the request. Request for reconsideration shall be submitted and processed in accordance with the procedures for submitting waiver requests set forth in this section.

§ 784.9 Content of waiver requests.

(a) Forms (OMB No. 1901–0800) for submitting requests for advance and identified invention waivers, indicating the necessary information, may be obtained from the Contracting Officer or Patent Counsel. All requests for advance and identified invention waivers shall include the following information:

(1) The requestor’s identification, business address, and, if represented by Counsel, the Counsel’s name and address;

(2) An identification of the pertinent contract or proposed contract and a copy of the contract Statement of Work or a nonproprietary statement which fully describes the proposed work to be performed;

(3) The nature and extent of waiver requested;

(4) A full and detailed statement of facts, to the extent known by or available to the requestor, directed to each of the considerations set forth in §§ 784.4 or 784.5 of this part, as applicable, and a statement applying such facts and considerations to the policies
set forth in §784.3 of this part. It is important that this submission be tailored to the unique aspects of each request for waiver, and be as complete as feasible; and

(5) The signature of the requestor or authorized representative with the following statement: “The facts set forth in this request for waiver are within the knowledge of the requestor and are submitted with the intention that the Secretary or designee rely on them in reaching the waiver determination.”

(b) In addition to the requirements of paragraph (a) of this section, requests for waiver of identified inventions shall include:

(1) The full names of all inventors;

(2) A statement of whether a patent application has been filed on the invention, together with a copy of such application if filed or, if not filed, a complete description of the invention;

(3) If a patent application has not been filed, any information which may indicate a potential statutory bar to the patenting of the invention under 35 U.S.C. 102 or a statement that no such bar is known to exist; and

(4) Where the requestor is the inventor, written authorization from the applicable contractor or subcontractor permitting the inventor to request a waiver.

(c) Subject to statutes, DOE regulations, requirements, and restrictions on the treatment of proprietary and classified information; all material submitted in requests for waiver or in support thereof will be made available to the public after a determination on the waiver request has been made, regardless of whether a waiver is granted. Accordingly, requests for waiver should not normally contain information or data that the requestor is not willing to have made public. If proprietary or classified information is needed to make the waiver determination, such information shall be submitted only at the request of Patent Counsel.

§784.11 Bases for granting waivers.

(a) The various factual situations which are appropriate for waivers cannot be categorized precisely because the appropriateness of a waiver will depend upon the manner in which the considerations set forth in §§784.4 or 784.5, and 784.6 if applicable, of this part relate to the facts and circumstances surrounding the particular contracting situation or the particular invention, in order to best achieve the objectives set forth in §784.3 of this part. However, some examples where advance waivers might be appropriate are:

(1) Cost-shared contracts;

(2) Situations in which DOE is providing increased funding to a specific ongoing privately-sponsored research, development, or demonstration project;

(3) Situations such as Work for Others Agreements, User Facility Agreements or CRADAs, involving DOE-approved private use of Government facilities where the waiver requestor is funding a substantial part of the costs; and

(4) Situations in which the equities of the contractor are so substantial in relation to that of the Government that the waiver is necessary to obtain the participation of the contractor.

(b) Waivers may be granted as to all or any part of the rights of the United States to an invention subject to certain rights retained by the United States as set forth in §784.12 of this part. The scope of the waiver will depend upon the relationship of the contractual situation or identified invention to considerations set forth in §§784.4 or 784.5, and 784.6, if applicable, in order to best achieve the objectives set forth in §784.3. For example, waivers may be restricted to a particular field of use in which the contractor has substantial equities or a commercial position, or restricted to those uses that are not the primary object of the contract effort. Waivers may also be made effective for a specified duration of time, may be limited to particular geographic locations, may require the contractor to license others at reduced royalties in consideration of the Government’s contribution to the research, development, or demonstration effort,

§784.10 Record of waiver determinations.

The Assistant General Counsel for Technology Transfer and Intellectual Property shall maintain and periodically update a publicly available record of waiver determinations.
§ 784.12 Terms and conditions of waivers.

The terms and conditions for waivers are set forth in the “Patent Rights—Waiver” clause in this section. A waiver of all foreign and domestic patent rights under a contract authorizes the use of this clause with any additions prescribed by the DOE Acquisition Regulations (48 CFR Chapter 9) or the terms of the waiver. This clause shall not be used in contracts with small business firms or nonprofit organizations subject to 35 U.S.C. 200 et seq. If a waiver of different scope is granted, the clause shall be modified to conform to the scope of the waiver granted. Advance waivers for arrangements other than contracts, grants, and cooperative agreements may use other clause provisions approved by the Assistant General Counsel for Technology Transfer and Intellectual Property, except that all waivers for funding agreements shall be subject to the license of clause paragraph (b) and the provisions of clause paragraphs (i) and (j). The terms and conditions of the clause shall also constitute the basis for confirmatory licenses regarding waivers of identified inventions. For inventions under advance waivers, a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled is required to be submitted promptly after filing a patent application thereon. If, however, a waiver request is pending, delivery of the confirmatory instrument may be delayed until a determination on the waiver request is made. In the case of a waiver of an identified invention pursuant to a request for greater rights, the confirmatory instrument shall be agreed to or submitted to Patent Counsel before or at the time the waiver is granted.

PATENT RIGHTS—WAIVER

Use the clause at 48 CFR 52.227–12 with the following changes:

(1) In paragraph (a) “Definitions” add the following definitions:

Background patent means a domestic patent covering an invention or discovery which is not a Subject Invention and which is owned or controlled by the Contractor at any time before the completion of this contract, or

(i) Which the Contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

Contract means any contract, grant, agreement, understanding, or other arrangement,
which includes research, development, or demonstration work, and includes any assignment or substitution of parties.

DOE patent waiver regulations means the Department of Energy patent waiver regulations at 10 CFR part 784.

Patent Counsel means the Department of Energy Patent Counsel assisting the procuring activity.

Secretary means the Secretary of Energy.

(2) In paragraph (a) in the definition of "Subject invention" substitute: "course of or" for: "performance of work".

(3) In paragraph (b) "Allocation of principal rights," add at the beginning of first sentence: "Whereas DOE has granted a waiver of rights to subject inventions to the Contractor,".

(4) In paragraph (c)(1), substitute: "Patent Counsel within six months after conception or first actual reduction to practice, whichever occurs first in the course of or under this contract, but in any event, prior to any sale, public use, or public disclosure of such invention known to the Contractor," for:

"Contractor officer within 2 months after the inventor discloses it in writing to Contractor Personnel responsible for Patent matters * * * earlier."

(5) In paragraph (c)(2) add at the end: "The Contractor shall notify the Patent Counsel as to those countries (including the United States) in which the Contractor will retain title not later than 60 days prior to the end of the statutory period."

(6) In paragraph (c)(3) substitute: "but not later than at least 60 days" for "or, if earlier."

(7) In paragraph (d) add (d)(5):

"(5) If the waiver authorizing the use of this clause is terminated as provided in paragraph (p) of this clause."

(8) In paragraph (e)(1) add: "under paragraph (d) of this clause" after "Government obtains title."

(9) In paragraph (e)(2) substitute "37 CFR part 404 and DOE licensing regulations." for "the Federal Property Management regulations and agency licensing regulations (if any)".

(10) In paragraph (f)(5) substitute "the course of or" for "performance of work."

(11) In paragraph (g) substitute paragraphs (1), (2) and (3) as follows:

(1) Unless otherwise directed by the Contracting Officer, the Contractor shall include the clause at 48 CFR 952.227-11, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Contractor shall include the patent rights clause at 48 CFR 952.227-13 (suitably modified to identify the parties).

(2) The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(3) In the case of subcontractors at any tier, Department, the subcontractor, and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Department with respect to those matters covered by this clause.

(12) Substitute the following for paragraph (k):

(k) Background Patents

(1) The Contractor agrees:

(i) to grant to the Government a royalty-free, nonexclusive license under any Background Patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(ii) that, upon written application by DOE, it will grant to responsible parties for purposes of practicing a subject of this contract, nonexclusive licenses under any Background Patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive or partially exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.

(2) Notwithstanding paragraph (k)(1)(ii), the Contractor shall not be obligated to license any Background Patent if the Contractor demonstrates to the satisfaction of the Secretary or his designee that:

(i) a competitive alternative to the subject matter covered by said Background Patent is commercially available from one or more other sources; or

(ii) the Contractor or its licensees are supplying the subject matter covered by said Background Patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(13) Add new paragraph (l) Communications as follows:

All reports and notifications required by this clause shall be submitted to the Patent Counsel unless otherwise instructed.

(14) In paragraph (m) add to end of sentence: ", except with respect to Background Patents, above."

(15) In paragraph (n)(4) substitute "conducted in such a manner as" for "subject to appropriate conditions."
§ 784.13 Effective dates.

Waivers shall be effective on the following dates:

(a) For advance waivers of identified inventions, i.e., inventions conceived prior to the effective date of the contract, on the effective date of the contract, even though the advance waiver may have been requested after that date;

(b) For identified inventions under advance waivers, i.e., inventions conceived or first actually reduced to
practice after the effective date of the contract, on the date the invention is reported with the election to retain rights as to that invention; and

(c) For waivers of identified inventions (other than under an advance waiver), on the date of the letter from Patent Counsel notifying the requestor that the waiver has been granted.

PART 800—LOANS FOR BID OR PROPOSAL PREPARATION BY MINORITY BUSINESS ENTERPRISES SEEKING DOE CONTRACTS AND ASSISTANCE

Subpart A—General

§ 800.001 Purpose.

The purpose of this regulation is to set forth policies and procedures for the award and administration of loans to minority business enterprises. The loans are to assist such enterprises in participating fully in research, development, demonstration and contract activities of the Department of Energy. The loans are to defray a percentage of the cost of obtaining DOE contracts and other agreements, including procurements, cooperative agreements, grants, loans and loan guarantees; of obtaining subcontracts with DOE operating contractors; and of obtaining contracts with first-tier subcontractors of DOE operating contractors in furtherance of the research, development, demonstration or other contract activities of DOE. Issuance of loans under this regulation is limited to the extent funds are provided in advance in appropriation acts. This regulation implements the authority for such loans in section 211(e) of the Department of Energy (DOE) Organization Act, Public Law 95–619, title VI, section 641, November 9, 1978, 92 Stat. 3284 (42 U.S.C.A. 7141).

[48 FR 17574, Apr. 25, 1983]

§ 800.002 Program management.

Program management responsibility for financial assistance awarded under this regulation has been assigned to the Office of Minority Economic Impact.

§ 800.003 Definitions.

For the purpose of this regulation:


*APPLICATION APPROVAL OFFICIAL* means the Director of the Office of Minority Economic Impact.

*APPLICATION EVALUATION PANEL* (also referred to as the *Panel*) means a team of Federal employees appointed by the Application Approving Official to


**SOURCE:** 46 FR 44689, Sept. 4, 1981, unless otherwise noted.
evaluate loan applications and make approval or disapproval recommendations regarding such applications.

Borrower means an applicant who enters into a loan agreement with DOE.

Contracting Officer means the DOE official warranted and authorized to contractually bind the Department of Energy and execute written agreements that are binding on the Department.

Costs of a bid or proposal means the cost of preparing, submitting and supporting a bid or proposal, whether solicited or not, for a DOE contract or other agreement such as a procurement contract, grant, cooperative agreement, loan or loan guarantee; or a subcontract with a DOE operating contractor; or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

Default means the actual failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan issued under this regulation, or the failure of the borrower to meet any other requirement specified as a default condition in the loan agreement.

Director means the Director of the Office of Minority Economic Impact (OMEI).

Loan, in reference to a loan made pursuant to the regulation, means a transaction in which a contractual instrument ("loan agreement") is executed between the United States, as lender, acting through the Secretary of Energy, and a borrower. The instrument must obligate the United States to provide the borrower with a specified amount(s) of United States funds for a specified period of time and must obligate the borrower to use the moneys to bid for and attempt to obtain contracts and other agreements relating to DOE research, development, demonstration and contract activities, and to repay the moneys at a specified time at an agreed rate of interest. The words 'loan', 'loan agreement' and 'transaction' include (where the context does not require otherwise) the terms and conditions of related documents, such as the borrower's note or bond or other evidence of, or security for, the borrower's indebtedness.

Minority Business Enterprise means a firm including a sole proprietorship, corporation, association, or partnership which is at least 50 percent owned or controlled by a member of a minority or group of members of a minority. For the purpose of this definition, 'control' means direct or indirect possession of the power to direct, or cause the direction of, management and policies, whether through the ownership of voting securities, by contract or otherwise. An individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut, or is a Spanish speaking individual of Spanish descent, is a member of a "minority" as used in this regulation.

Operating Contractors means contractors under contracts having one of the following purposes, in accordance with the provisions of §9.50.001(a)(1) of the DOE procurement regulations (title 41 CFR part 9–50):

(a) DOE prime contracts for the management of Federal Government-owned laboratories, production plants, and research facilities located on Federal Government-owned or Federal Government-leased sites, where the programs being conducted are considered of a long-term, continuing nature; or

(b) DOE prime contracts for the operation of Federal Government-owned facilities located on contractor-owned or leased sites where the programs being conducted are considered of a long-term, continuing nature. An example of this category would be those contracts with universities for the operation of Federal Government-owned facilities, for the purpose of conducting long-term basic research programs.

(c) Other contracts performed on sites owned by the Federal Government when so designated by the appropriate procurement official.

Secretary means the Secretary of the Department of Energy or his delegate.

§ 800.004 Eligibility.

In order to be eligible for a loan, an applicant must be a minority business enterprise as defined in §800.003.
Subpart B—Loan Solicitation, Application and Review

§ 800.100 Solicitation of applications.
The Secretary will periodically issue an announcement soliciting applications under this regulation. The announcement will be published in the FEDERAL REGISTER, synopsized in the Commerce Business Daily, and circulated to minority trade associations and organizations and to the Minority Business Development Agency and Small Business Administration. The announcement will indicate funds availability, eligibility requirements, application instructions, interest rates, maturities and other key loan terms and any applicable restrictions. In such solicitations, DOE shall further indicate that, in the case of applications for loans relating to bids or proposals for contracts with first-tier subcontractors of DOE operating contractors, information necessary to substantiate such applications may be unavailable to DOE from such subcontractors. If the substantiating information is not made available to DOE in a timely manner, the application may be rejected.


§ 800.101 Application requirements.

(a) Applications for loans shall be filed, one original and three copies with: Department of Energy, Washington, DC 20585, Attention: Announcement No. DE–PS60–MI.

(b) An application for a loan under this regulation must include the following information. Items described in paragraphs (b)(1) through (7) of this section may be submitted for preliminary review in advance of a specific loan request but must be updated at time of loan request to reflect substantial changes.

(1) Applicant’s name and address, with a description of the kind and size of its business, its business experience and its history as a minority business enterprise.

(2) Financial statements of applicant and its principals, including source of revenue and balance sheets for the current year and, as to applicant, for the two preceding years of applicant’s existence as a business entity. The Secretary may require applicant to provide certification by a public accountant, or other certification acceptable to the Secretary.

(3) A description of any other Federal financial backing (direct loans, guaranteed loans, grants, etc.) applied for or obtained by the applicant within the previous five years, or expected to be applied for.

(4) A description of applicant’s management structure, with list of applicant’s key persons with their responsibilities and qualifications.

(i) In the case of a specific loan request this list should include any contractor or consultant whose services are proposed in connection with the bid or proposal for which the loan is sought.

(5) Affidavit(s) of eligibility (see §800.004).

(6) Documentation as to applicant’s authority to undertake the activities contemplated by the application. Such documentation shall take substantially the following form:

(i) If the applicant is a corporation, a copy of the charter or certificate and articles of incorporation, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application.

(ii) If the applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing board, if any, authorizing the filing of the application.

(iii) If the applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made.

(iv) If the applicant is a joint stock company, a verified copy of the articles of association and of the authorizing resolution.

(v) If the application is made on behalf of a partnership, a copy of the partnership agreement, if any; if on behalf of a limited partnership, a duly
§ 800.102 Review by Application Evaluation Panel.

(a) Applications for loans under this regulation shall be reviewed by an Application Evaluation Panel, which shall be appointed by the Application Approving Official. The Panel shall include, at a minimum, a representative of the Office of Minority Economic Impact, the contracting officer and a representative of the Office of the Controller.

(b) Panel review shall be conducted pursuant to paragraph (c) or (d) of this section, as applicable, to evaluate, to clarify and to develop information contained in the application and such other information as the Application Approving Official or the Panel may request.

(1) The Panel shall give priority to applications relating to a competitive solicitation, because of time limits on such solicitations. The Panel may defer action a maximum of five days after a solicitation has been announced in the Commerce Business Daily to provide all interested applicants an opportunity to apply.

(2) Initial screening will be in the order applications are received, but time required to process an application may vary from case to case.

(c) Panel review of specific loan requests.

(1) If an application contains a specific loan request, and complies with § 800.101, the Panel shall arrange for risk analysis, independent of any such analysis submitted by or on behalf of the applicant. Risk analysis shall be directed both to the loan request and to applicant’s prospective performance of work pursuant to the bid or proposal.

(2) The Panel shall evaluate the loan request in light of the risk analysis, and shall give its conclusions in writing to the Application Approving Official, with respect to the following and to such other considerations as that official may direct:

(i) Applicant’s eligibility as a minority business enterprise.

(ii) Compliance with the application requirements of §800.101.

(iii) Compliance with §800.200 on allowable costs.

(iv) Applicant’s financial ability to make the bid or proposal without the loan.

(v) Applicant’s contribution of, or ability to contribute, the 25% minimum share of allowable costs, or more.
(vi) Applicant’s ability to prepare an adequate bid or proposal, if the loan is made.

(vii) Possibility of award to applicant pursuant to its bid or proposal.

NOTE: Normally, not more than three loans will be approved for the same competitive award.

(viii) Applicant’s ability to perform pursuant to the bid or proposal.

(ix) Likelihood that applicant will repay the requested loan, regardless of success of applicant’s bid or proposal.

(x) Optimal use of available program funds.

(xi) The Panel’s recommendation.

(d) Panel review of other applications. If the application was submitted without a specific loan request, the Panel shall review the application in accordance with paragraph (b) of this section with the limited purpose of determining whether the applicant has complied with §800.101, except as to matters determinable only with respect to a future specific loan request, and shall inform the Application Approving Official in writing as to its determinations.

§800.103 Review by Application Approving Official.

(a) The Application Approving Official shall consider the results of the Panel’s review under section 102 (c) or (d), and such other information as the Application Approving Official determines to be relevant pursuant to the provisions of this regulation, and shall either approve or disapprove the application, giving it priority in accordance with the provisions of §800.102(b).

(b) The Application Approving Official shall authorize a contracting officer to notify the applicant of approval or disapproval.

(c) An applicant whose application has been rejected will be informed, on request, of the reason for rejection. Rejection is not a bar to submission of an appropriately revised application.

Subpart C—Loans

§800.200 Maximum loan; allowable costs.

(a) A loan under this regulation shall not exceed 75 percent of allowable costs of a bid or proposal to obtain a DOE contract or other agreement (such as a procurement contract, cooperative agreement, grant, loan or loan guarantee), or a subcontract with a DOE operating contractor, or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

(b) To be allowable, costs must, in DOE’s judgment:

1. Be consistent with the bidding cost principles of the Federal Procurement Regulation (41 CFR Ch. 1, 1–15.205–3) and DOE Procurement Regulation (41 CFR Ch. 9, 9–15.205–3); and;

2. Be necessary, reasonable and customary for the bid or proposal contemplated by the application; and

3. Be incurred, or expected to be incurred, by the applicant.

(c) Costs which are, in general, allowable, if consistent with paragraph (b) of this section include, but are not limited to:

1. Bid bond premiums.

2. Financial, accounting, legal, engineering and other professional, consulting or similar fees and service charges.

3. Printing and reproduction costs.

4. Travel and transportation costs.

5. Costs of the loan application under this rule.

(d) Costs that are not considered as allowable costs include the following:

1. Fees and commissions charged to the applicant, including finder’s fees, for obtaining Federal funds.

2. Expenses, which, in DOE’s judgment, have primarily an application broader than the specific loan request.

3. Costs which, in DOE’s judgment, fail to conform to paragraph (b) of this section.


§800.201 Findings.

A loan shall issue under this regulation only if the Secretary, having reviewed the action of the Application Approving Official, and having considered such other information as the Secretary may deem pertinent, has made all the findings that follow:
§ 800.202 Loan terms and conditions.

(a) The loan shall be based upon a loan agreement and the borrower’s separate promissory note for the proceeds of the loan, including interest. The agreement and note shall be executed in writing between the borrower and the Secretary. The contracting officer shall execute the loan agreement on behalf of the Secretary. The loan agreement and the promissory note shall provide as follows, either at full length or by incorporation by reference to terms of the other of the two documents.

1. The borrower agrees to repay the loan of funds provided by the Secretary.

2. The interest rate on the loan is as established in consultation with the Secretary of the Treasury, taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the loan.

3. The loan shall be repaid over a maximum period as follows, in equal monthly installments of principal and interest, unless a different frequency of installments is specified by the Secretary:

<table>
<thead>
<tr>
<th>Loan value</th>
<th>Maximum repayment</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0—$5,000</td>
<td>3 years 3 months.</td>
</tr>
<tr>
<td>$5,000—$25,000</td>
<td>5 years 3 months.</td>
</tr>
<tr>
<td>Excess of $25,000</td>
<td>8 years 3 months.</td>
</tr>
</tbody>
</table>

*1 Maximum repayment period from date of initial disbursement.

Repayment of principal and interest shall begin within 90 days following the initial loan disbursement or such longer period as may be acceptable to the Secretary. Installments shall be applied to accrued interest first and then to repayment of principal. Past due installments shall accrue interest at the quarterly current-value-of-funds-rate specified by the Treasury for overdue accounts. Prepayments may be made at any time without penalty.

4. The borrower shall have appropriate opportunities, as specified in the loan agreement, to cure any default, failure, or breach of any of the covenants, conditions and obligations undertaken by the borrower pursuant to the provisions of the loan agreement.

5. Loans of $10,000 or less will be disbursed in a single disbursement. Disbursement of loans larger than $10,000 shall be per schedule and documentation specified by the Secretary.

6. The loan may be used by the borrower to defray as much as, but no more than, 75 percent of the cost of the bid or proposal within the limitations specified in §800.200, on allowable costs. Costs incurred by the borrower prior to the effective date of the loan agreement, and allowable under §800.200, may be credited toward the borrower’s share of costs if, in DOE’s judgment, they were primarily related to the bid...
§ 800.300 Loan servicing.

(a) Servicing of a loan under this regulation may be performed by DOE, by another Federal agency, or by a servicing agent (commercial bank, broker, or other financial institution or entity) having the capability, and legally qualified, to service the loan consistently with the requirements of this regulation, which contracts with DOE to act as servicing agent. In determining the capability of a prospective servicing agent, DOE shall give due consideration to the experience of the

§ 800.303 Loan limits.

The Secretary shall not make a loan in excess of $50,000, or make aggregate loans to the same minority business enterprise, including its affiliates, in any Federal fiscal year in excess of $100,000. In addition, the Secretary shall not increase a loan to an amount which would cause the limits set forth in the previous sentence to be exceeded. Nothing in this regulation shall be interpreted to restrict the Secretary, in making the various determinations provided for in this regulation, from taking into account considerations relating to the Office of Minority Economic Impact loan program as a whole.

§ 800.304 Deviations.

(a) To the extent consistent with the Act, relevant appropriations acts, and other applicable statutes, DOE may waive on an individual application basis from the requirements of this regulation upon a finding by the Secretary that such deviation is necessary or appropriate in the individual case for the accomplishment of program objectives.

(b) The contracting officer may, subject to written agreement by other necessary parties, modify or amend the terms and conditions of a loan provided that such modification or amendment shall be consistent with this regulation.

Subpart D—Loan Administration

§ 800.300 Loan servicing.

(a) Servicing of a loan under this regulation may be performed by DOE, by another Federal agency, or by a servicing agent (commercial bank, broker, or other financial institution or entity) having the capability, and legally qualified, to service the loan consistently with the requirements of this regulation, which contracts with DOE to act as servicing agent. In determining the capability of a prospective servicing agent, DOE shall give due consideration to the experience of the

Department of Energy

or proposal, but shall not be reim-
bursed from the loan.

(7) The borrower shall make periodic
reports regarding the bid or proposal.

(8) The borrower shall maintain good
standing under Federal, State and local
laws and regulations applicable to the
conduct of its business, including cur-
rent payment of all taxes, fees and
other charges and all requisite licenses
and other governmental authorization
necessary for the continued operation
of the business throughout the term of
the loan.

(9) The borrower shall remain a mi-
nority business enterprise throughout
the term of the loan.

(10) The borrower shall return funds
discharged, but not required together
with accrued interest thereon, to DOE,
or to the servicing agent, if applicable,
when its bid or proposal is ready for
submission. The return of unrequired
funds shall be by check separate from
any payment of interest or principal,
shall be identified by the borrower as a
return of unrequired funds, and shall be
accompanied by the borrower’s certifi-
cation that so much of the loan as has
been disbursed to the borrower and not
returned has been, or will be, expended
by the borrower for costs allowable
under § 800.200.

(11) Such other provisions as the Sec-
retary deems appropriate.

(b) The loan agreement shall also
provide for loan servicing and moni-
toring in accordance with § 800.300 and
§ 800.301, loan limitation in accordance
with § 800.302, assignment and transfer
in accordance with § 800.303, default in
accordance with § 800.304 and appeals in
accordance with § 800.307.

(c) The Secretary may require, as
preconditions to disbursement, that
the borrower have specified amounts of
working capital (including amounts de-
}
§ 800.301  Monitoring.

The Secretary shall have the right to audit any and all costs of the bid or proposal for which the loan is sought or made and to exclude or reduce the includible amount of any cost in accordance with §800.200. Auditors who are employees of the United States Government, who are designated by the Secretary of Energy or by the Controller General of the United States, shall have access to, and the right to examine, any directly pertinent documents and records of an applicant or borrower at reasonable times under reasonable circumstances. The servicing agent, if any, shall make information regarding the loan available to the Secretary of Energy and Controller General to the extent lawful and within its ability. The Secretary may direct the applicant or borrower to submit to an audit by public accountant or equivalent acceptable to the Secretary.

§ 800.302  Loan limitation.

The Secretary may limit the loan by written notice to the borrower to those amounts, if any, already disbursed under the loan, if the Secretary has determined that the borrower has failed to comply with a material term or condition set forth in the loan agreement.

§ 800.303  Assignment or transfer of loan.

Assignment or transfer of the loan and obligations thereunder may be made only with the prior written consent of the Secretary.

§ 800.304  Default.

(a) In the event that the borrower fails to perform the terms and conditions of the loan, the borrower shall be in default and the Secretary shall have the right, at the Secretary’s option, to accelerate the indebtedness and demand full payment of all principal and interest amounts outstanding under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of receipt of the Secretary’s demand to make payment in full.

(d) In the event that the failure on the part of the borrower to perform the terms and conditions of the loan does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, or is deemed by the Secretary to be insubstantial, the Secretary may elect, at the Secretary’s option, to defer such performance and/or restructure the repayment required.
by the loan agreement in any mutually acceptable manner.

e Should the borrower fail to pay after demand as provided in paragraph (c) of this section, and no deferral or restructuring is agreed to by the Secretary as provided in paragraph (d) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

§ 800.305 Disclosure.

Information received from an applicant by DOE may be available to the public subject to the provision of 5 U.S.C. 552, 18 U.S.C. 1905 and 10 CFR part 1004; provided that:

(a) Subject to the requirements of law, information such as trade secrets, commercial and financial information, and other information concerning the minority business enterprise that the enterprise submits to DOE in writing, in an application, or at other times throughout the duration of the loan on a privileged or confidential basis, will not be disclosed without prior notice to submittor in accordance with DOE regulations concerning public disclosure of information. Any submittor asserting that the information is privileged or confidential should appropriately identify and mark such information.

(b) Upon a showing satisfactory to the Secretary that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information of the minority business enterprise, the Secretary may not disclose such information.

(c) This section shall not be construed as authority to withhold information from Congress or from any committee of Congress upon request of the Chairman.

§ 800.306 Noninterference with other laws.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower by Federal, State and local government agencies in connection with permits, licenses, or other authorizations to conduct or finance its business.

§ 800.307 Appeals.

Any dispute concerning questions of fact arising under the loan agreement shall be decided in writing by the contracting officer. The borrower may request the contracting officer to reconsider any such decision, which reconsideration shall be promptly undertaken. If not satisfied with the contracting officer’s final decision, the borrower, upon receipt of such written decision, may appeal the decision within 60 days in writing to the Chairman, Financial Assistance Appeals Board (FAAB), Department of Energy, Washington, DC 20585. The Board shall proceed in accordance with the Department of Energy’s rules and regulations for such purpose. The decision of the Board with respect to such appeals shall be the final decision of the Secretary.
§ 810.1 Purpose.

These regulations implement section 57b of the Atomic Energy Act which empowers the Secretary of Energy to authorize U.S. persons to engage directly or indirectly in the production of special nuclear material outside the United States. Their purpose is to:

(a) Indicate activities which have been generally authorized by the Secretary of Energy and thus require no further authorization;

(b) Indicate activities which require specific authorization by the Secretary and explain how to request authorization; and

(c) Explain reporting requirements for various activities.

§ 810.2 Scope.

10 CFR part 810:

(a) Applies to all persons subject to the jurisdiction of the United States who engage directly or indirectly in the production of special nuclear material outside the United States.

(b) Applies to activities conducted either in the United States or abroad by such persons or by licensees, contractors or subsidiaries under their direction, supervision, responsibility or control.

(c) Applies, but is not limited to, activities involving nuclear reactors and other nuclear fuel cycle facilities for the following: fluoride or nitrate conversion; isotope separation (enrichment); the chemical, physical or metallurgical processing, fabricating, or alloying of special nuclear material; production of heavy water, zirconium (hafnium-free or low-hafnium), nuclear-grade graphite, or reactor-grade beryllium; production of reactor-grade uranium dioxide from yellowcake; and certain uranium milling activities.

(d) Does not apply to exports licensed by the Nuclear Regulatory Commission.

§ 810.3 Definitions.

As used in part 810:

Accelerator-driven subcritical assembly system is a system comprising a “sub-critical assembly” and a “production accelerator” and which is designed or used for the purpose of producing or processing special nuclear material (SNM) or which a U.S. provider of assistance knows or has reason to know will be used for the production or processing of SNM. In such a system, the “production accelerator” provides a source of neutrons used to effect SNM production in the “subcritical assembly.”

Agreement for cooperation means an agreement with another nation or group of nations concluded under sections 123 or 124 of the Atomic Energy Act.


Classified information means National Security Information classified under Executive Order 12356 or any superseding order, or Restricted Data classified under the Atomic Energy Act.

General authorization means an authorization granted by the Secretary of Energy under section 57b(2) of the Atomic Energy Act to provide certain assistance to foreign atomic energy activities and which is effective without a specific request to the Secretary or the issuance of an authorization to a particular person.

IAEA means the International Atomic Energy Agency.

Non-nuclear-weapon state is a country not recognized as a nuclear-weapon state by the NPT (i.e., states other than the United States, Russia, the United Kingdom, France, and China).

NNPA means the Nuclear Non-Proliferation Act of 1978.

NPT means the Treaty on the Non-Proliferation of Nuclear Weapons.

Nuclear reactor means an apparatus, other than a nuclear explosive device, designed or used to sustain nuclear fission in a self-supporting chain reaction.

Open meeting means a conference, seminar, trade show or other gathering that all technically qualified members of the public may attend and at which they may make written or other personal record of the proceedings, notwithstanding that (1) a reasonable registration fee may be charged, or (2) a reasonable numerical limit exists on actual attendance.

Operational safety means the capability of a reactor to be operated in a manner that prevents uncontrolled or inadvertent criticality, prevents or
mitigates uncontrolled release of radioactivity to the environment, monitors and limits staff exposure to radiation and radioactivity, and protects off-site population from exposure to radiation or radioactivity. Operational safety may be enhanced by providing expert advice, equipment, instrumentation, technology, software, services, analyses, procedures, training, or other assistance that improves the capability of the reactor to be operated in such a manner.

Person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Department of Energy, any State or political entity within a State; and (2) any legal successor, representative, agent or agency of the foregoing. Persons under U.S. jurisdiction are responsible for their foreign licensees, contractors or subsidiaries to the extent that the former have control over the activities of the latter.

Production accelerator is a particle accelerator designed and/or intended to be used, with a subcritical assembly, for the production or processing of SNM or which a U.S. provider of assistance knows or has reason to know will be used for the production or processing of SNM.

Production reactor means a nuclear reactor specially designed or used primarily for the production of plutonium or uranium-233.

Public information means: (1) Information available in periodicals, books or other print or electronic media for distribution to any member of the public, or to a community of persons such as those in a scientific, engineering, or educational discipline or in a particular commercial activity who are interested in a subject matter; (2) Information available in public libraries, public reading rooms, public document rooms, public archives, or public data banks, or in university courses; (3) Information that has been presented at an open meeting (see definition of "open meeting"); (4) Information that has been made available internationally without restriction on its further dissemination; or (5) Information contained in an application which has been filed with the U.S. Patent Office and eligible for foreign filing under 35 U.S.C. 184 or which has been made available under 5 U.S.C. 552, the Freedom of Information Act. Public information must be available to the public prior to or at the same time as it is transmitted to a foreign recipient. It does not include any technical embellishment, enhancement, explanation or interpretation which in itself is not public information, or information subject to sections 147 and 148 of the Atomic Energy Act.

Restricted Data means all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act.

Sensitive nuclear technology means any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public [see definition of "public information"] which is important to the design, construction, fabrication, operation, or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water, but shall not include Restricted Data controlled pursuant to Chapter 12 of the Atomic Energy Act. The information may take a tangible form such as a model, prototype, blueprint, or operation manual or an intangible form such as technical services.

Source Material means: (1) Uranium or thorium, other than special nuclear material or (2) ores which contain by weight 0.05 percent or more of uranium or thorium, or any combination of these.

Special nuclear material means (1) plutonium, (2) uranium-233, or (3) uranium enriched above 0.711 percent by weight in the isotope uranium-235.

Specific authorization means an authorization granted by the Secretary of Energy under section 57b(2) of the Atomic Energy Act to a person to provide specified assistance to a foreign atomic energy activity in response to
§ 810.4 Communications.

(a) All communications concerning the regulations in this part should be addressed to: U.S. Department of Energy, Washington, DC 20585. Attention: Director, Nuclear Transfer and Supplier Policy Division, NN–43, Office of Arms Control and Nonproliferation. Telephone: (202) 586–2331.

(b) Communications also may be delivered to the Department’s headquarters at 1000 Independence Avenue, SW., Washington, DC. All clearly marked proprietary information will be given the maximum protection allowed by law.

§ 810.5 Interpretations.

A person may request the advice of the Director, Nuclear Transfer and Supplier Policy Division (NN–43), on whether a proposed activity falls outside the scope of this part, is generally authorized under § 810.7, or requires specific authorization under § 810.8; however, unless authorized by the Secretary of Energy, in writing, no interpretation of the regulations in this part other than a written interpretation by the General Counsel is binding upon the Department. When advice is requested from the Director, Nuclear Transfer and Supplier Policy Division, or a binding, written determination is requested from the General Counsel, a response normally will be made within 30 days and, if this is not feasible, an interim response will explain the delay.

§ 810.6 Authorization requirement.

Section 57b of the Atomic Energy Act in pertinent part provides that:

It shall be unlawful for any person to directly or indirectly engage in the production of any special nuclear material outside of the United States except (1) as specifically authorized under an agreement for cooperation made pursuant to section 123, including a specific authorization in a subsequent arrangement under section 131 of this Act, or (2) upon authorization by the Secretary of Energy after a determination that such activity will not be inimical to the interest of the United States: Provided, That any such determination by the Secretary of Energy shall be made only with the concurrence of the Department of State and after consultation with the Arms Control and Disarmament Agency, the Nuclear Regulatory Commission, the Department of Commerce, and the Department of Defense.

§ 810.7 Generally authorized activities.

In accordance with section 57b(2) of the Atomic Energy Act, the Secretary of Energy has determined that the following activities are generally authorized, provided no sensitive nuclear technology is transferred:

(a) Furnishing public information as defined in § 810.3;

(b) Furnishing information or assistance to prevent or correct a current or imminent radiological emergency posing a significant danger to the health and safety of the off-site population, provided the Department of Energy is notified in advance and does not object;

(c) Furnishing information or assistance, including through continuing programs, to enhance the operational safety of an existing civilian nuclear power plant in a country listed in § 810.8(a) or to prevent, reduce, or correct a danger to the health and safety of the off-site population posed by a civilian nuclear power plant in such a country; provided the Department of Energy is notified in advance by certified mail, return receipt requested, and approves the use of the authorization in writing; the Department will notify the applicant of the status of the request within 30 days from the date of receipt of the notification.

(d) Implementing the Agreement between the United States of America and the International Atomic Energy
§ 810.8 Activities requiring specific authorization.

Unless generally authorized by §810.7, a person requires specific authorization by the Secretary of Energy before:
(a) Engaging directly or indirectly in the production of special nuclear material in any of the following countries. Countries marked with an asterisk (*) are non-nuclear-weapon states that do not have full-scope IAEA safeguards agreements in force.

Afghanistan
Albania
Algeria
Andorra*
Angola*
Armenia
Azerbaijan*
Bahrain*
Belarus
Benin*
Botswana*
Burkina Faso*
Burma (Myanmar)
Burundi*
Cambodia*
Cameroon*
Cape Verde*
Central African Republic*
Chad*
China, People’s Republic of
Comoros*
Congo* (Zaire)
Cuba*
Djibouti*
Equatorial Guinea*
Eritrea*
Gabon*
Georgia*
Guinea*
Guinea-Bissau*
Haiti*
India*
Iran
Iraq*
Israel*
Kazakhstan
Kenya*
Korea, People’s Democratic Republic of*
Kuwait*
Kyrgyzstan*
Lao*
Liberia*
Libya
Macedonia
Mali*
Marshall Islands*
Mauritania*
Micronesia*
Moldova*
Mongolia
Mozambique*
Niger*
Oman*
Pakistan*
Palau*
Qatar*
Russia
Rwanda*
Sao Tome and Principe*
Saudi Arabia*
Seychelles*
Sierra Leone*
Somalia*
Sudan
Syria
Tajikistan*
Tanzania*
Togo*
Turkmenistan*
Uganda*
Ukraine
United Arab Emirates*
Uzbekistan
Vanuatu*
Vietnam
Yemen*
Yugoslavia
(b) Providing sensitive nuclear technology for an activity in any foreign country.
(c) Engaging in or providing assistance or training in any of the following
§ 810.9 Restrictions on general and specific authorization.

A general or specific authorization granted by the Secretary of Energy under these regulations:

(a) Is limited to activities involving only unclassified information and does not permit furnishing Restricted Data or other classified information.

(b) Does not relieve a person from complying with relevant laws or the regulations of other Government agencies applicable to exports;

(c) Does not authorize a person to engage in any activity when the person knows or has reason to know that the activity is intended to provide assistance in designing, developing, fabricating or testing a nuclear explosive device.
the Atomic Energy Act and of any applicable U.S. international commitments must also be met.

(d) Approximately 30 days after the Secretary's grant of a specific authorization, a copy of the Secretary's determination may be provided to any person requesting it at the Department's Public Reading Room, unless the applicant submits information showing that public disclosure will cause substantial harm to its competitive position. This provision does not affect any other authority provided by law for the Department not to disclose information.

§810.13 Reports.

(a) Any person who has received a specific authorization shall, within 30 days after beginning the authorized activity provide to the Department of Energy a report containing the following information:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person or entity for which the activity is being performed;

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion; and

(4) A copy of the Department of Energy's letter authorizing the activity.

(b) Any person carrying out a specifically authorized activity shall inform DOE when the activity is completed or if it is terminated before completion.

(c) Any person granted a specific authorization shall inform DOE when it is known that the proposed activity will not be undertaken and the granted authorization will not be used.

(d) Any person, within 30 days after beginning any generally authorized activity under §810.7(b), (c), or (h), shall provide to the Department of Energy:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person or entity for which the activity is being performed; and

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion.

(4) An assurance that the U.S. vendor has an agreement with the recipient ensuring that any subsequent transfer of materials, equipment, or technology transferred under general authorization to a country listed in §810.8(a) will only take place if the vendor obtains DOE approval.
§ 810.14

(e) Persons engaging in generally authorized activities as employees of persons required to report are not themselves required to report.

(f) Persons engaging in activities generally authorized under §810.7(a), (d), (e), (f), and (g) are not subject to reporting requirements under this section.

(g) All reports should be sent to: U.S. Department of Energy, National Nuclear Security Administration, Washington, DC 20585, Attention: Director, Nuclear Transfer and Supplier Policy Division, NN–43, Office of Arms Control and Nonproliferation.


§ 810.14 Additional information.

The Department of Energy may at any time require a person engaging in any generally or specifically authorized activity to submit additional information.

§ 810.15 Violations.

(a) The Atomic Energy Act provides that:

(1) Permanent or temporary injunctions or restraining orders may be granted to prevent any person from violating any provision of the Atomic Energy Act or its implementing regulations.

(2) Any person convicted of violating or conspiring or attempting to violate any provision of section 57 of the Atomic Energy Act may be fined up to $10,000 or imprisoned up to 10 years, or both. If the offense is committed with intent to injure the United States or to aid any foreign nation, the penalty could be up to life imprisonment and a $20,000 fine.

(b) Title 18 of the United States Code, section 1001, provides that persons convicted of willfully falsifying, concealing, or covering up a material fact or making false, fictitious or fraudulent statements or representations may be fined up to $10,000 or imprisoned up to five years, or both.

§ 810.16 Effective date and savings clause.

Except for actions that may be taken by DOE pursuant to §810.11, the regulations in this part do not affect the validity or terms of any specific authorizations granted under regulations in effect before April 26, 2000 (and contained in the 10 CFR, part 500 to end, edition revised as of January 1, 2000) or generally authorized activities under those regulations for which the contracts, purchase orders, or licensing arrangements were already in effect. Persons engaging in activities that were generally authorized under regulations in effect before April 26, 2000, but that require specific authorization under the regulations in this part, must request specific authorization by July 25, 2000 but may continue their activities until DOE acts on the request.

[65 FR 16128, Mar. 27, 2000]
Department of Energy

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APPENDIX A TO PART 820—GENERAL STATEMENT OF ENFORCEMENT POLICY

SOURCE: 58 FR 43692, Aug. 17, 1993, unless otherwise noted.

Subpart A—General

§ 820.1 Purpose and scope.
(a) Scope. This part sets forth the procedures to govern the conduct of persons involved in DOE nuclear activities and, in particular, to achieve compliance with the DOE Nuclear Safety Requirements by all persons subject to those requirements.
(b) Questions not addressed by these rules. Questions that are not addressed in this part shall be resolved at the discretion of the DOE Official.
(c) Exclusion. Activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion are excluded from the requirements of subparts D and E of this part regarding interpretations and exemptions related to this part. The Deputy Assistance Secretary for Naval Reactors or his designee will be responsible for formulating, issuing, and maintaining appropriate records of interpretations and exemptions for these facilities and activities.

§ 820.2 Definitions.
(a) The following definitions apply to this part:
Act or AEA means the Atomic Energy Act of 1954, as amended.
Consent Agreement means any written document, signed by the Director and a person, containing stipulations or conclusions of fact or law and a remedy acceptable to both the Director and the person.
Contractor means any person under contract (or its subcontractors or suppliers) with the Department of Energy with the responsibility to perform activities or to supply services or products that are subject to DOE Nuclear Safety Requirements.
Department means the United States Department of Energy or any predecessor agency.
Director means the DOE Official to whom the Secretary has assigned the authority to issue Notices of Violation under subpart B of this part, including the Director of Enforcement, or his designee. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, the Director shall mean the Deputy Assistant Secretary for Naval Reactors or his designee.
Docketing Clerk means the Office in DOE with which documents for an enforcement action must be filed and which is responsible for maintaining a record and a public docket for enforcement actions commencing with the filing of a Preliminary Notice of Violation. It is also the Office with which interpretations, exemptions, and any other documents designated by the Secretary shall be filed.
DOE means the United States Department of Energy or any predecessor agency.
DOE Nuclear Safety Requirements means the set of enforceable rules, regulations, or orders relating to nuclear safety adopted by DOE (or by another
§ 820.2  Agency if DOE specifically identifies the rule, regulation, or order) to govern the conduct of persons in connection with any DOE nuclear activity and includes any programs, plans, or other provisions intended to implement these rules, regulations, orders, a Nuclear Statute or the Act, including technical specifications and operational safety requirements for DOE nuclear facilities. For purposes of the assessment of civil penalties, the definition of DOE Nuclear Safety Requirements is limited to those identified in 10 CFR §820.20(b).

DOE Official means the person, or his designee, in charge of making a decision under this part.

Enforcement adjudication means the portion of the enforcement process that commences when a respondent requests an on-the-record adjudication of the assessment of a civil penalty and terminates when a Presiding Officer files an initial decision.

Exemption means the final order that sets forth the relief, waiver, or release, either temporary or permanent, from a DOE Nuclear Safety Requirement, as granted by the appropriate Secretarial Officer pursuant to the provisions of subpart E of this part.

Filing means, except as otherwise specifically indicated, the completion of providing a document to the Office of the Docketing Clerk and serving the document on the person to whom the document is addressed.

Final Notice of Violation means a document issued by the Director in which the Director determines that the respondent has violated or is continuing to violate a DOE Nuclear Safety Requirement and includes:

(i) A statement specifying the DOE Nuclear Safety Requirement to which the violation relates;
(ii) A concise statement of the basis for the determination;
(iii) Any remedy, including the amount of any civil penalty;
(iv) A statement explaining the reasoning behind any remedy; and
(v) If the Notice assesses a civil penalty, notice of respondent’s right:
(A) To waive further proceedings and pay the civil penalty;
(B) To request an on-the-record adjudication of the assessment of the civil penalty; or
(C) To seek judicial review of the assessment of the civil penalty.

Final Order means an order of the Secretary that represents final agency action and, where appropriate, imposes a remedy with which the recipient of the order must comply.

General Counsel means the General Counsel of DOE or his designee.

Hearing means an on-the-record enforcement adjudication open to the public and conducted under the procedures set forth in subpart B of this part.

Initial Decision means the decision filed by the Presiding Officer based upon the record of the enforcement adjudication out of which it arises.

Interpretation means a statement by the General Counsel concerning the meaning or effect of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement which relates to a specific factual situation but may also be a ruling of general applicability where the General Counsel determines such action to be appropriate.

Nuclear Statute means any statute or provision of a statute that relates to a DOE nuclear activity and for which DOE is responsible.

Party means the Director and the respondent in an enforcement adjudication under this part.

Person means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity and any legal successor, representative, agent or agency of the foregoing; provided that person does not include the Department or the United States Nuclear Regulatory Commission. For purposes of civil penalty assessment, the term also includes affiliated entities, such as a parent corporation.

Preliminary Notice of Violation means a document issued by the Director in which the Director sets forth the preliminary conclusions that the respondent has violated or is continuing to
of an activity under the Act. With regard to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion, Secretarial Officer shall mean the Deputy Assistant Secretary for Naval Reactors.

Secretary means the Secretary of Energy or his designee.

(b) Terms defined in the Act and not defined in these rules are used consistent with the meanings given in the Act.

(c) As used in this part, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 820.3 Separation of functions.

(a) Separation of functions. After a respondent requests an on-the-record adjudication of an assessment of a civil penalty contained in a Final Notice of Violation, no person shall participate in a decision-making function in an enforcement proceeding if he has been, is or will be responsible for an investigative or prosecutorial function related to that proceeding or if he reports to the person responsible for the investigative or prosecutorial function.

(b) Director. The Director shall be responsible for the investigation and prosecution of violations of the DOE Nuclear Safety Requirements. After the request for an enforcement adjudication, the Director shall not discuss ex parte the merits of the proceeding with a DOE Official or any person likely to advise the DOE Official in the decision of the proceeding.

(c) Presiding Officer. A Presiding Officer shall perform no duties inconsistent with his responsibilities as a Presiding Officer, and will not be responsible to or subject to the supervision or direction of any officer or employee engaged in the performance of an investigative or prosecutorial function. The Presiding Officer may not consult any person other than a member of his staff or a special assistant on any fact at issue unless on notice and opportunity for all parties to participate, except as required for the disposition of ex parte matters as authorized by law.
§ 820.4 Conflict of interest.

A DOE Official may not perform functions provided for in this part regarding any matter in which he has a financial interest or has any relationship that would make it inappropriate for him to act. A DOE Official shall withdraw at any time from any action in which he deems himself disqualified or unable to act for any reason. Any interested person may at any time request the General Counsel to disqualify a DOE Official or request that the General Counsel disqualify himself. In the case of an enforcement adjudication, a motion to disqualify shall be made to the Presiding Officer. The request shall be supported by affidavits setting forth the grounds for disqualification of the DOE Official. A decision shall be made as soon as practicable and information may be requested from any person concerning the matter. If a DOE Official is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in this section shall replace him.

§ 820.5 Service.

(a) General rule. Any document filed with the Docketing Clerk must be served on the addressee of the document and shall not be considered filed until service is complete and unless accompanied by proof of service; provided that the filing with the Docketing Clerk of any document addressed to the DOE Official shall be considered service on the DOE Official.

(b) Service in an Enforcement Adjudication. Any document filed in an enforcement adjudication must be served on all other participants in the adjudication.

(c) Who may be served. Any paper required to be served upon a person shall be served upon him or upon the representative designated by him or by law to receive service of papers. When an attorney has entered an appearance on behalf of a person, service must be made upon the attorney of record.

(d) How service may be made. Service may be made by personal delivery, by first class, certified or registered mail or as otherwise authorized or required by the DOE Official. The DOE Official may require service by express mail.

(e) When service is complete. Service upon a person is complete:

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By mail, on deposit in the United States mail, properly stamped and addressed; or

(3) By any other means authorized or required by the DOE Official.

(f) Proof of service. Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, and may be made by:

(1) Written acknowledgement of the person served or his counsel;

(2) The certificate of counsel if he has made the service;

(3) The affidavit of counsel if he has made the service;

(4) Any other means authorized or required by the DOE Official.

(g) Deemed service. If a document is deemed filed under this part, then the service requirements shall be deemed satisfied when the document is deemed filed.

§ 820.6 Computation and extension of time.

(a) Computation. In computing any period of time set forth in this part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. A DOE Official may grant an extension of any time period set forth in this part.

(c) Service by mail. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Where a
pleading or document is served by express mail, only two (2) days shall be added.

§ 820.7 Questions of policy or law.

(a) Certification. There shall be no interlocutory appeal from any ruling order, or action decision of a DOE Official except as permitted by this section. A Presiding Officer in an enforcement adjudication may certify, in his discretion, a question to the Secretary, when the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and either an immediate decision will materially advance the ultimate termination of the proceeding, or subsequent review will be inadequate or ineffectual.

(b) Decision. The certified question shall be decided as soon as practicable. If the Secretary determines that the question was improvidently certified, or if he takes no action within thirty days of the certification, the certification is dismissed. The Secretary may decide the question on the basis of the submission made by the Presiding Officer or may request further information from any person.

§ 820.8 Evidentiary matters.

(a) General. A DOE Official may obtain information or evidence for the full and complete investigation of any matter related to a DOE nuclear activity or for any decision required by this part. A DOE Official may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(b) Special Report Orders. A DOE Official may issue a Special Report Order (SRO) requiring any person involved in a DOE nuclear activity or otherwise subject to the jurisdiction of DOE to file a special report providing information relating to a DOE Nuclear Safety Requirement, the Act, or a Nuclear Statute, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required by this part.

(c) Extension of Time. The DOE Official who issues a subpoena or SRO pursuant to this section, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(d) Reconsideration. Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may request reconsideration of the subpoena or SRO with the DOE Official who issued the document. If the subpoena or SRO is not modified or rescinded within 10 days of the date of the filing of the request, the subpoena or SRO shall be effective as issued and the person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the filing. There is no administrative appeal of a subpoena or SRO.

(e) Service. A subpoena or SRO shall be served in the manner set forth in §820.5, except that service by mail must be made by registered or certified mail.

(f) Fees. (1) A witness subpoenaed by a DOE Official shall be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(2) If a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage shall be paid by the DOE if the person shows:

(i) The presence of the subpoenaed witness will materially advance the proceeding; and

(ii) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage. The DOE Official issuing the subpoena shall make
the determination required by this sub-section.

(g) **Enforcement.** If any person upon whom a subpoena or SRO is served pursuant to this section, refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the United States District Court to enforce the subpoena or SRO.

(h) **Certification.** (1) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that a diligent search has been made for each document responsive to the subpoena, and to the best of his knowledge, information, and belief all such documents responsive to the subpoena are being produced unless withheld on the grounds of privilege pursuant to paragraph (i) of this section.

(2) Any information furnished in response to an SRO shall be accompanied by the sworn certification under penalty of perjury of the person to whom it was directed or his authorized agent who actually provides the information that to the best of his knowledge, information and belief a diligent effort has been made to provide all information required by the SRO, and all information furnished is true, complete, and correct unless withheld on grounds of privilege pursuant to paragraph (i) of this section.

(3) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO.

(i) **Withheld information.** If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (h) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent

the document, the privilege relied upon as the basis for withholding the document or information, a memorandum of law supporting the claim of privilege, and an identification of the person whose privilege is being asserted.

(j) **Statements/testimony.**

(1) If a person’s statement/testimony is taken pursuant to a subpoena, the DOE Official shall determine whether the statement/testimony shall be recorded and the means by which it is recorded.

(2) A person whose statement/testimony is recorded may procure a copy of the transcript by making a written request for a copy and paying the appropriate fees. Upon proper identification, any potential witness or his attorney has the right to inspect the official transcript of the witness’ own statement or testimony.

(k) **Sequestration.** The DOE Official may sequester any person who furnishes documents or gives testimony. Unless permitted by the DOE Official, no witness nor his attorney shall be present during the examination of any other witnesses.

(l) **Attorney.** (1) Any person whose statement or testimony is taken may be accompanied, represented and advised by his attorney; provided that, if the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(2) The DOE Official shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. The DOE Official may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

§ 820.9 **Special assistant.**

A DOE Official may appoint a person to serve as a special assistant to assist the DOE Official in the conduct of any proceeding under this part. Such appointment may occur at any appropriate time. A special assistant shall be subject to the disqualification provisions in §820.5. A special assistant may perform those duties assigned by the
§ 820.10 Office of the docketing clerk.

(a) Docket. The Docketing Clerk shall maintain a docket for enforcement actions commencing with the issuance of a Preliminary Notice of Violation, interpretations issued pursuant to subpart D of this part, exemptions issued pursuant to subpart E of this part, and any other matters designated by the Secretary. A docket for an enforcement action shall contain all documents required to be filed in the proceeding.

(b) Public inspection. Subject to the provisions of law restricting the public disclosure of certain information, any person may, during Department business hours, inspect and copy any document filed with the Docketing Clerk. The cost of duplicating documents shall be borne by the person seeking copies of such documents. The DOE Official may waive this cost in appropriate cases.

(c) Transcript. Except as otherwise provided in this part, after the filing of a Preliminary Notice of Violation, all hearings, conferences, and other meetings in the enforcement process shall be transcribed verbatim. A copy of the transcript shall be filed with the Docketing Clerk promptly. The Docketing Clerk shall serve all participants with notice of the availability of the transcript and shall furnish the participants with a copy of the transcript upon payment of the cost of reproduction, unless a participant can show that the cost is unduly burdensome.

§ 820.11 Information requirements.

(a) Any information pertaining to a nuclear activity provided to DOE by any person or maintained by any person for inspection by DOE shall be complete and accurate in all material respects.

(b) No person involved in a DOE nuclear activity shall conceal or destroy any information concerning a violation of a DOE Nuclear Safety Requirement, a Nuclear Statute, or the Act.

§ 820.12 Classified, confidential, and controlled information

(a) General rule. The DOE Official in charge of a proceeding under this part may utilize any procedures deemed appropriate to safeguard and prevent disclosure of classified, confidential, and controlled information, including Restricted Data and National Security Information, to unauthorized persons, with minimum impairment of rights and obligations under this part.

(b) Obligation to protect restricted information. Nothing in this part shall relieve any person from safeguarding classified, confidential, and controlled information, including Restricted Data or National Security Information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

Subpart B—Enforcement Process

§ 820.20 Purpose and scope.

(a) Purpose. This subpart establishes the procedures for investigating the nature and extent of violations of the DOE Nuclear Safety Requirements, for determining, whether a violation has occurred, for imposing an appropriate remedy, and for adjudicating the assessment of a civil penalty.

(b) Basis for civil penalties. DOE may assess civil penalties against any person subject to the provisions of this part who has entered into an agreement of indemnification under 42 U.S.C. 2210(d) (or any subcontractor or supplier thereto), unless exempted from civil penalties as provided in paragraph (c) of this section, on the basis of a violation of:

1. Any DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations;
2. Any Compliance Order issued pursuant to subpart C of this part; or
3. Any program, plan or other provision required to implement any requirement or order identified in paragraphs (b)(1) or (b)(2) of this section.

(c) Exemptions. The following contractors, and subcontractors and suppliers thereto, are exempt from the assessment of civil penalties under this
§ 820.21 Investigations.

(a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with the Act and the DOE Nuclear Safety Requirements and take such action as he deems necessary and appropriate to the conduct of the investigation or inspection, including any action pursuant to §820.8.

(b) Any person may request the Director to initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection shall set forth the subject matter or activity to be investigated or inspected as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(c) Any person who is requested to furnish documentary evidence, information or testimony in an investigation or during an inspection shall be informed, upon written request, of the general purpose of the investigation or inspection.

(d) Information or documents that are obtained during any investigation or inspection shall not be disclosed unless the Director directs or authorizes the public disclosure of the investigation. Upon such authorization, the information or documents are a matter of public record and disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and 10 CFR part 1004. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not prevent disclosure by the Director if disclosure is determined to be in the public interest and otherwise permitted or required by law.

(e) During the course of an investigation or inspection any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish information which the person considers relevant to a matter or activity under investigation or inspection.

(f) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the investigation may be closed without prejudice to further investigation or inspection by the Director at any time that circumstances so warrant.

§ 820.22 Informal conference.

The Director may convene an informal conference to discuss any situation that might be a violation of the Act or a DOE Nuclear Safety Requirement, its significance and cause, any correction taken or not taken by the person, any mitigating or aggravating circumstances, and any other useful information. The Director may compel a person to attend the conference. This conference will not normally be open to the public and there shall be no transcript.

§ 820.23 Consent order.

(a) Settlement policy. DOE encourages settlement of an enforcement proceeding at any time if the settlement is consistent with the objectives of the Act and the DOE Nuclear Safety Requirements. The Director and a person
may confer at any time concerning settlement. These settlement conferences shall not be open to the public and there shall be no transcript.

(b) Consent order. Notwithstanding any other provision of this part, DOE may at any time resolve any or all issues in an outstanding enforcement proceeding with a Consent Order. A Consent Order must be signed by the Director and the person who is its subject, or a duly authorized representative, must indicate agreement to the terms contained therein and must be filed. A Consent Order need not constitute an admission by any person that the Act or a DOE Nuclear Safety Requirement has been violated, nor need it constitute a finding by the DOE that such person has violated the Act or a DOE Nuclear Safety Requirement. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order and what remedy, if any, is imposed.

(c) Effect on enforcement adjudication. If a Consent Order is signed after the commencement of an enforcement adjudication, the adjudication of the issues subject to the Consent Order shall be stayed until the completion of the Secretarial Review Process. If the Consent Order becomes a Final Order, the adjudication shall be terminated or modified as specified in the Order.

(d) Secretarial review. A Consent Order shall become a Final Order 30 days after it is filed unless the Secretary files a rejection of the Consent Order or a Modified Consent Order. A Modified Consent Order shall become a Final Order if the Director and the person who is its subject sign it within 15 days of its filing.

§ 820.24 Preliminary notice of violation.

(a) If the Director has reason to believe a person has violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Preliminary Notice of Violation. The Notice and any transmittal documents shall contain sufficient information to fairly apprise the respondent of the facts and circumstances of the alleged violations and the basis of any proposed remedy, and to properly indicate what further actions are necessary by or available to respondent.

(b) Within 30 days after the filing of a Preliminary Notice of Violation, the respondent shall file a reply.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a statement of all relevant facts pertaining to the situation that is the subject of the Notice. The reply shall state any facts, explanations and arguments which support a denial that a violation has occurred as alleged; demonstrate any extenuating circumstances or other reason why the proposed remedy should not be imposed or should be mitigated; and furnish full and complete answers to the questions set forth in the Notice. Copies of all relevant documents shall be submitted with the reply. The reply shall include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE.

(d) The respondent may terminate an enforcement action if the reply agrees to comply with the proposed remedy and waives any right to contest the Notice or the remedy. If a respondent elects this option, the Preliminary Notice of Violation shall be deemed a Final Order upon the filing of the reply.

§ 820.25 Final notice of violation.

(a) General rule. If, after reviewing the reply submitted by the respondent, the Director determines that a person violated or is continuing to violate a provision of the Act or a DOE Nuclear Safety Requirement, he may file a Final Notice of Violation. The Final Notice shall concisely state the determined violation, any designated penalty, and further actions necessary by or available to respondent.

(b) Effect of final notice. (1) If a Final Notice of Violation does not contain a civil penalty, it shall be deemed filed as a Final Order 15 days after the Final Notice is filed unless the Secretary files a Final Order which modifies the Final Notice.

(2) If a Final Notice of Violation contains a civil penalty, the respondent must file within 30 days after the filing of the Final Notice:
§ 820.26 Enforcement adjudication.

If a respondent files a request for an on-the-record adjudication, an enforcement adjudication is initiated and the Docketing Clerk shall notify the Secretary who shall appoint an Administrative Law Judge to be the Presiding Officer.

§ 820.27 Answer.

(a) General. If a respondent files a request for an on-the-record adjudication pursuant to §820.25, a written answer to the Final Notice of Violation shall be filed at the same time the request is filed.

(b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Final Notice of Violation with regard to which respondent has any knowledge, information or belief. Where respondent has no knowledge, information or belief of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state the circumstance or argument that is alleged to constitute the grounds of defense and the facts that respondent intends to place at issue.

(c) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the Final Notice of Violation constitutes an admission of the allegation.

(d) Amendment of the answer. The respondent may amend the answer to the Final Notice of Violation upon motion granted by the Presiding Officer.

§ 820.28 Prehearing actions.

(a) General. The Presiding Officer shall establish a schedule for the adjudication and take such other actions as he determines appropriate to conduct the adjudication in a fair and expeditious manner.

(b) Prehearing conference. The Presiding Officer, at any time before a hearing begins, may direct the parties and their counsel, or other representatives, to appear at a conference before him to consider, as appropriate:

(1) The settlement of the case;
(2) The simplification of issues and stipulation of facts not in dispute;
(3) The necessity or desirability of amendments to pleadings;
(4) The exchange of exhibits;
(5) The limitation of the number of expert or other witnesses;
(6) Setting a time and place for the hearing; and
(7) Any other matters that may expedite the disposition of the proceeding.

(c) Exchange of witness lists and documents. Unless otherwise ordered by the Presiding Officer, at least five (5) days before any prehearing conference, each party shall make available to all other parties, as appropriate, the names of the expert and other witnesses it intends to call, together with a brief narrative summary of their expected testimony, and copies of all documents and exhibits that each party intends to introduce into evidence. Documents and
§ 820.29 Hearing.

(a) General. Except as otherwise provided by this part or the Presiding Officer, a hearing shall be conducted in accordance with the Federal Rules of Evidence. The Presiding Officer shall have the discretion to admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, if he believes the evidence might facilitate the fair and expeditious resolution of the proceeding. But such evidence may be reasonably limited by the Presiding Officer in scope and length in order to permit prompt resolution of the proceeding. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information, and shall protect classified and unclassified controlled nuclear information, as well as any other information protected from public disclosure pursuant to law or regulation. The confidential, trade secret, or classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion that arise out of that portion of the evidence that is confidential, includes trade secrets, is classified, or is otherwise protected.

(b) Subpoenas. The attendance of witnesses or the production of documentary evidence may be required by subpoena.
§ 820.30 Examinations of witnesses. There shall be no direct oral testimony by witnesses, except as permitted by the Presiding Officer. In lieu of oral testimony, the Presiding Officer shall admit into the record as evidence verified written statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall have delivered a copy of the statement to the Presiding Officer and the opposing counsel not less than 10 days prior to the date the witness is scheduled to testify. The witness presenting the statement shall swear or affirm that the statement is true and accurate to the best of his knowledge, information, and belief and shall be subject to appropriate oral cross-examination upon the contents thereof provided such cross-examination is not unduly repetitious.

(d) Burden of presentation; burden of persuasion. The Director has the burden of going forward with and of proving that the violation occurred as set forth in the Notice of Violation and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the Notice of Violation. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 820.31 Initial decision.

(a) Initial Decision. The Presiding Officer shall file an Initial Decision as soon as practicable after the period for filing reply briefs under § 820.30 has expired. The Initial Decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, any remedy and a proposed Final Order. A party may file comments on an Initial Decision within fifteen days of its filing.

(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and that a civil penalty is appropriate, the Initial Decision shall set forth the dollar amount of the civil penalty. If the Presiding Officer decides to assess a penalty different in amount from the penalty assessed in the Final Notice of Violation, the Initial Decision shall set forth the specific reasons for the increase or decrease.

§ 820.32 Final order.

(a) Effect of Initial Decision. The Initial Decision shall be deemed filed as a Final Order thirty days after the filing of the Initial Decision unless the Secretary files a Final Order that modifies the Initial Decision or the Secretary files a Notice of Review.

(b) Notice of review. If the Secretary files a Notice of Review, he shall file a Final Order as soon as practicable after completing his review. The Secretary may, at his discretion, order additional procedures, remand the matter or modify the remedy, including an increase or decrease in the amount of the civil penalty from the amount recommended to be assessed in the Initial Decision.

(c) Payment of a civil penalty. The respondent shall pay the full amount of any civil penalty assessed in the Final Order within thirty (30) days after the Final Order is filed unless otherwise agreed by the parties.

§ 820.33 Default order.

(a) Default. The Presiding Officer, upon motion by a party or the filing of a Notice of Intent to issue a Default Order sua sponte, may find a party to be in default if the party fails to comply with the provisions of this part or an order of the Presiding Officer. The alleged defaulting party shall have ten
days to answer the motion or the Notice of Intent. No finding of default shall be made against the respondent unless the Director presents sufficient evidence to the Presiding Officer to establish a *prima facie* case against the respondent. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the Final Notice of Violation and a waiver of respondent’s rights to an on-the-record adjudication of such factual allegations. Default by the Director shall result in an order to dismiss the Final Notice of Violation with prejudice.

(b) **Effect of default order.** When the Presiding Officer finds a default has occurred, he shall file a Default Order against the defaulting party. This order shall constitute an Initial Decision.

(c) **Contents of a default order.** A Default Order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of fact, law or discretion, and the remedy.

§ 820.34 Accelerated decision.

(a) **General.** The Presiding Officer, upon motion of any party or sua sponte, may at any time render an Accelerated Decision in favor of the Director or the respondent as to all or any part of the adjudication, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the adjudication. In addition, the Presiding Officer, upon motion of the respondent, may render at any time an Accelerated Decision to dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a *prima facie* case or other grounds that show no right to relief on the part of the Director.

(b) **Effect of Accelerated Decision.** (1) If an Accelerated Decision is rendered as to all the issues and claims in the adjudication, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon file an interlocutory order specifying the facts that appear substantially uncontroverted, and the issues and claims upon which the adjudication will proceed.

§ 820.35 Ex parte discussions.

At no time after a respondent has requested an on-the-record adjudication of the assessment of a civil penalty shall a DOE Official, or any person who is likely to advise a DOE Official in the decision on the case, discuss *ex parte* the merits of the proceeding with any interested person outside DOE, with any DOE staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to a DOE Official during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. Any oral communication shall be set forth in a written memorandum and served on all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

§ 820.36 Filing, form, and service of documents.

(a) Filing in an enforcement proceeding. The original and three copies of any document in an enforcement proceeding shall be filed with the Docteting Clerk commencing with the filing of a Preliminary Notice of Violation.

(b) Form of documents in an enforcement proceeding. (1) Except as provided herein, or by order of the DOE Official, there are no specific requirements as to the form of documents filed in an enforcement proceeding.

(2) The first page of every document shall contain a caption identifying the respondent and the docket number.
§ 820.37 Participation in an adjudication.

(a) Parties. In an enforcement adjudication, the Director and the respondent shall be the only parties; provided that the Presiding Officer may permit a person to intervene as a party if the person demonstrates it could be liable in the event a civil penalty is assessed.

(b) Appearances. Any party to an enforcement adjudication may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

(c) Amicus Curiae. Persons not parties to an enforcement adjudication who wish to file briefs may so move. The motion shall identify the interest of the person and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

§ 820.38 Consolidation and severance.

(a) Consolidation. The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more enforcement adjudications under this part where there exists common parties or common questions of fact or law, consolidation would expedite and simplify consideration of the issues, and consolidation would not adversely affect the rights of parties engaged in otherwise separate adjudications.

(b) Severance. The Presiding Officer may, by motion or sua sponte, for good cause shown order any enforcement adjudication severed with respect to any or all parties or issues.

§ 820.39 Motions.

(a) General. All motions in an enforcement adjudication except those made orally, shall be in writing, state the grounds therefor with particularity, set forth the relief or order sought, and be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon.

(b) Answer to motions. Except as otherwise specified by a particular provision of this part or by the Presiding Officer, a party shall have the right to file a written answer to the motion of another party within 10 days after the filing of such motion. The answer shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no answer is filed within the designated period, the party may be deemed to have waived any objection to the granting of the motion. The Presiding Officer may set a shorter or longer time for an answer, or make such other orders concerning the disposition of motions as he deems appropriate.

(c) Decision. The Presiding Officer shall rule on a motion as soon as practicable after the filing of the answer. The decision of the Presiding Officer on any motion shall not be subject to administrative appeal.
§ 820.40 Purpose and scope.
This subpart provides for the issuance of Compliance Orders to prevent, rectify or penalize violations of the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement and to require action consistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

§ 820.41 Compliance order.
The Secretary may issue to any person involved in a DOE nuclear activity a Compliance Order that:
(a) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement;
(b) Mandates a remedy or other action; and,
(c) States the reasons for the remedy or other action.

§ 820.42 Final order.
A Compliance Order is a Final Order that constitutes a DOE Nuclear Safety Requirement that is effective immediately unless the Order specifies a different effective date.

§ 820.43 Appeal.
Within fifteen days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request shall not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

Subpart D—Interpretations

§ 820.50 Purpose and scope.
This subpart provides for interpretations of the Act, Nuclear Statutes, and DOE Nuclear Safety Requirements. Any written or oral response to any written or oral question which is not provided pursuant to this subpart does not constitute an interpretation and does not provide any basis for action inconsistent with the Act, a Nuclear Statute, or a DOE Nuclear Safety Requirement.

§ 820.51 General Counsel.
The General Counsel shall be the DOE Official responsible for formulating and issuing any interpretation concerning the Act, a Nuclear Statute or a DOE Nuclear Safety Requirement.

§ 820.52 Procedures.
The General Counsel may utilize any procedure which he deems appropriate to comply with his responsibilities under this subpart. All interpretations issued under this subpart must be filed with the Office of the Docketing Clerk which shall maintain a docket for interpretations.

Subpart E—Exemption Relief

§ 820.60 Purpose and scope.
This subpart provides for exemption relief from provisions of DOE Nuclear Safety Requirements at nuclear facilities.

§ 820.61 Secretarial officer.
The Secretarial Officer who is primarily responsible for the activity to which a DOE Nuclear Safety Requirement relates may grant a temporary or permanent exemption from that requirement as requested by any person subject to its provisions; provided that, the Secretarial Officer responsible for environment, safety and health matters shall exercise this authority with respect to provisions relating to radiological protection of workers, the public and the environment. This authority may not be further delegated.

§ 820.62 Criteria.
The criteria for granting an exemption to a DOE Nuclear Safety Requirement are determinations that the exception:
(a) Would be authorized by law;
(b) Would not present an undue risk to public health and safety, the environment, or facility workers;
(c) Would be consistent with the safe operation of a DOE nuclear facility; and
(d) Involves special circumstances, including the following:
   (1) Application of the requirement in the particular circumstances conflicts with other requirements; or
§ 820.63 Application of the requirement in the particular circumstances would not serve or is not necessary to achieve its underlying purpose, or would result in resource impacts which are not justified by the safety improvements; or

(3) Application of the requirement would result in a situation significantly different than that contemplated when the requirement was adopted, or that is significantly different from that encountered by others similarly situated; or

(4) The exemption would result in benefit to human health and safety that compensates for any detriment that may result from the grant of the exemption; or

(5) Circumstances exist which would justify temporary relief from application of the requirement while taking good faith action to achieve compliance; or

(6) There is present any other material circumstance not considered when the requirement was adopted for which it would be in the public interest to grant an exemption.

§ 820.63 Procedures.

The Secretarial Officer shall utilize any procedures deemed necessary and appropriate to comply with his responsibilities under this subpart. All exemption decisions must set forth in writing the reasons for granting or denying the exemption, and if granted, the basis for the determination that the criteria in § 820.62 have been met and the terms of the exemption. All exemption decisions must be filed with the Office of the Docketing Clerk which shall maintain a docket for exemption decisions issued pursuant to this subpart.

§ 820.64 Terms and conditions.

An exemption may contain appropriate terms and conditions including, but not limited to, provisions that:

(a) Limit its duration;

(b) Require alternative action;

(c) Require partial compliance; or

(d) Establish a schedule for full or partial compliance.

§ 820.65 Implementation plan.

With respect to a DOE Nuclear Safety Requirement for which there is no regulatory provision for an implementation plan or schedule, an exemption may be granted to establish an implementation plan which reasonably demonstrates that full compliance with the requirement will be achieved within two years of the effective date of the requirement without a determination of special circumstances under § 820.62(d).

§ 820.66 Appeal.

Within fifteen (15) days of the filing of an exemption decision by a Secretarial Officer, the person requesting the exemption may file a Request to Review with the Secretary, or the Secretary may file, sua sponte, a Notice of Review. The Request to Review shall state specifically the respects in which the exemption determination is claimed to be erroneous, the grounds of the request, and the relief requested.

§ 820.67 Final order.

If no filing is made under § 820.66, an exemption decision becomes a Final Order fifteen (15) days after it is filed by a Secretarial Officer. If filing is made under § 820.66, an exemption decision becomes a Final Order 45 days after it is filed by a Secretarial Officer, unless the Secretary stays the effective date or issues a Final Order that modifies the decision.

Subpart F—Criminal Penalties

§ 820.70 Purpose and scope.

This subpart provides for the identification of criminal violations of the Act or DOE Nuclear Safety Requirements and the referral of such violations to the Department of Justice.

§ 820.71 Standard.

If a person subject to the Act or the DOE Nuclear Safety Requirements has, by act or omission, knowingly and willfully violated, caused to be violated, attempted to violate, or conspired to violate any section of the Act or any applicable DOE Nuclear Safety Requirement, the person shall be subject to criminal sanctions under the Act.
§ 820.72 Referral to the Attorney General.

If there is reason to believe a criminal violation of the Act or the DOE Nuclear Safety Requirements has occurred, DOE may refer the matter to the Attorney General of the United States for investigation or prosecution.

Subpart G—Civil Penalties

Source: 62 FR 46184, Sept. 2, 1997, unless otherwise noted.

§ 820.80 Basis and purpose.


§ 820.81 Amount of penalty.

Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $110,000 for each such violation. If any violation under 42 U.S.C. 2282a is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

APPENDIX A TO PART 820—GENERAL STATEMENT OF ENFORCEMENT POLICY

I. Introduction

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its enforceable nuclear safety regulations and orders (hereafter collectively referred to as DOE Nuclear Safety Requirements) and, in particular, exercise the civil penalty authority provided to DOE in the Price Anderson Amendments Act of 1988, 42 U.S.C. 2282a (PAAA). The policy set forth in this section is applicable to violations of DOE Nuclear Safety Requirements by DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2216(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to DOE’s Nuclear Safety Requirements as specified in the PAAA. It is not intended to establish a “cookbook” approach to the initiation and resolution of situations involving noncompliance with DOE Nuclear Safety Requirements. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval nuclear propulsion.

(b) Both the Department of Energy Organization Act, 42 U.S.C. 7101, and the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, require DOE to protect the public health and safety, as well as the safety of workers at DOE facilities, in conducting its nuclear activities, and grant DOE broad authority to achieve this goal.

(c) The DOE goal in the compliance arena is to enhance and protect the radiological health and safety of the public and worker at DOE facilities by fostering a culture among both the DOE line organizations and the contractors that activity seeks to attain and sustain compliance with DOE Nuclear Safety Requirements. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, and the initiation of comprehensive corrective actions to resolve both the noncompliance conditions and the program or process deficiencies that led to noncompliance.

(d) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. These initiatives and activities will be duly considered in exercising enforcement discretion.

(e) The PAAA provides DOE with the authority to compromise, modify, or remit civil penalties with or without conditions. In
implementing the PAAA, DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to nuclear facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

II. Purpose

The purpose of the DOE enforcement program is to promote and protect the radiological health and safety of the public and workers at DOE facilities by:

a. Ensuring compliance by DOE contractors with applicable DOE Nuclear Safety Requirements.

b. Providing positive incentives for a DOE contractor’s:

(1) Timely self-identification of nuclear safety deficiencies,

(2) Prompt and complete reporting of such deficiencies to DOE,

(3) Root cause analyses of nuclear safety deficiencies,

(4) Prompt correction of nuclear safety deficiencies in a manner which precludes recurrence, and

(5) Identification of modifications in practices or facilities that can improve public or worker radiological health and safety.

c. Deterring future violations of DOE requirements by a DOE contractor.

d. Encouraging the continuous overall improvement of operations at DOE nuclear facilities.

III. Statutory Authority

Section 17 of the PAAA makes most DOE contractors covered by the DOE Price-Anderson indemnification system, and their subcontractors and suppliers, subject to civil penalties for violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2282a. Furthermore, section 18 of the PAAA makes all employees of DOE contractors, and their subcontractors and suppliers, subject to criminal penalties, including monetary penalties and imprisonment, for knowing and willful violations of applicable DOE nuclear safety rules, regulations and orders. 42 U.S.C. 2282a. Suspected, or alleged, criminal violations are referred to the Department of Justice for appropriate action. 42 U.S.C. 2271. Therefore, DOE’s enforcement authority and policy will apply only to civil penalties since decisions on criminal violations are the responsibility of the Department of Justice. However, referral of a case to the Department of Justice does not preclude DOE from taking civil enforcement action in accordance with this policy statement. Such actions will be coordinated with the Department of Justice to the extent practicable.

IV. Responsibilities

The Director, as the principal enforcement officer of the DOE, has been delegated the authority to conduct enforcement investigations and conferences, issue Notices of Violations and proposed civil penalties, and represent DOE in an enforcement adjudication.

V. Procedural Framework

(a) 10 CFR part 820 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of contested enforcement actions in the event a DOE contractor elects to litigate contested issues before an Administrative Law Judge.

(b) Pursuant to 10 CFR part 820, the Director initiates the civil penalty process by issuing a Preliminary Notice of Violation and Proposed Civil Penalty (PNOV). The DOE contractor is required to respond in writing to the PNOV, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it, admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty, or denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor’s response, the Director of Enforcement may determine that no violation has occurred, that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and Proposed Civil Penalty.

(c) An opportunity to challenge a proposed civil penalty either before an Administrative Law Judge or in a United States District Court is provided in the PAAA, 42 U.S.C. 2282a(c), and 10 CFR part 820 sets forth the procedures associated with an administrative hearing rather than waiving its right to contest the civil penalty and paying it. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at
any time, either informally prior to the initiation of an administrative proceeding or by consent order after a formal proceeding has begun.

**VI. Severity of Violations**

(a) Violations of DOE Nuclear Safety Requirements have varying degrees of safety significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations are categorized in three levels of severity to identify their relative safety significance, and Notices of Violation are issued for noncompliance which, when appropriate, propose civil penalties.

(b) Severity Level I has been assigned to violations which are the most significant. Severity Level I is reserved for violations of DOE Nuclear Safety Requirements which involve actual or high potential for adverse impact on the safety of the public or workers at DOE facilities. Severity level II violations represent a significant lack of attention or carelessness toward responsibilities of DOE contractors for the protection of public or worker safety which could, if uncorrected, potentially lead to an adverse impact on public or worker safety at DOE facilities. Severity Level III violations are less serious but are of more than minor concern; i.e., if left uncorrected, they could lead to a more serious concern. In some cases, violations may be evaluated in the aggregate and a single severity level assigned for a group of violations.

(c) Isolated minor violations of DOE Nuclear Safety Requirements will not be the subject of formal enforcement action through the issuance of a Notice of Violation. However, these minor violations will be identified as noncompliance and tracked to assure that appropriate corrective/remedial action is taken to prevent their recurrence, and evaluated to determine if generic or specific problems exist. If circumstances demonstrate that a number of related minor noncompliances have occurred in the same time frame (e.g. all identified during the same assessment), or that related minor noncompliances have recurred despite prior notice to the DOE contractor and sufficient opportunity to correct the problem, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious violation warranting a Severity Level III designation, a Notice of Violation and a possible civil penalty.

(d) The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently than those in which there is gross negligence, deception or wilfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Likewise, in situations of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of public and worker health and safety.

(e) Other factors which will be considered by DOE in determining the appropriate severity level of a violation include the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than an isolated occurrence. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of each case.

(f) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to the DOE or an untimely report or notification, will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for failure to report a condition or event unless the contractor was actually aware, or should have been aware of the condition or event which it failed to report.

**VII. Enforcement Conferences**

(a) Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of DOE Nuclear Safety Requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty or issuance of an enforcement order, DOE will normally hold an enforcement conference with the DOE contractor involved prior to taking enforcement action. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty or enforcement order but which could, if repeated,
VIII. Enforcement Letter

a. In cases where DOE has decided not to issue a Preliminary Notice of Violation, DOE may send an Enforcement Letter to the contractor signed by the Director. The Enforcement Letter is intended to communicate the basis of the decision not to pursue further enforcement action for a noncompliance. The Enforcement Letter is intended to direct contractors to the desired level of nuclear safety performance. It may be used when DOE concludes the specific noncompliance at issue is not of the level of significance warranted for issuance of a Preliminary Notice of Violation (PNOV). Even where a noncompliance may be significant, the Enforcement Letter recognizes that the contractor’s actions may have attenuated the need for further enforcement action. The Letter will typically recognize how the contractor handled the circumstances surrounding the noncompliance and address additional areas requiring the contractor’s attention and DOE’s expectations for corrective action. The Enforcement Letter notifies the contractor that, when verification is received that corrective actions have been implemented, DOE will close the enforcement action.

b. In many investigations, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out an investigation simply through an annotation in the DOE Noncompliance Tracking System (NTS). See Guidance for Identifying, Reporting and Tracking Nuclear Safety Noncompliances, and Addendum, Noncompliance Tracking System Users Manual, DOE-HDBK-1089-95, July 1995. A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

IX. Enforcement Actions

a. This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties. In determining whether to impose enforcement sanctions, DOE will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, e.g., instances which involve NRC licensed entities which are also DOE contractors, and in which the NRC exercises its own enforcement authority.

b. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation. Administrative actions, such as determination of award fees where DOE contracts provide for such determinations, will be considered separately from any civil penalties that may be imposed under this Enforcement Policy. Likewise, imposition of a civil penalty will be based on the circumstances of each case, unaffected by any award fee determination.

1. Notice of Violation

a. A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of the DOE Office of Nuclear Safety that one or more violations of DOE Nuclear Safety Requirements has occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in Section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

b. DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the notice of violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued.
for willful violations, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the contractor otherwise warrants increasing Severity Level III violations to a higher severity level.

c. DOE contractors are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with DOE Nuclear Safety Requirements. Should a contractor believe that a shortage of funding precludes it from achieving compliance with one or more DOE Nuclear Safety Requirements, it must pursue one of two alternative courses of action. First, it may request, in writing, an exemption from the requirement(s) in question from the appropriate Secretarial Officer (SO), explicitly addressing the criteria for exemptions set forth in 10 CFR 820.62. A justification for continued operation for the period during which the exemption request is being considered should also be submitted. In such a case, the SO must grant or deny the request in writing, explaining the rationale for the decision. Second, if the criteria for approval of an exemption cannot be demonstrated, the contractor, in conjunction with the SO, must take appropriate steps to modify, curtail, suspend or cease the activities which cannot be conducted in compliance with the DOE Nuclear Safety Requirement(s) in question.

d. DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all DOE Nuclear Safety Requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at DOE facilities. Accordingly, this policy should not be construed to excuse personnel errors.

e. Finally, certain contractors are explicitly exempted from the imposition of civil penalties pursuant to the provisions of the PAAA, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. See 10 CFR 820.20(c). In addition, in fairness to non-profit educational institutions, the Department has determined that they should be likewise exempted. See 10 CFR 820.20(d). However, compliance with DOE Nuclear Safety Requirements is no less important for these facilities than for other facilities in the DOE complex which work with, store or dispose of radioactive materials. Indeed, the exempted contractors conduct some of the most important nuclear-related research and development activities performed for the Department. Therefore, in order to serve the purposes of this enforcement policy and to emphasize the importance the Department places on compliance with all of its nuclear safety requirements, DOE intends to issue Notices of Violation to the exempted contractors and non-profit educational institutions when appropriate under this policy, notwithstanding the statutory and regulatory exemptions from the imposition of civil penalties.

2. Civil Penalty

a. A civil penalty is a monetary penalty that may be imposed for violations of applicable DOE Nuclear Safety Requirements, including Compliance Orders. See 10 CFR 820.20(b). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting and correction of violations of DOE Nuclear Safety Requirements.

b. Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations. Civil penalties will be proposed for Severity Level III violations which are similar to previous violations for which the contractor did not take effective corrective action. “Similar” violations are those which could reasonably have been expected to have been prevented by corrective action for the previous violation. DOE normally considers civil penalties only for similar Severity Level III violations that occur over a reasonable period of time to be determined at the discretion of DOE.

c. DOE will impose different base level civil penalties considering the severity level of the violation(s) by Price-Anderson indemnified contractors. Table 1 shows the daily base civil penalties for the various categories of severity levels. However, as described above in Section IV, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

d. Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such
as parent corporations) when it asserts that it cannot pay the proposed penalty.

e. DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Table 1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be escalated or mitigated based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit. However, it should be emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered as a separate violation and, as such, subject to a separate civil penalty. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

**TABLE 1.—SEVERITY LEVEL BASE CIVIL PENALTIES**

<table>
<thead>
<tr>
<th>Severity level</th>
<th>Base civil penalty amount (percent of maximum civil penalty per violation per day)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>100</td>
</tr>
<tr>
<td>II</td>
<td>50</td>
</tr>
<tr>
<td>III</td>
<td>10</td>
</tr>
</tbody>
</table>

3. Adjustment Factors

a. DOE’s enforcement program is not an end in itself, but a means to achieve compliance with DOE Nuclear Safety Requirements, and civil penalties are not collected to swell the coffers of the United States Treasury, but to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of nuclear safety deficiencies and violations of DOE Nuclear Safety Requirements by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct non-compliance with DOE Nuclear Safety Requirements. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of nuclear safety-related problems that may constitute, or lead to, violations of DOE Nuclear Safety Requirements before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of nuclear safety problems before they are discovered by DOE. Obviously, public and worker health and safety is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of nuclear safety-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

b. Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of DOE Nuclear Safety Requirements. Thus, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

c. On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

d. Further, in cases involving willfulness, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

4. Identification and Reporting

Reduction of up to 50% of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with DOE Nuclear Safety Requirements or place the facility or operation in a safe configuration are not taken.
5. Self-Identification and Tracking Systems

a. DOE strongly encourages contractors to self-identify noncompliances with DOE Nuclear Safety Requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, regardless of whether prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

b. Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation; whether discovery of the violation resulted from a contractor’s self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

c. DOE has established a voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS (DOE-HDBK–1089–95), DOE has established reporting thresholds for reporting items of noncompliance of potentially greater safety significance into the NTS. Contractors may, however, use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor’s system and the contractor’s system notes the item as a noncompliance with a DOE Nuclear Safety Requirement. For noncompliances that are below the reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor’s system and DOE subsequently finds the facts and their safety significance have been significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

6. Self-Disclosing Events

a. DOE expects contractors to demonstrate acceptance of responsibility for safety of the public, workers, and the environment and to proactively identify noncompliance conditions in their programs and processes. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not generally allow a reduction in civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to workers, the public, and the environment, such contractor actions do not lead to the improvement in nuclear safety contemplated by the Act.

b. The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

1. prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;
2. normal surveillance, quality assurance assessments, and post-maintenance testing;
3. readily observable parameter trends; and
4. contractor employee or DOE observations of potential safety problems. Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

c. For example, a critique of the event might find that one of the root causes was a lack of clarity in a Radiation Work Permit (RWP) which led to improper use of anti-contamination clothing and resulting uptake of contamination by the individual. DOE could subsequently conclude that no reduction in civil penalties for self-identification should be allowed since the event itself disclosed the inadequate RWP and the contractor could have, through proper independent assessment or by fostering a questioning attitude by its workers and supervisors, identified the inadequate RWP before the event.

d. Alternatively, if following a self-disclosing event, DOE found that the contractor’s processes and procedures were adequate and the contractor’s personnel generally behaved in a manner consistent with the contractor’s processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single procedural noncompliance that led to the...
the event and thus, might allow a reduction in civil penalties.

7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in up to a 50% increase or decrease in the base civil penalty shown in Table 1. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 50% of the base value if initiation or corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

8. DOE’s Contribution to a Violation

There may be circumstances in which a violation of a DOE Nuclear Safety Requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take, or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, and may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 820.50, no interpretation of a DOE Nuclear Safety Requirement is binding upon DOE unless issued in writing by the General Counsel. Further, as discussed in this section of this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

9. Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

a. In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation which meets all of the following criteria:

1. The violation is promptly identified and reported to DOE before DOE learns of it.
2. The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor’s corrective action for a previous violation.
3. The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.
4. The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.
5. It was not a willful violation or a violation that could reasonably be expected to have been prevented by the DOE contractor’s corrective action for a previous violation.

b. DOE may refrain from proposing a civil penalty for a violation involving a past problem, such as in engineering design or installation, that meets all of the following criteria:

1. It was identified by a DOE contractor as a result of a formal effort such as a Safety System Functional Inspection, Design Reconstitution program, or other program that has a defined scope and timetable which is being aggressively implemented and reported;
2. Comprehensive corrective action has been taken or is well underway within a reasonable time following identification; and
3. It was not likely to be identified by routine contractor efforts such as normal surveillance or quality assurance activities.

c. DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

d. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

1. It was promptly identified by the DOE nuclear entity;
2. It is normally classified at a Severity Level III;
3. It was promptly reported to DOE;
4. Prompt and appropriate corrective action will be taken, including measures to prevent recurrence; and
5. It was not a willful violation or a violation that could reasonably be expected to have been prevented by the DOE contractor’s corrective action for a previous violation.

e. DOE may refrain from issuing a Notice of Violation for an item of noncompliance that meets all of the following criteria:

1. It was an isolated Severity Level III violation identified during a Tiger Team inspection conducted by the Office of Environment, Safety and Health, during an inspection or integrated performance assessment conducted by the Office of Nuclear Safety, or during some other DOE assessment activity.

2. The identified noncompliance was properly reported by the contractor upon discovery.
(3) The contractor initiated or completed appropriate assessment and corrective actions within a reasonable period, usually before the termination of the onsite inspection or integrated performance assessment.

(4) The violation is not willful or one which could reasonably be expected to have been prevented by the DOE contractor’s corrective action for a previous violation.

f. In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

g. If DOE initiates an enforcement action for a violation at a Severity Level II or III and, as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

h. It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE’s judgment, such action is warranted on the basis of the circumstances of an individual case.

X. Procurement of Products or Services and the Reporting of Defects

(a) DOE’s enforcement policy is also applicable to subcontractors and suppliers to DOE Price-Anderson indemnified contractors. Through procurement contracts with these DOE contractors, subcontractors and suppliers are generally required to have quality assurance programs that meet applicable DOE Nuclear Safety Requirements. Suppliers of products or services provided in support of or for use in DOE facilities operated by Price-Anderson indemnified contractors are subject to certain requirements designed to ensure the high quality of the products or services supplied to DOE facilities that could, if deficient, adversely affect public or worker safety. DOE regulations require that DOE be notified whenever a DOE contractor obtains information reasonably indicating that a DOE facility (including its structures, systems and components) which conducts activities subject to the provisions of the Atomic Energy Act of 1954, as amended or DOE Nuclear Safety Requirements either fails to comply with any provision of the Atomic Energy Act or any applicable DOE Nuclear Safety Requirement, or contains a defect or has been supplied with a product or service which could create or result in a substantial safety hazard.

(b) DOE will conduct audits and assessments of its contractors to determine whether they are ensuring that subcontractors and suppliers are meeting their contractual obligations with regard to quality of products or services that could have an adverse effect on public or worker radiological safety, and ensure that DOE contractors have in place adequate programs to determine whether products or services supplied to them for DOE facilities meet applicable DOE requirements and that substandard products or services are not used by Price-Anderson indemnified contractors at the facilities they operate for DOE. As part of the effort of ensuring that contractual and regulatory requirements are met, DOE may also audit or assess subcontractors and suppliers. These assessments could include examination of the quality assurance programs and their implementation by the subcontractors and suppliers through examination of product quality.

(c) When audits or assessments determine that subcontractors or suppliers have failed to comply with applicable DOE Nuclear Safety Requirements or to fulfill contractual commitments designed to ensure the quality of a safety significant product or service, enforcement action will be taken. Notices of Violations and civil penalties will be issued, as appropriate, for DOE contractor failures to ensure that their subcontractors and suppliers provide products and services that meet applicable DOE requirements. Notices of Violations and civil penalties will also be issued to subcontractors and suppliers of DOE contractors which fail to comply with the reporting requirements set forth in any other applicable DOE Nuclear Safety Requirements.

XI. Inaccurate and Incomplete Information

(a) A violation of DOE Nuclear Safety Requirements for failure to provide complete and accurate information to DOE, 10 CFR 820.11, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or
incomplete or inaccurate information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section VI, “Severity of Violations.”

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submissions because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as:

(b)(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(b)(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

(b)(3) The degree of intent or negligence, if any, involved;

(b)(4) The formality of the communication;

(b)(5) The reasonableness of DOE reliance on the information;

(b)(6) The importance of the information that was wrong or not provided; and

(b)(7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advance in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not correct it or if there were clear opportunities to identify the error.

XII. Secretarial Notification and Consultation

The Secretary will be provided written notification of all enforcement actions involving proposed civil penalties. The Secretary will be consulted prior to taking action in the following situations:

a. Proposals to impose civil penalties in an amount equal to or greater than the statutory limit;

b. Any proposed enforcement action that involves a Severity Level I violation;

c. Any action the Director believes warrants the Secretary’s involvement; or

d. Any proposed enforcement action on which the Secretary seeks to be consulted.

XIII. Whistleblower Enforcement Policy

a. DOE contractors may not retaliate against any employee because the employee has disclosed information, participated in activities or refused to participate in activities listed in 10 CFR 708.5(a)–(c) as provided by 10 CFR 708.43. DOE contractor employees may seek remedial relief for allegations of retaliation from the DOE Office of Hearings and Appeals (OHA) under 10 CFR part 708 (Part 708) or from the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24.

b. An act of retaliation by a DOE contractor, proscribed under 10 CFR 708.43, that results from a DOE contractor employee’s involvement in an activity listed in 10 CFR 708.5(a)–(c) concerning nuclear safety in connection with a DOE nuclear activity, may
constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 (Part 820). The retaliation may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708. The same facts that support remedial relief to employees under Part 708 may be used by the Director of the Office of Investigation and Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24-820.25.

c. When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor retaliation against a contractor, the employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee’s action concerning a DOE nuclear activity.

d. The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a PNOV. 10 CFR 820.25.

e. The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

f. Normally, the Director will await the completion of a Part 708 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 708 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

g. DOE encourages its contractors to cooperate in resolving whistleblower complaints filed by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

h. In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

i. In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

j. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against a contractor, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 708.

k. At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.


PART 830—NUCLEAR SAFETY MANAGEMENT

Sec.
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Subpart A—Quality Assurance Requirements

830.120 Scope.
830.121 Quality Assurance Program (QAP).
830.122 Quality assurance criteria.
§ 830.1 Scope.

This part governs the conduct of DOE contractors, DOE personnel, and other persons conducting activities (including providing items and services) that affect, or may affect, the safety of DOE nuclear facilities.

§ 830.2 Exclusions.

This part does not apply to:
(a) Activities that are regulated through a license by the Nuclear Regulatory Commission (NRC) or a State under an Agreement with the NRC, including activities certified by the NRC under section 1701 of the Atomic Energy Act (Act);
(b) Activities conducted under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 106–65;
(c) Transportation activities which are regulated by the Department of Transportation;
(d) Activities conducted under the Nuclear Waste Policy Act of 1982, as amended, and any facility identified under section 322(5) of the Energy Reorganization Act of 1974, as amended; and
(e) Activities related to the launch approval and actual launch of nuclear energy systems into space.

§ 830.3 Definitions.

(a) The following definitions apply to this part:
Administrative controls means the provisions relating to organization and management, procedures, record-keeping, assessment, and reporting necessary to ensure safe operation of a facility.
Bases appendix means an appendix that describes the basis of the limits and other requirements in technical safety requirements.
Critical assembly means special nuclear devices designed and used to sustain nuclear reactions, which may be subject to frequent core and lattice configuration change and which frequently may be used as mockups of reactor configurations.
Criticality means the condition in which a nuclear fission chain reaction becomes self-sustaining.
Design features means the design features of a nuclear facility specified in the technical safety requirements that, if altered or modified, would have a significant effect on safe operation.
Document means recorded information that describes, specifies, reports, certifies, requires, or provides data or results.
Documented safety analysis means a documented analysis of the extent to which a nuclear facility can be operated safely with respect to workers, the public, and the environment, including a description of the conditions, safe boundaries, and hazard controls that provide the basis for ensuring safety.
Environmental restoration activities means the process(es) by which contaminated sites and facilities are identified and characterized and by which contamination is contained, treated, or removed and disposed.
Existing DOE nuclear facility means a DOE nuclear facility in operation before April 9, 2001.
Fissionable materials means a nuclide capable of sustaining a neutron-induced chain reaction (e.g., uranium-233, uranium-235, plutonium-238, plutonium-239, plutonium-241, neptunium-237, americium-241, and curium-244).
Graded approach means the process of ensuring that the level of analysis, documentation, and actions used to comply with a requirement in this part are commensurate with:
(1) The relative importance to safety, safeguards, and security;
(2) The magnitude of any hazard involved;
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(3) The life cycle stage of a facility;
(4) The programmatic mission of a facility;
(5) The particular characteristics of a facility;
(6) The relative importance of radiological and nonradiological hazards; and
(7) Any other relevant factor.

Hazard means a source of danger (i.e., material, energy source, or operation) with the potential to cause illness, injury, or death to a person or damage to a facility or to the environment (without regard to the likelihood or credibility of accident scenarios or consequence mitigation).

Hazard controls means measures to eliminate, limit, or mitigate hazards to workers, the public, or the environment, including
(1) Physical, design, structural, and engineering features;
(2) Safety structures, systems, and components;
(3) Safety management programs;
(4) Technical safety requirements; and
(5) Other controls necessary to provide adequate protection from hazards.

Item is an all-inclusive term used in place of any of the following: appurtenance, assembly, component, equipment, material, module, part, product, structure, subassembly, subsystem, system, unit, or support systems.

Limiting conditions for operation means the limits that represent the lowest functional capability or performance level of safety structures, systems, and components required for safe operations.

Limiting control settings means the settings on safety systems that control process variables to prevent exceeding a safety limit.

Low-level residual fixed radioactivity means the remaining radioactivity following reasonable efforts to remove radioactive systems, components, and stored materials. The remaining radioactivity is composed of surface contamination that is fixed following chemical cleaning or some similar process; a component of surface contamination that can be picked up by smears; or activated materials within structures. The radioactivity can be characterized as low-level if the smearable radioactivity is less than the values defined for removable contamination by 10 CFR Part 835, Appendix D, Surface Contamination Values, and the hazard analysis results show that no credible accident scenario or work practices would release the remaining fixed radioactivity or activation components at levels that would prudently require the use of active safety systems, structures, or components to prevent or mitigate a release of radioactive materials.

Major modification means a modification to a DOE nuclear facility that is completed on or after April 9, 2001 that substantially changes the existing safety basis for the facility.

New DOE nuclear facility means a DOE nuclear facility that begins operation on or after April 9, 2001.

Nonreactor nuclear facility means those facilities, activities or operations that involve, or will involve, radioactive and/or fissionable materials in such form and quantity that a nuclear or a nuclear explosive hazard potentially exists to workers, the public, or the environment, but does not include accelerators and their operations and does not include activities involving only incidental use and generation of radioactive materials or radiation such as check and calibration sources, use of radioactive sources in research and experimental and analytical laboratory activities, electron microscopes, and X-ray machines.

Nuclear facility means a reactor or a nonreactor nuclear facility where an activity is conducted for or on behalf of DOE and includes any related area, structure, facility, or activity to the extent necessary to ensure proper implementation of the requirements established by this Part.

Operating limits means those limits required to ensure the safe operation of a nuclear facility, including limiting control settings and limiting conditions for operation.

Preliminary documented safety analysis means documentation prepared in connection with the design and construction of a new DOE nuclear facility or a major modification to a DOE nuclear facility that provides a reasonable basis for the preliminary conclusion.
§ 830.3

that the nuclear facility can be operated safely through the consideration of factors such as

(1) The nuclear safety design criteria to be satisfied;

(2) A safety analysis that derives aspects of design that are necessary to satisfy the nuclear safety design criteria; and

(3) An initial listing of the safety management programs that must be developed to address operational safety considerations.

Process means a series of actions that achieves an end or result.

Quality means the condition achieved when an item, service, or process meets or exceeds the user’s requirements and expectations.

Quality assurance means all those actions that provide confidence that quality is achieved.

Quality Assurance Program (QAP) means the overall program or management system established to assign responsibilities and authorities, define policies and requirements, and provide for the performance and assessment of work.

Reactor means any apparatus that is designed or used to sustain nuclear chain reactions in a controlled manner such as research, test, and power reactors, and critical and pulsed assemblies and any assembly that is designed to perform subcritical experiments that could potentially reach criticality; and, unless modified by words such as containment, vessel, or core, refers to the entire facility, including the housing, equipment and associated areas devoted to the operation and maintenance of one or more reactor cores.

Record means a completed document or other media that provides objective evidence of an item, service, or process.

Safety basis means the documented safety analysis and hazard controls that provide reasonable assurance that a DOE nuclear facility can be operated safely in a manner that adequately protects workers, the public, and the environment.

Safety class structures, systems, and components means the structures, systems, or components, including portions of process systems, whose preventive or mitigative function is necessary to limit radioactive hazardous material exposure to the public, as determined from safety analyses.

Safety evaluation report means the report prepared by DOE to document

(1) The sufficiency of the documented safety analysis for a hazard category 1, 2, or 3 DOE nuclear facility;

(2) The extent to which a contractor has satisfied the requirements of Subpart B of this part; and

(3) The basis for approval by DOE of the safety basis for the facility, including any conditions for approval.

Safety limits means the limits on process variables associated with those safety class physical barriers, generally passive, that are required to guard against the uncontrolled release of radioactive materials.

Safety management program means a program designed to ensure a facility is operated in a manner that adequately protects workers, the public, and the environment by covering a topic such as: quality assurance; maintenance of safety systems; personnel training; conduct of operations; inadvertent criticality protection; emergency preparedness; fire protection; waste management; or radiological protection of workers, the public, and the environment.

Safety management system means an integrated safety management system established consistent with 48 CFR 970.5223–1.

Safety significant structures, systems, and components means the structures, systems, and components which are not designated as safety class structures, systems, and components, but whose preventive or mitigative function is a major contributor to defense in depth and/or worker safety as determined from safety analyses.

Safety structures, systems, and components means both safety class structures, systems, and components and safety significant structures, systems, and components.

Service means the performance of work, such as design, manufacturing, construction, fabrication, assembly,
decontamination, environmental restoration, waste management, laboratory sample analyses, inspection, non-destructive examination/testing, environmental qualification, equipment qualification, repair, installation, or the like.

Surveillance requirements means requirements relating to test, calibration, or inspection to ensure that the necessary operability and quality of safety structures, systems, and components and their support systems required for safe operations are maintained, that facility operation is within safety limits, and that limiting control settings and limiting conditions for operation are met.

Technical safety requirements (TSRs) means the limits, controls, and related actions that establish the specific parameters and requisite actions for the safe operation of a nuclear facility and include, as appropriate for the work and the hazards identified in the documented safety analysis for the facility: Safety limits, operating limits, surveillance requirements, administrative and management controls, use and application provisions, and design features, as well as a bases appendix.

Unreviewed Safety Question (USQ) means a situation where

1. The probability of the occurrence or the consequences of an accident or the malfunction of equipment important to safety previously evaluated in the documented safety analysis could be increased;
2. The possibility of an accident or malfunction of a different type than any evaluated previously in the documented safety analysis could be created;
3. A margin of safety could be reduced; or
4. The documented safety analysis may not be bounding or may be otherwise inadequate.

Unreviewed Safety Question process means the mechanism for keeping a safety basis current by reviewing potential unreviewed safety questions, reporting unreviewed safety questions to DOE, and obtaining approval from DOE prior to taking any action that involves an unreviewed safety question.

Use and application provisions means the basic instructions for applying technical safety requirements.

(b) Terms defined in the Act or in 10 CFR Part 820 and not defined in this section of the rule are to be used consistent with the meanings given in the Act or in 10 CFR Part 820.

§ 830.4 General requirements.

(a) No person may take or cause to be taken any action inconsistent with the requirements of this part.

(b) A contractor responsible for a nuclear facility must ensure implementation of, and compliance with, the requirements of this part.

(c) The requirements of this part must be implemented in a manner that provides reasonable assurance of adequate protection of workers, the public, and the environment from adverse consequences, taking into account the work to be performed and the associated hazards.

(d) If there is no contractor for a DOE nuclear facility, DOE must ensure implementation of, and compliance with, the requirements of this part.

§ 830.5 Enforcement.

The requirements in this part are DOE Nuclear Safety Requirements and are subject to enforcement by all appropriate means, including the imposition of civil and criminal penalties in accordance with the provisions of 10 CFR Part 820.

§ 830.6 Recordkeeping.

A contractor must maintain complete and accurate records as necessary to substantiate compliance with the requirements of this part.

§ 830.7 Graded approach.

Where appropriate, a contractor must use a graded approach to implement the requirements of this part, document the basis of the graded approach used, and submit that documentation to DOE. The graded approach may not be used in implementing the unreviewed safety question (USQ) process or in implementing technical safety requirements.
§ 830.120 Scope.

This subpart establishes quality assurance requirements for contractors conducting activities, including providing items or services, that affect, or may affect, nuclear safety of DOE nuclear facilities.

§ 830.121 Quality Assurance Program (QAP).

(a) Contractors conducting activities, including providing items or services, that affect, or may affect, the nuclear safety of DOE nuclear facilities must conduct work in accordance with the Quality Assurance criteria in §830.122.

(b) The contractor responsible for a DOE nuclear facility must:

1. Submit a QAP to DOE for approval and regard the QAP as approved 90 days after submittal, unless it is approved or rejected by DOE at an earlier date.
2. Modify the QAP as directed by DOE.
3. Annually submit any changes to the DOE-approved QAP to DOE for approval. Justify in the submittal why the changes continue to satisfy the quality assurance requirements.
4. Conduct work in accordance with the QAP.

(c) The QAP must:

1. Describe how the quality assurance criteria of §830.122 are satisfied.
2. Integrate the quality assurance criteria with the Safety Management System, or describe how the quality assurance criteria apply to the Safety Management System.
3. Use voluntary consensus standards in its development and implementation, where practicable and consistent with contractual and regulatory requirements, and identify the standards used.
4. Describe how the contractor responsible for the nuclear facility ensures that subcontractors and suppliers satisfy the criteria of §830.122.

§ 830.122 Quality assurance criteria.

The QAP must address the following management, performance, and assessment criteria:

a) Criterion 1—Management/Program.
   1. Establish an organizational structure, functional responsibilities, levels of authority, and interfaces for those managing, performing, and assessing the work.
   2. Establish management processes, including planning, scheduling, and providing resources for the work.

b) Criterion 2—Management/Personnel Training and Qualification.
   1. Train and qualify personnel to be capable of performing their assigned work.
   2. Provide continuing training to personnel to maintain their job proficiency.

c) Criterion 3—Management/Quality Improvement.
   1. Establish and implement processes to detect and prevent quality problems.
   2. Identify, control, and correct items, services, and processes that do not meet established requirements.
   3. Identify the causes of problems and work to prevent recurrence as a part of correcting the problem.
   4. Review item characteristics, process implementation, and other quality-related information to identify items, services, and processes needing improvement.

   1. Prepare, review, approve, issue, use, and revise documents to prescribe processes, specify requirements, or establish design.
   2. Specify, prepare, review, approve, and maintain records.

e) Criterion 5—Performance/Work Processes.
   1. Perform work consistent with technical standards, administrative controls, and other hazard controls adopted to meet regulatory or contract requirements, using approved instructions, procedures, or other appropriate means.
   2. Identify and control items to ensure their proper use.
   3. Maintain items to prevent their damage, loss, or deterioration.
   4. Calibrate and maintain equipment used for process monitoring or data collection.

f) Criterion 6—Performance/Design.
§ 830.202

Subpart B—Safety Basis Requirements

§ 830.200 Scope.

This Subpart establishes safety basis requirements for hazard category 1, 2, and 3 DOE nuclear facilities.

§ 830.201 Performance of work.

A contractor must perform work in accordance with the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility and, in particular, with the hazard controls that ensure adequate protection of workers, the public, and the environment.

§ 830.202 Safety basis.

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must establish and maintain the safety basis for the facility.

(b) In establishing the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility, the contractor responsible for the facility must:

(1) Define the scope of the work to be performed;

(2) Identify and analyze the hazards associated with the work;

(3) Categorize the facility consistent with DOE–STD–1027–92 ("Hazard Categorization and Accident Analysis Techniques for compliance with DOE Order 5480.23, Nuclear Safety Analysis Reports," Change Notice 1, September 1997);

(4) Prepare a documented safety analysis for the facility; and

(5) Establish the hazard controls upon which the contractor will rely to ensure adequate protection of workers, the public, and the environment.

(c) In maintaining the safety basis for a hazard category 1, 2, or 3 DOE nuclear facility, the contractor responsible for the facility must:

(1) Update the safety basis to keep it current and to reflect changes in the facility, the work and the hazards as they are analyzed in the documented safety analysis;

(2) Annually submit to DOE either the updated documented safety analysis for approval or a letter stating that there have been no changes in the documented safety analysis since the prior submission; and

(3) Ensure persons who perform independent assessments are technically qualified and knowledgeable in the areas to be assessed.
§ 830.203 Unreviewed safety question process.

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must establish, implement, and take actions consistent with a USQ process that meets the requirements of this section.

(b) The contractor responsible for a hazard category 1, 2, or 3 DOE existing nuclear facility must submit for DOE approval a procedure for its USQ process by April 10, 2001. Pending DOE approval of the USQ procedure, the contractor must continue to use its existing USQ procedure. If the existing procedure already meets the requirements of this section, the contractor must notify DOE by April 10, 2001 and request that DOE issue an approval of the existing procedure.

(c) The contractor responsible for a hazard category 1, 2, or 3 DOE new nuclear facility must submit for DOE approval a procedure for its USQ process on a schedule that allows DOE approval in a safety evaluation report issued pursuant to section 207(d) of this Part.

(d) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must implement the DOE-approved USQ procedure in situations where there is a:

1. Temporary or permanent change in the facility as described in the existing documented safety analysis;
2. Temporary or permanent change in the procedures as described in the existing documented safety analysis;
3. Test or experiment not described in the existing documented safety analysis; or
4. Potential inadequacy of the documented safety analysis because the analysis potentially may not be bounding or may be otherwise inadequate.

(e) A contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must obtain DOE approval prior to taking any action determined to involve a USQ.

(f) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must annually submit to DOE a summary of the USQ determinations performed since the prior submission.

(g) If a contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility discovers or is made aware of a potential inadequacy of the documented safety analysis, it must:
1. Take action, as appropriate, to place or maintain the facility in a safe condition until an evaluation of the safety of the situation is completed;
2. Notify DOE of the situation;
3. Perform a USQ determination and notify DOE promptly of the results; and
4. Submit the evaluation of the safety of the situation to DOE prior to removing any operational restrictions initiated to meet paragraph (g)(1) of this section.

§ 830.204 Documented safety analysis.

(a) The contractor responsible for a hazard category 1, 2, or 3 DOE nuclear facility must obtain approval from DOE for the methodology used to prepare the documented safety analysis for the facility unless the contractor uses a methodology set forth in Table 2 of Appendix A to this Part.

(b) The documented safety analysis for a hazard category 1, 2, or 3 DOE nuclear facility must, as appropriate for the complexities and hazards associated with the facility:
1. Describe the facility (including the design of safety structures, systems and components) and the work to be performed;
2. Provide a systematic identification of both natural and man-made hazards associated with the facility;
3. Evaluate normal, abnormal, and accident conditions, including consideration of natural and man-made external events, identification of energy sources or processes that might contribute to the generation or uncontrolled release of radioactive and other hazardous materials, and consideration of the need for analysis of accidents which may be beyond the design basis of the facility;
4. Derive the hazard controls necessary to ensure adequate protection of workers, the public, and the environment, demonstrate the adequacy of these controls to eliminate, limit, or mitigate identified hazards, and define the process for maintaining the hazard controls.
§ 830.207 DOE approval of safety basis.

(a) By April 10, 2003, a contractor responsible for a hazard category 1, 2, or 3 existing DOE nuclear facility must submit for DOE approval a safety basis for a hazard category 1, 2, or 3 existing DOE nuclear facility that meets the requirements of this Subpart.

(b) Pending issuance of a safety evaluation report in which DOE approves a safety basis for a hazard category 1, 2, or 3 existing DOE nuclear facility, the contractor responsible for the facility must continue to perform work in accordance with the safety basis for the facility in effect on October 10, 2000, or as approved by DOE at a later date, and maintain the existing safety basis.
consistent with the requirements of this Subpart.

(c) If the safety basis for a hazard category 1, 2, or 3 existing DOE nuclear facility already meets the requirements of this Subpart and reflects the current work and hazards associated with the facility, the contractor responsible for the facility must, by April 9, 2001, notify DOE, document the adequacy of the existing safety basis and request DOE to issue a safety evaluation report that approves the existing safety basis. If DOE does not issue a safety evaluation report by October 10, 2001, the contractor must submit a safety basis pursuant to paragraph (a) of this section.

(d) With respect to a hazard category 1, 2, or 3 new DOE nuclear facility or a major modification to a hazard category 1, 2, or 3 DOE nuclear facility, a contractor may not begin operation of the facility or modification prior to the issuance of a safety evaluation report in which DOE approves the safety basis for the facility or modification.

APPENDIX A TO SUBPART B TO PART 830—GENERAL STATEMENT OF SAFETY BASIS POLICY

A. INTRODUCTION

This appendix describes DOE's expectations for the safety basis requirements of 10 CFR Part 830, acceptable methods for implementing these requirements, and criteria DOE will use to evaluate compliance with these requirements. This Appendix does not create any new requirements and should be used consistently with DOE Policy 450.2A, "Identifying, Implementing and Complying with Environment, Safety and Health Requirements" (May 15, 1996).

B. PURPOSE

1. The safety basis requirements of Part 830 require the contractor responsible for a DOE nuclear facility to analyze the facility, the work to be performed, and the associated hazards and to identify the conditions, safe boundaries, and hazard controls necessary to protect workers, the public and the environment from adverse consequences. These analyses and hazard controls constitute the safety basis upon which the contractor and DOE rely to conclude that the facility can be operated safely. Performing work consistent with the safety basis provides reasonable assurance of adequate protection of workers, the public, and the environment.

2. The safety basis requirements are intended to further the objective of making safety an integral part of how work is performed throughout the DOE complex. Developing a thorough understanding of a nuclear facility, the work to be performed, the associated hazards and the needed hazard controls is essential to integrating safety into management and work at all levels. Performing work in accordance with the safety basis for a nuclear facility is the realization of that objective.

C. SCOPE

1. A contractor must establish and maintain a safety basis for a hazard category 1, 2, or 3 DOE nuclear facility because these facilities have the potential for significant radiological consequences. DOE-STD-1027-92 ("Hazard Categorization and Accident Analysis Techniques for compliance with DOE Order 5480.23, Nuclear Safety Analysis Reports," Change Notice 1, September 1997) sets forth the methodology for categorizing a DOE nuclear facility (see Table 1). The hazard categorization must be based on an inventory of all radioactive materials within a nuclear facility.

2. Unlike the quality assurance requirements of Part 830 that apply to all DOE nuclear facilities (including radiological facilities), the safety basis requirements only apply to hazard category 1, 2, and 3 nuclear facilities and do not apply to nuclear facilities below hazard category 3.

<table>
<thead>
<tr>
<th>TABLE 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>**A DOE nuclear facility categorized as * * ***</td>
</tr>
<tr>
<td>Hazard category 1</td>
</tr>
<tr>
<td>Hazard category 2</td>
</tr>
<tr>
<td>Hazard category 3</td>
</tr>
<tr>
<td>Below category 3</td>
</tr>
</tbody>
</table>
D. INTEGRATED SAFETY MANAGEMENT

1. The safety basis requirements are consistent with integrated safety management. DOE expects that, if a contractor complies with the Department of Energy Acquisition Regulation (DEAR) clause on integration of environment, safety, and health into work planning and execution (48 CFR 970.5223–1, Integration of Environment, Safety and Health into Work Planning and Execution) and the DEAR clause on laws, regulations, and DOE directives (48 CFR 970.5294–2, Laws, Regulations and DOE Directives), the contractor will have established the foundation to meet the safety basis requirements.

2. The processes embedded in a safety management system should lead to a contractor establishing adequate safety bases and safety management programs that will meet the safety basis requirements of this Subpart. Consequently, the DOE expects if a contractor has adequately implemented integrated safety management, few additional requirements will stem from this Subpart and, in such cases, the existing safety basis prepared in accordance with integrated safety management provisions, including existing DOE safety requirements in contracts, should meet the requirements of this Subpart.

3. DOE does not expect there to be any conflict between contractual requirements and regulatory requirements. In fact, DOE expects that contract provisions will be used to provide more detail on implementation of safety basis requirements such as preparing a documented safety analysis, developing technical safety requirements, and implementing a USQ process.

E. ENFORCEMENT OF SAFETY BASIS REQUIREMENTS

1. Enforcement of the safety basis requirements will be performance oriented. That is, DOE will focus its enforcement efforts on whether a contractor operates a nuclear facility consistent with the safety basis for the facility and, in particular, whether work is performed in accordance with the safety basis.

2. As part of the approval process, DOE will review the content and quality of the safety basis documentation. DOE intends to use the approval process to assess the adequacy of a safety basis developed by a contractor to ensure that workers, the public, and the environment are provided reasonable assurance of adequate protection from identified hazards. Once approved by DOE, the safety basis documentation will not be subject to regulatory enforcement actions unless DOE determines that the information which supports the documentation is not complete and accurate in all material respects, as required by 10 CFR 820.11. This is consistent with the DOE enforcement provisions and policy in 10 CFR Part 820.

3. DOE does not intend the adoption of the safety basis requirements to affect the existing quality assurance requirements or the existing obligation of contractors to comply with the quality assurance requirements. In particular, in conjunction with the adoption of the safety basis requirements, DOE revised the language in 10 CFR 830.122(e)(1) to make clear that hazard controls are part of the work processes to which a contractor and other persons must adhere when performing work. This obligation to perform work consistent with hazard controls adopted to meet regulatory or contract requirements existed prior to the adoption of the safety basis requirements and is both consistent with and independent of the safety basis requirements.

4. A documented safety analysis must address all hazards (that is, both radiological and nonradiological hazards) and the controls necessary to provide adequate protection to the public, workers, and the environment from these hazards. Section 234A of the Atomic Energy Act, however, only authorizes DOE to issue civil penalties for violations of requirements related to nuclear safety. Therefore, DOE will impose civil penalties for violations of the safety basis requirements (including hazard controls) only if they are related to nuclear safety.

F. DOCUMENTED SAFETY ANALYSIS

1. A documented safety analysis must demonstrate the extent to which a nuclear facility can be operated safely with respect to workers, the public, and the environment.

2. DOE expects a contractor to use a graded approach to develop a documented safety analysis and describe how the graded approach was applied. The level of detail, analysis, and documentation will reflect the complexity and hazard associated with a particular facility. Thus, the documented safety analysis for a simple, low hazard facility may be relatively short and qualitative in nature, while the documented safety analysis for a complex, high hazard facility may be quite elaborate and more quantitative. DOE will work with its contractors to ensure a documented safety analysis is appropriate for the facility for which it is being developed.

3. Because DOE has ultimate responsibility for the safety of its facilities, DOE will review each documented safety analysis to determine whether the rigor and detail of the documented safety analysis are appropriate for the complexity and hazards expected at the nuclear facility. In particular, DOE will evaluate the documented safety analysis by considering the extent to which the documented safety analysis satisfies the provisions of the methodology used to prepare
the documented safety analysis and (2) adequately addresses the criteria set forth in 10 CFR 830.204(b). DOE will prepare a Safety Evaluation Report to document the results of its review of the documented safety analysis. A documented safety analysis must contain any conditions or changes required by DOE.

4. In most cases, the contract will provide the framework for specifying the methodology and schedule for developing a documented safety analysis. Table 2 sets forth acceptable methodologies for preparing a documented safety analysis.

<table>
<thead>
<tr>
<th>The contractor responsible for * * *</th>
<th>May prepare its documented safety analyses by * * *</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) A DOE nuclear facility with a limited operational life</td>
<td>Using the method in either: (1) DOE-STD–3009, Change Notice No. 1, January 2000, or successor document, or (2) DOE-STD–3011–94, Guidance for Preparation of DOE 5480.22 (TSR) and DOE 5480.23 (SAR) Implementation Plans, November 1994, or successor document.</td>
</tr>
<tr>
<td>(4) The deactivation or the transition surveillance and maintenance of a DOE nuclear facility.</td>
<td>Using the method in either: (1) DOE-STD–3009, Change Notice No. 1, January 2000, or successor document, or (2) DOE-STD–3011–94 or successor document.</td>
</tr>
<tr>
<td>(5) The decommissioning of a DOE nuclear facility.</td>
<td>Using the method in either: (1) Using the method in DOE–STD–1120–98, Integration of Environment, Safety, and Health into Facility Disposition Activities, May 1998, or successor document; (2) Using the provisions in 29 CFR 1910.120 (or 29 CFR 1926.65 for construction activities) for developing Safety and Health Programs, Work Plans, Health and Safety Plans, and Emergency Response Plans to address public safety, as well as worker safety; and (3) Deriving hazard controls based on the Safety and Health Programs, the Work Plans, the Health and Safety Plans, and the Emergency Response Plans.</td>
</tr>
<tr>
<td>(6) A DOE environmental restoration activity that involves either work not done within a permanent structure or the decommissioning of a facility with only low-level residual fixed radioactive.</td>
<td>Using the methods in Chapters 2, 3, 4, and 5 of DOE–STD–3016–99, Hazards Analysis Reports for Nuclear Explosive Operations, February 1999, or successor document.</td>
</tr>
<tr>
<td>(7) A DOE nuclear explosive facility and the nuclear explosive operations conducted therein.</td>
<td>Developing its documented safety analysis in two pieces: (1) A Safety Analysis Report for the nuclear facility that considers the generic nuclear explosive operations and is prepared in accordance with DOE-STD–3009, Change Notice No. 1, January 2000, or successor document, and (2) A Hazard Analysis Report for the specific nuclear explosive operations prepared in accordance with DOE–STD–3009, Change Notice No. 1, January 2000, or successor document to address in a simplified fashion: (1) The basic description of the facility/activity and its operations, including safety structures, systems, and components; (2) A qualitative hazards analysis; and (3) The hazard controls (consisting primarily of inventory limits and safety management programs) and their bases.</td>
</tr>
<tr>
<td>(9) Transportation activities.</td>
<td></td>
</tr>
</tbody>
</table>
The contractor responsible for * * * May prepare its documented safety analyses by * * *

1. Preparing a Safety Analysis Report for Packaging in accordance with DOE-O-461.1, Packaging and Transportation of Materials of National Security Interest, September 29, 2000, or successor document and

5. Table 2 refers to specific types of nuclear facilities. These references are not intended to constitute an exhaustive list of the specific types of nuclear facilities. Part 830 defines nuclear facility broadly to include all those facilities, activities, or operations that involve, or will involve, radioactive and/or fissionable materials in such form and quantity that a nuclear or a nuclear explosive hazard potentially exists to the employees or the general public, and to include any related area, structure, facility, or activity to the extent necessary to ensure proper implementation of the requirements established by Part 830. The only exceptions are those facilities specifically excluded such as accelerators. Table 3 defines the specific nuclear facilities referenced in Table 2 that are not defined in 10 CFR 830.3

6. If construction begins after December 11, 2000, the contractor responsible for the de-
facility or a major modification to an existing DOE nuclear facility must prepare a preliminary documented safety analysis. A preliminary documented safety analysis can ensure that substantial costs and time are not wasted in constructing a nuclear facility that will not be acceptable to DOE. If a contractor is required to prepare a preliminary documented safety analysis, the contractor must obtain DOE approval of the preliminary documented safety analysis prior to procuring materials or components or beginning construction. DOE, however, may authorize the contractor to perform limited procurement and construction activities without approval of a preliminary documented safety analysis if DOE determines that the activities are not detrimental to public health and safety and are in the best interests of DOE. DOE Order 420.1, Facility Safety, sets forth acceptable nuclear safety design criteria for use in preparing a preliminary documented safety analysis. As a general matter, DOE does not expect preliminary documented safety analyses to be needed for activities that do not involve significant construction such as environmental restoration activities, decontamination and decommissioning activities, specific nuclear explosive operations, or transition surveillance and maintenance activities.

G. HAZARD CONTROLS

1. Hazard controls are measures to eliminate, limit, or mitigate hazards to workers, the public, or the environment. They include (1) physical, design, structural, and engineering features; (2) safety structures, systems, and components; (3) safety management programs; (4) technical safety requirements; and (5) other controls necessary to provide adequate protection from hazards.

2. The types and specific characteristics of the safety management programs necessary for a DOE nuclear facility will be dependent on the complexity and hazards associated with the nuclear facility and the work being performed. In most cases, however, a contractor should consider safety management programs covering topics such as quality assurance, procedures, maintenance, personnel training, conduct of operations, criticality safety, emergency preparedness, fire protection, waste management, and radiation protection. In general, DOE Orders set forth DOE’s expectations concerning specific topics. For example, DOE Order 420.1 provides DOE’s expectations concerning fire protection and criticality safety.

3. Safety structures, systems, and components require formal definition of (1) acceptable performance in the documented safety analysis. This is accomplished by first defining a safety function, then describing the structure, systems, and components, placing functional requirements on those portions of the structures, systems, and components required for the safety function, and identifying performance criteria that will ensure functional requirements are met. Technical safety requirements are developed to ensure the operability of the safety structures, systems, and components and define actions to be taken if a safety structure, system, or component is not operable.

4. Technical safety requirements establish limits, controls, and related actions necessary for the safe operation of a nuclear facility. The exact form and contents of technical safety requirements will depend on the circumstances of a particular nuclear facility as defined in the documented safety analysis for the nuclear facility. As appropriate, technical safety requirements may have sections on (1) safety limits, (2) operating limits, (3) surveillance requirements, (4) administrative controls, (5) use and application, and (6) design features. It may also have an appendix on the bases for the limits and requirements. DOE Guide 423.X, Implementation Guide for Use in Developing Technical Safety Requirements (TSRs) provides a complete description of what technical safety requirements should contain and how they should be developed and maintained.

5. DOE will examine and approve the technical safety requirements as part of preparing the safety evaluation report and reviewing updates to the safety basis. As with all hazard controls, technical safety requirements must be kept current and reflect changes in the facility, the work and the hazards as they are analyzed in the documented safety analysis. In addition, DOE expects a contractor to maintain technical safety requirements and other hazard controls as appropriate, as controlled documents with an authorized users list.

6. Table 4 sets forth DOE’s expectations concerning acceptable technical safety requirements.
<table>
<thead>
<tr>
<th>Table 4</th>
<th>\textbf{Department of Energy}</th>
</tr>
</thead>
<tbody>
<tr>
<td>**As appropriate for a particular DOE nuclear facility, the section of the technical safety requirements on * * ***</td>
<td>Will provide information on * * *</td>
</tr>
<tr>
<td>(1) Safety limits</td>
<td>The limits on process variables associated with those safety class physical barriers, generally passive, that are necessary for the intended facility function and that are required to guard against the uncontrolled release of radioactive materials. The safety limit section describes, as precisely as possible, the parameters being limited, states the limit in measurable units (pressure, temperature, flow, etc.), and indicates the applicability of the limit. The safety limit section also describes the actions to be taken in the event that the safety limit is exceeded. These actions should first place the facility in the safe, stable condition attainable, including total shutdown (except where such action might reduce the margin of safety) or should verify that the facility is safe and stable and will remain so. The technical safety requirement should state that the contractor must obtain DOE authorization to restart the nuclear facility following a violation of a safety limit. The safety limit section also establishes the steps and time limits to correct the out-of-specification condition.</td>
</tr>
<tr>
<td>(2) Operating limits</td>
<td>Those limits which are required to ensure the safe operation of a nuclear facility. The operating limits section may include subsections on limiting control settings and limiting conditions for operation.</td>
</tr>
<tr>
<td>(3) Limiting control settings</td>
<td>The settings on safety systems that control process variables to prevent exceeding a safety limit. The limited control settings section normally contains the settings for automatic alarms and for the automatic or nonautomatic initiation of protective actions related to those variables associated with the function of safety class structures, systems, or components if the safety analysis shows that they are relied upon to mitigate or prevent an accident. The limited control settings section also identifies the protective actions to be taken at the specific settings chosen in order to correct a situation automatically or manually such that the related safety limit is not exceeded. Protective actions may include maintaining the variables within the requirements and repairing the automatic device promptly or shutting down the affected part of the process and, if required, the entire facility.</td>
</tr>
<tr>
<td>(4) Limiting conditions for operations</td>
<td>The limits that represent the lowest functional capability or performance level of safety structures, systems, and components required to perform an activity safely. The limiting conditions for operation section describes, as precisely as possible, the lowest functional capability or performance level of equipment required for continued safe operation of the facility. The limiting conditions for operation section also states the action to be taken to address a condition not meeting the limiting conditions for operation section. Normally this simply provides for the adverse condition being corrected in a certain time frame and for further action if this is impossible.</td>
</tr>
<tr>
<td>(5) Surveillance requirements</td>
<td>Requirements relating to test, calibration, or inspection to assure that the necessary operability and quality of safety structures, systems, and components is maintained; that facility operation is within safety limits; and that limiting control settings and limiting conditions for operation are met. If a required surveillance is not successfully completed, the contractor is expected to assume the systems or components involved are inoperable and take the actions defined by the technical safety requirement until the systems or components can be shown to be operable. If, however, a required surveillance is not performed within its required frequency, the contractor is allowed to perform the surveillance within 24 hours or the original frequency, whichever is smaller, and confirm operability.</td>
</tr>
<tr>
<td>(6) Administrative controls</td>
<td>Organization and management, procedures, recordkeeping, assessment, and reporting necessary to ensure safe operation of a facility consistent with the technical safety requirement. In general, the administrative controls section addresses (1) the requirements associated with administrative controls, including those for reporting violations of the technical safety requirement; (2) the staffing requirements for facility positions important to safe conduct of the facility; and (3) the commitments to the safety management programs identified in the documented safety analysis as necessary components of the safety basis for the facility.</td>
</tr>
<tr>
<td>(7) Use and application provisions</td>
<td>The basic instructions for applying the safety restrictions contained in a technical safety requirement. The use and application section includes definitions of terms, operating modes, logical connectors, completion times, and frequency notations.</td>
</tr>
<tr>
<td>(8) Design features</td>
<td>Design features of the facility that, if altered or modified, would have a significant effect on safe operation.</td>
</tr>
<tr>
<td>(9) Bases appendix</td>
<td>The reasons for the safety limits, operating limits, and associated surveillance requirements in the technical safety requirements. The statements for each limit or requirement show how the numeric value, the condition, or the surveillance fulfills the purpose derived from the safety documentation. The primary purpose for establishing the basis of each limit or requirement is to ensure that any future changes to the limit or requirement is done with full knowledge of the original intent or purpose of the limit or requirement.</td>
</tr>
</tbody>
</table>
H. UNREVIEWED SAFETY QUESTIONS

1. The USQ process is an important tool to evaluate whether changes affect the safety basis. A contractor must use the USQ process to ensure that the safety basis for a DOE nuclear facility is not undermined by changes in the facility, the work performed, the associated hazards, or other factors that support the adequacy of the safety basis.

2. The USQ process permits a contractor to make physical and procedural changes to a nuclear facility and to conduct tests and experiments without prior approval, provided these changes do not cause a USQ. The USQ process provides a contractor with the flexibility needed to conduct day-to-day operations by requiring only those changes and tests with a potential to impact the safety basis (and therefore the safety of the nuclear facility) be approved by DOE. This allows DOE to focus its review on those changes significant to safety. The USQ process helps keep the safety basis current by ensuring appropriate review of and response to situations that might adversely affect the safety basis.

3. DOE Guide 424.X, Implementation Guide for Addressing Unreviewed Safety Question (USQ) Requirements, provides DOE’s expectations for a USQ process. The contractor must obtain DOE approval of its procedure used to implement the USQ process.

I. FUNCTIONS AND RESPONSIBILITIES

1. The DOE Management Official for a DOE nuclear facility (that is, the Assistant Secretary, the Assistant Administrator, or the Office Director who is primarily responsible for the management of the facility) has primary responsibility within DOE for ensuring that the safety basis for the facility is adequate and complies with the safety basis requirements of Part 830. The DOE Management Official is responsible for ensuring the timely and proper (1) review of all safety basis documents submitted to DOE and (2) preparation of a safety evaluation report concerning the safety basis for a facility.

2. DOE will maintain a public list on the internet that provides the status of the safety basis for each hazard category 1, 2, or 3 DOE nuclear facility and, to the extent practicable, provides information on how to obtain a copy of the safety basis and related documents for a facility.

PART 835—OCCUPATIONAL RADIATION PROTECTION

Subpart A—General Provisions

835.1 Scope.
835.2 Definitions.
835.3 General rule.
§ 835.2 Definitions.

(a) As used in this part:

Accountable sealed radioactive source means a sealed radioactive source having a half-life equal to or greater than 30 days and an isotopic activity equal to or greater than the corresponding value provided in appendix E of this part.

Airborne radioactive material or airborne radioactivity means radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.
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Airborne radioactivity area means any area, accessible to individuals, where:
(1) The concentration of airborne radioactivity, above natural background, exceeds or is likely to exceed the derived air concentration (DAC) values listed in appendix A or appendix C of this part; or
(2) An individual present in the area without respiratory protection could receive an intake exceeding 12 DAC-hours in a week.

ALARA means “As Low As is Reasonably Achievable,” which is the approach to radiation protection to manage and control exposures (both individual and collective) to the work force and to the general public to as low as is reasonable, taking into account social, technical, economic, practical, and public policy considerations. As used in this part, ALARA is not a dose limit but a process which has the objective of attaining doses as far below the applicable limits of this part as is reasonably achievable.

Annual limit on intake (ALI) means the derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in a year by the reference man (ICRP Publication 23) that would result in a committed effective dose equivalent of 5 rems (0.05 sievert) or a committed dose equivalent of 50 rems (0.5 sievert) to any individual organ or tissue. ALI values for intake by ingestion and inhalation of selected radionuclides are based on Table 1 of the U.S. Environmental Protection Agency’s Federal Guidance Report No. 11, Limiting Values of Radionuclide Intake and Air Concentration and Dose Conversion Factors for Inhalation, Submersion, and Ingestion, published September 1988. This document is available from the National Technical Information Service, Springfield, VA.

Background means radiation from:
(i) Naturally occurring radioactive materials which have not been technologically enhanced;
(ii) Cosmic sources;
(iii) Global fallout as it exists in the environment (such as from the testing of nuclear explosive devices);
(iv) Radon and its progeny in concentrations or levels existing in buildings or the environment which have not been elevated as a result of current or prior activities; and
(v) Consumer products containing nominal amounts of radioactive material or producing nominal amounts of radiation.

Bioassay means the determination of kinds, quantities, or concentrations, and, in some cases, locations of radioactive material in the human body, whether by direct measurement or by analysis, and evaluation of radioactive materials excreted or removed from the human body.

Calibration means to adjust and/or determine either:
(i) The response or reading of an instrument relative to a standard (e.g., primary, secondary, or tertiary) or to a series of conventionally true values; or
(ii) The strength of a radiation source relative to a standard (e.g., primary, secondary, or tertiary) or conventionally true value.

Contamination area means any area, accessible to individuals, where removable surface contamination levels exceed or are likely to exceed the removable surface contamination values specified in appendix D of this part, but do not exceed 100 times those values.

Contractor means any entity under contract with the Department of Energy with the responsibility to perform activities at a DOE site or facility.

Controlled area means any area to which access is managed by or for DOE to protect individuals from exposure to radiation and/or radioactive material.

Declared pregnant worker means a woman who has voluntarily declared to her employer, in writing, her pregnancy for the purpose of being subject to the occupational dose limits to the embryo/fetus as provided at § 835.206. This declaration may be revoked, in writing, at any time by the declared pregnant worker.

Derived air concentration (DAC) means, for the radionuclides listed in appendix A of this part, the airborne concentration that equals the ALI divided by the volume of air breathed by an average worker for a working year of 2000 hours (assuming a breathing
volume of 2400 m$^3$). For the radionuclides listed in appendix C of this part, the air immersion DACs were calculated for a continuous, non-shielded exposure via immersion in a semi-infinite atmospheric cloud. The value is based upon the derived airborne concentration found in Table 1 of the U.S. Environmental Protection Agency’s Federal Guidance Report No. 11, Limiting Values of Radionuclide Intake and Air Concentration and Dose Conversion Factors for Inhalation, Submersion, and Ingestion, published September 1988. This document is available from the National Technical Information Service, Springfield, VA.

Derived air concentration-hour (DAC-hour) means the product of the concentration of radioactive material in air (expressed as a fraction or multiple of the DAC for each radionuclide) and the time of exposure to that radionuclide, in hours.

DOE activity means an activity taken for or by DOE in a DOE operation or facility that has the potential to result in the occupational exposure of an individual to radiation or radioactive material. The activity may be, but is not limited to, design, construction, operation, or decommissioning. To the extent appropriate, the activity may involve a single DOE facility or operation or a combination of facilities and operations, possibly including an entire site or multiple DOE sites.

Entrance or access point means any location through which an individual could gain access to areas controlled for the purposes of radiation protection. This includes entry or exit portals of sufficient size to permit human entry, irrespective of their intended use.

General employee means an individual who is either a DOE or DOE contractor employee; an employee of a subcontractor to a DOE contractor; or an individual who performs work for or in conjunction with DOE or utilizes DOE facilities.

High contamination area means any area, accessible to individuals, where removable surface contamination levels exceed or are likely to exceed 100 times the removable surface contamination values specified in appendix D of this part.

High radiation area means any area, accessible to individuals, in which radiation levels could result in an individual receiving a deep dose equivalent in excess of 0.1 rem (0.001 sievert) in 1 hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.

Individual means any human being.

Member of the public means an individual who is not a general employee. An individual is not a “member of the public” during any period in which the individual receives an occupational dose.

Minor means an individual less than 18 years of age.

Monitoring means the measurement of radiation levels, airborne radioactivity concentrations, radioactive contamination levels, quantities of radioactive material, or individual doses and the use of the results of these measurements to evaluate radiological hazards or potential and actual doses resulting from exposures to ionizing radiation.

Nonstochastic effects means effects due to radiation exposure for which the severity varies with the dose and for which a threshold normally exists (e.g., radiation-induced opacities within the lens of the eye).

Occupational dose means an individual’s ionizing radiation dose (external and internal) as a result of that individual’s work assignment. Occupational dose does not include doses received as a medical patient or doses resulting from background radiation or participation as a subject in medical research programs.

Person means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or other entity, and any legal successor, representative, agent or agency of the foregoing; provided that person does not include the Department or the United States Nuclear Regulatory Commission.

Radiation means ionizing radiation: alpha particles, beta particles, gamma rays, X-rays, neutrons, high-speed electrons, high-speed protons, and other...
§ 835.2  

particles capable of producing ions. Radiation as used in this part, does not include non-ionizing radiation, such as radio- or micro-waves, or visible, infrared, or ultraviolet light.

Radiation area means any area accessible to individuals in which radiation levels could result in an individual receiving a deep dose equivalent in excess of 0.005 rem (0.05 millisievert) in 1 hour at 30 centimeters from the source or from any surface that the radiation penetrates.

Radiative material area means any area within a controlled area, accessible to individuals, in which items or containers of radioactive material exist and the total activity of radioactive material exceeds the applicable values provided in appendix E of this part.

Radioactive material transportation means the movement of radioactive material by aircraft, rail, vessel, or highway vehicle when such movement is subject to Department of Transportation regulations or DOE Orders that govern such movements. Radioactive material transportation does not include preparation of material or packagings for transportation, monitoring required by this part, storage of material awaiting transportation, or application of markings and labels required for transportation.

Radiological area means any area within a controlled area defined in this section as a “radiation area,” “high radiation area,” “very high radiation area,” “contamination area,” “high contamination area,” or “airborne radioactivity area.”

Radiological worker means a general employee whose job assignment involves operation of radiation producing devices or working with radioactive materials, or who is likely to be routinely occupationally exposed above 0.1 rem (0.001 sievert) per year total effective dose equivalent.

Real-time air monitoring means measurement of the concentrations or quantities of airborne radioactive materials on a continuous basis.

Respiratory protective device means an apparatus, such as a respirator, worn by an individual for the purpose of reducing the individual’s intake of airborne radioactive materials.

Sealed radioactive source means a radioactive source manufactured, obtained, or retained for the purpose of utilizing the emitted radiation. The sealed radioactive source consists of a known or estimated quantity of radioactive material contained within a sealed capsule, sealed between layer(s) of non-radioactive material, or firmly fixed to a non-radioactive surface by electroplating or other means intended to prevent leakage or escape of the radioactive material. Sealed radioactive sources do not include reactor fuel elements, nuclear explosive devices, and radioisotope thermoelectric generators.

Source leak test means a test to determine if a sealed radioactive source is leaking radioactive material.

Stochastic effects means malignant and hereditary diseases for which the probability of an effect occurring, rather than its severity, is regarded as a function of dose without a threshold for radiation protection purposes.

Very high radiation area means any area accessible to individuals in which radiation levels could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter from a radiation source or from any surface that the radiation penetrates.

Week means a period of seven consecutive days.

Year means the period of time beginning on or near January 1 and ending on or near December 31 of that same year used to determine compliance with the provisions of this part. The starting and ending date of the year used to determine compliance may be changed provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(b) As used in this part to describe various aspects of radiation dose:

Absorbed dose (D) means the energy absorbed by matter from ionizing radiation per unit mass of irradiated material at the place of interest in that material. The absorbed dose is expressed in units of rad (or gray) (1 rad = 0.01 gray).

Committed dose equivalent (H_{T,50}) means the dose equivalent calculated to be received by a tissue or organ over
Department of Energy

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a 50-year period after the intake of a radionuclide into the body. It does not include contributions from radiation sources external to the body. Committed dose equivalent is expressed in units of rem (or sievert).

Committed effective dose equivalent \( (H_{E,50}) \) means the sum of the committed dose equivalents to various tissues in the body \( (H_{T,50}) \), each multiplied by the appropriate weighting factor \( (w_T) \)—that is, \( H_{E,50} = \sum w_T H_{T,50} \). Committed effective dose equivalent is expressed in units of rem (or sievert).

Cumulative total effective dose equivalent means the sum of all total effective dose equivalent values recorded for an individual, where available, for each year occupational dose was received, beginning January 1, 1989.

Deep dose equivalent means the dose equivalent derived from external radiation at a depth of 1 cm in tissue.

Dose is a general term for absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, or total effective dose equivalent as defined in this part.

Dose equivalent \( (H) \) means the product of absorbed dose \( (D) \) in rad (or gray) in tissue, a quality factor \( (Q) \), and other modifying factors \( (N) \). Dose equivalent is expressed in units of rem (or sievert) \( (1 \text{ rem} = 0.01 \text{ sievert}) \).

Effective dose equivalent \( (H_E) \) means the summation of the products of the dose equivalent received by specified tissues of the body \( (H_T) \) and the appropriate weighting factor \( (w_T) \)—that is, \( H_E = \Sigma w_T H_T \). It includes the dose from radiation sources internal and/or external to the body. For purposes of compliance with this part, deep dose equivalent to the whole body may be used as effective dose equivalent for external exposures. The effective dose equivalent is expressed in units of rem (or sievert).

External dose or exposure means that portion of the dose equivalent received from radiation sources outside the body (i.e., "external sources").

Extremity means hands and arms below the elbow or feet and legs below the knee.

Internal dose or exposure means that portion of the dose equivalent received from radioactive material taken into the body (e.g., "internal sources").

Lens of the eye dose equivalent means the external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 cm.

Quality factor \( (Q) \) means the modifying factor used to calculate the dose equivalent from the absorbed dose; the absorbed dose (expressed in rad or gray) is multiplied by the appropriate quality factor.

(i) The quality factors to be used for determining dose equivalent in rem are as follow:

\begin{center}
\begin{tabular}{|l|l|}
\hline
\textbf{Radiation type} & \textbf{Quality factor} \\
\hline
X-rays, gamma rays, positrons, electrons (including tritium beta particles) & 1 \\
Neutrons, 0.1 keV & 3 \\
Neutrons, >10 keV & 10 \\
Protons and singly-charged particles of unknown energy with rest mass greater than one atomic mass unit & 10 \\
Alpha particles and multiple-charged particles (and particles of unknown charge) & 20 \\
&(and particles of unknown energy) \\
\hline
\end{tabular}
\end{center}

When spectral data are insufficient to identify the energy of the neutrons, a quality factor of 10 shall be used.

(ii) When spectral data are sufficient to identify the energy of the neutrons, the following mean quality factor values may be used:

\begin{center}
\begin{tabular}{|l|l|l|}
\hline
\textbf{Neutron energy (MeV)} & \textbf{Mean quality factor} & \textbf{Neutron flux density (cm}^{-2} \text{s}^{-1}) \\
\hline
2.5 \times 10^{-4} \text{ thermal} & 2 & 680 \\
1 \times 10^{-7} & 2 & 680 \\
1 \times 10^{-6} & 2 & 560 \\
1 \times 10^{-5} & 2 & 560 \\
1 \times 10^{-4} & 2 & 560 \\
1 \times 10^{-3} & 2 & 680 \\
1 \times 10^{-2} & 2.5 & 700 \\
1 \times 10^{-1} & 7.5 & 115 \\
5 \times 10^{-1} & 11 & 27 \\
1 & 11 & 19 \\
2.5 & 9 & 20 \\
5 & 8 & 16 \\
7 & 7 & 17 \\
10 & 6.5 & 17 \\
14 & 7.5 & 12 \\
20 & 6 & 11 \\
40 & 7 & 10 \\
\hline
\end{tabular}
\end{center}
§ 835.3 General rule.

(a) No person or DOE personnel shall take or cause to be taken any action inconsistent with the requirements of:
(1) This part; or
(2) Any program, plan, schedule, or other process established by this part.
(b) With respect to a particular DOE activity, contractor management shall be responsible for compliance with the requirements of this part.
(c) Where there is no contractor for a DOE activity, DOE shall ensure implementation of and compliance with the requirements of this part.
(d) Nothing in this part shall be construed as limiting actions that may be necessary to protect health and safety.

§ 835.4 Radiological units.

Unless otherwise specified, the quantities used in the records required by this part shall be clearly indicated in special units of curie, rad, roentgen, or r, including multiples and subdivisions of these units. The SI units, becquerel (Bq), gray (Gy), and sievert (Sv), are only provided parenthetically in this part for reference with scientific standards.

Subpart B—Management and Administrative Requirements

§ 835.101 Radiation protection programs.

(a) A DOE activity shall be conducted in compliance with a documented radiation protection program (RPP) as approved by the DOE.
(b) The DOE may direct or make modifications to a RPP.
§ 835.202 

(c) The content of each RPP shall be commensurate with the nature of the activities performed and shall include formal plans and measures for applying the as low as reasonably achievable (ALARA) process to occupational exposure.

(d) The RPP shall specify the existing and/or anticipated operational tasks that are intended to be within the scope of the RPP. Except as provided in §835.101(h), any task outside the scope of a RPP shall not be initiated until an update of the RPP is approved by DOE.

(e) The content of the RPP shall address, but shall not necessarily be limited to, each requirement in this part.

(f) The RPP shall include plans, schedules, and other measures for achieving compliance with regulations of this part. Unless otherwise specified in this part, compliance with amendments to this part shall be achieved no later than 180 days following approval of the revised RPP by DOE.

Compliance with the requirements of §835.402(d) for radiobioassay program accreditation shall be achieved no later than January 1, 2002.

(g) An update of the RPP shall be submitted to DOE:

(1) Whenever a change or an addition to the RPP is made;

(2) Prior to the initiation of a task not within the scope of the RPP; or

(3) Within 180 days of the effective date of any modifications to this part.

(h) Changes, additions, or updates to the RPP may become effective without prior Department approval only if the changes do not decrease the effectiveness of the RPP and the RPP, as changed, continues to meet the requirements of this part. Proposed changes that decrease the effectiveness of the RPP shall not be implemented without submittal to and approval by the Department.

(i) An initial RPP or an update shall be considered approved 180 days after its submission unless rejected by DOE at an earlier date.

§ 835.103 Education, training and skills.

Individuals responsible for developing and implementing measures necessary for ensuring compliance with the requirements of this part shall have the appropriate education, training, and skills to discharge these responsibilities.

§ 835.104 Written procedures.

Written procedures shall be developed and implemented as necessary to ensure compliance with this part, commensurate with the radiological hazards created by the activity and consistent with the education, training, and skills of the individuals exposed to those hazards.

Subpart C—Standards for Internal and External Exposure

§ 835.201 [Reserved]

§ 835.202 Occupational dose limits for general employees.

(a) Except for planned special exposures conducted consistent with §835.204 and emergency exposures authorized in accordance with §835.1302, the occupational dose received by general employees shall be controlled such that the following limits are not exceeded in a year:

(1) A total effective dose equivalent of 5 rems (0.05 sievert);

(2) The sum of the deep dose equivalent for external exposures and the committed dose equivalent to any organ or tissue other than the lens of the eye of 50 rems (0.5 sievert);

(3) A lens of the eye dose equivalent of 15 rems (0.15 sievert); and

(4) A shallow dose equivalent of 50 rems (0.5 sievert) to the skin or to any extremity.

(b) All occupational doses received during the current year, except doses
§ 835.203 Combining internal and external dose equivalents.

(a) The total effective dose equivalent during a year shall be determined by summing the effective dose equivalent from external exposures and the committed effective dose equivalent from intakes during the year.

(b) Determinations of the effective dose equivalent shall be made using the weighting factor values provided in §835.2.

§ 835.204 Planned special exposures.

(a) A planned special exposure may be authorized for a radiological worker to receive doses in addition to and accounted for separately from the doses received under the limits specified in §835.202(a), provided that each of the following conditions is satisfied:

(1) The planned special exposure is considered only in an exceptional situation when alternatives that might prevent a radiological worker from exceeding the limits in §835.202(a) are unavailable or impractical;

(2) The contractor management (and employer, if the employer is not the contractor) specifically requests the planned special exposure, in writing; and

(3) Joint written approval is received from the appropriate DOE Headquarters program office and the Secretarial Officer responsible for environment, safety and health matters.

(b) Prior to requesting an individual to participate in an authorized planned special exposure, the individual’s dose from all previous planned special exposures and all doses in excess of the occupational dose limits shall be determined.

(c) An individual shall not receive a planned special exposure that, in addition to the doses determined in §835.204(b), would result in a dose exceeding the following:

(1) In a year, the numerical values of the dose limits established at §835.202(a); and

(2) Over the individual’s lifetime, five times the numerical values of the dose limits established at §835.202(a).

(d) Prior to a planned special exposure, written consent shall be obtained from each individual involved. Each such written consent shall include:

(1) The purpose of the planned operations and procedures to be used;

(2) The estimated doses and associated potential risks and specific radiological conditions and other hazards which might be involved in performing the task; and

(3) Instructions on the measures to be taken to keep the dose ALARA considering other risks that may be present.

(e) Records of the conduct of a planned special exposure shall be maintained and a written report submitted within 30 days after the planned special exposure to the approving organizations identified in §835.204(a)(3).

(f) The dose from planned special exposures is not to be considered in controlling future occupational dose of the individual under §835.202(a), but is to be included in records and reports required under this part.

§ 835.205 Determination of compliance for non-uniform exposure of the skin.

(a) Non-uniform exposures of the skin from X-rays, beta radiation, and/or radioactive material on the skin are to be assessed as specified in this section.

(b) For purposes of demonstrating compliance with §835.202(a)(4), assessments shall be conducted as follows:

(1) Area of skin irradiated is 100 cm² or more. The non-uniform dose equivalent
§ 835.401 General requirements.

(a) Monitoring of individuals and areas shall be performed to:

(1) Demonstrate compliance with the regulations in this part;

(2) Document radiological conditions;

(3) Detect changes in radiological conditions;

(4) Detect the gradual buildup of radioactive material;

(5) Verify the effectiveness of engineering and process controls in containing radioactive material and reducing radiation exposure; and

(6) Identify and control potential sources of individual exposure to radiation and/or radioactive material.

§ 835.206 Limits for the embryo/fetus.

(a) The dose equivalent limit for the embryo/fetus from the period of conception to birth, as a result of occupational exposure of a declared pregnant worker, is 0.5 rem (0.005 sievert).

(b) Substantial variation above a uniform exposure rate that would satisfy the limits provided in §835.206(a) shall be avoided.

(c) If the dose equivalent to the embryo/fetus is determined to have already exceeded 0.5 rem (0.005 sievert) by the time a worker declares her pregnancy, the declared pregnant worker shall not be assigned to tasks where additional occupational exposure is likely during the remaining gestation period.

§ 835.207 Occupational dose limits for minors.

The dose equivalent limits for minors occupationally exposed to radiation and/or radioactive materials at a DOE activity are 0.1 rem (0.001 sievert) total effective dose equivalent in a year and 10% of the occupational dose limits specified at §835.202(a)(3) and (a)(4).

[63 FR 59682, Nov. 4, 1998]

§ 835.208 Limits for members of the public entering a controlled area.

The total effective dose equivalent limit for members of the public exposed to radiation and/or radioactive material during access to a controlled area is 0.1 rem (0.001 sievert) in a year.

[63 FR 59682, Nov. 4, 1998]

§ 835.209 Concentrations of radioactive material in air.

(a) The derived air concentration (DAC) values given in appendices A and C of this part shall be used in the control of occupational exposures to airborne radioactive material.

(b) The estimation of internal dose shall be based on bioassay data rather than air concentration values unless bioassay data are:

(1) Unavailable;

(2) Inadequate; or

(3) Internal dose estimates based on air concentration values are demonstrated to be as or more accurate.


Subpart D [Reserved]

Subpart E—Monitoring of Individuals and Areas

§ 835.401 General requirements.

(a) Monitoring of individuals and areas shall be performed to:

(1) Demonstrate compliance with the regulations in this part;

(2) Document radiological conditions;

(3) Detect changes in radiological conditions;

(4) Detect the gradual buildup of radioactive material;

(5) Verify the effectiveness of engineering and process controls in containing radioactive material and reducing radiation exposure; and

(6) Identify and control potential sources of individual exposure to radiation and/or radioactive material.

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§ 835.402 Instruments and equipment used for monitoring shall be:

(1) Periodically maintained and calibrated on an established frequency;
(2) Appropriate for the type(s), levels, and energies of the radiation(s) encountered;
(3) Appropriate for existing environmental conditions; and
(4) Routinely tested for operability.

§ 835.402 Individual monitoring.

(a) For the purpose of monitoring individual exposures to external radiation, personnel dosimeters shall be provided to and used by:

(1) Radiological workers who, under typical conditions, are likely to receive one or more of the following:
   (i) An effective dose equivalent to the whole body of 0.1 rem (0.001 sievert) or more in a year;
   (ii) A shallow dose equivalent to the skin or to any extremity of 5 rems (0.05 sievert) or more in a year;
   (iii) A lens of the eye dose equivalent of 1.5 rems (0.015 sievert) or more in a year;
(2) Declared pregnant workers who are likely to receive a committed effective dose equivalent of 0.1 rem (0.001 sievert) or more from all occupational radionuclide intakes in a year;
(3) Occupationally exposed minors likely to receive a dose in excess of 50 percent of the applicable limit stated at § 835.207 in a year from external sources;
(4) Members of the public entering a controlled area likely to receive a dose in excess of 50 percent of the limit stated at § 835.208 in a year from external sources;
(5) Individuals entering a high or very high radiation area.

(b) External dose monitoring programs implemented to demonstrate compliance with § 835.402(a) shall be adequate to demonstrate compliance with the dose limits established in subpart C of this part and shall be:

(1) Accredited, or excepted from accreditation, in accordance with the DOE Laboratory Accreditation Program for Personnel Dosimetry;
(2) Determined by the Secretarial Officer responsible for environment, safety and health matters to have performance substantially equivalent to that of programs accredited under the DOE Laboratory Accreditation Program for Personnel Dosimetry.

(c) For the purpose of monitoring individual exposures to internal radiation, internal dosimetry programs (including routine bioassay programs) shall be conducted for:

(1) Radiological workers who, under typical conditions, are likely to receive a committed effective dose equivalent of 0.1 rem (0.001 sievert) or more from all occupational radionuclide intakes in a year;
(2) Declared pregnant workers likely to receive an intake or intakes resulting in a dose equivalent to the embryo/fetus in excess of 10 percent of the limit stated at § 835.206(a);
(3) Occupationally exposed minors who are likely to receive a dose in excess of 50 percent of the applicable limit stated at § 835.207 from all radionuclide intakes in a year; or
(4) Members of the public entering a controlled area likely to receive a dose in excess of 50 percent of the limit stated at § 835.208 from all radionuclide intakes in a year.

(d) Internal dose monitoring programs implemented to demonstrate compliance with § 835.402(c) shall be adequate to demonstrate compliance with the dose limits established in subpart C of this part and shall be:

(1) Accredited, or excepted from accreditation, in accordance with the DOE Laboratory Accreditation Program for Radiobioassay; or
(2) Determined by the Secretarial Officer responsible for environment, safety and health matters to have performance substantially equivalent to that of programs accredited under the DOE Laboratory Accreditation Program for Radiobioassay.

§ 835.403 Air monitoring.

(a) Monitoring of airborne radioactivity shall be performed:

(1) Where an individual is likely to receive an exposure of 40 or more DAC-hours in a year; or
(2) As necessary to characterize the airborne radioactivity hazard where...
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§ 835.502 Respiratory protective devices for protection against airborne radionuclides have been prescribed.

(b) Real-time air monitoring shall be performed as necessary to detect and provide warning of airborne radioactivity concentrations that warrant immediate action to terminate inhalation of airborne radioactive material.

[63 FR 59683, Nov. 4, 1998]

§ 835.404 [Reserved]

§ 835.405 Receipt of packages containing radioactive material.

(a) If packages containing quantities of radioactive material in excess of a Type A quantity (as defined at 10 CFR 71.4) are expected to be received from radioactive material transportation, arrangements shall be made to either:

(1) Take possession of the package when the carrier offers it for delivery; or

(2) Receive notification as soon as practicable after arrival of the package at the carrier’s terminal and to take possession of the package expeditiously after receiving such notification.

(b) Upon receipt from radioactive material transportation, external surfaces of packages known to contain radioactive material shall be monitored if the package:

(1) Is labeled with a Radioactive White I, Yellow II, or Yellow III label (as specified at 49 CFR 172.403 and 172.436–440); or

(2) Has been transported as low specific activity material (as defined at 10 CFR 71.4) on an exclusive use vehicle (as defined at 10 CFR 71.4); or

(3) Has evidence of degradation, such as packages that are crushed, wet, or damaged.

(c) The monitoring required by paragraph (b) of this section shall include:

(1) Measurements of removable contamination levels, unless the package contains only special form (as defined at 10 CFR 71.4) or gaseous radioactive material; and

(2) Measurements of the radiation levels, unless the package contains less than a Type A quantity (as defined at 10 CFR 71.4) of radioactive material.

(d) The monitoring required by paragraph (b) of this section shall be completed as soon as practicable following receipt of the package, but not later than 8 hours after the beginning of the working day following receipt of the package.

[63 FR 59683, Nov. 4, 1998]

Subpart F—Entry Control Program

§ 835.501 Radiological areas.

(a) Personnel entry control shall be maintained for each radiological area.

(b) The degree of control shall be commensurate with existing and potential radiological hazards within the area.

(c) One or more of the following methods shall be used to ensure control:

(1) Signs and barricades;

(2) Control devices on entrances;

(3) Conspicuous visual and/or audible alarms;

(4) Locked entrance ways; or

(5) Administrative controls.

(d) Written authorizations shall be required to control entry into and perform work within radiological areas. These authorizations shall specify radiation protection measures commensurate with the existing and potential hazards.

(e) No control(s) shall be installed at any radiological area exit that would prevent rapid evacuation of personnel under emergency conditions.


§ 835.502 High and very high radiation areas.

(a) The following measures shall be implemented for each entry into a high radiation area:

(1) The area shall be monitored as necessary during access to determine the exposure rates to which the individuals are exposed; and

(2) Each individual shall be monitored by a supplemental dosimetry device or other means capable of providing an immediate estimate of the individual’s integrated deep dose equivalent during the entry.

(b) Physical controls. One or more of the following features shall be used for each entrance or access point to a high radiation area where radiation levels
exist such that an individual could exceed a deep dose equivalent to the whole body of 1 rem (0.01 sievert) in any one hour at 30 centimeters from the source or from any surface that the radiation penetrates:

1. A control device that prevents entry to the area when high radiation levels exist or upon entry causes the radiation level to be reduced below that level defining a high radiation area;

2. A device that functions automatically to prevent use or operation of the radiation source or field while individuals are in the area;

3. A control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry;

4. Entryways that are locked. During periods when access to the area is required, positive control over each entry is maintained;

5. Continuous direct or electronic surveillance that is capable of preventing unauthorized entry;

6. A control device that will automatically generate audible and visual alarm signals to alert personnel in the area before use or operation of the source.

(c) Very high radiation areas. In addition to the above requirements, additional measures shall be implemented to ensure individuals are not able to gain unauthorized or inadvertent access to very high radiation areas.

(d) No control(s) shall be established in a high or very high radiation area that would prevent rapid evacuation of personnel.

[58 FR 56884, Nov. 4, 1998]

Subpart G—Posting and Labeling

§ 835.601 General requirements.

(a) Except as otherwise provided in this subpart, postings and labels required by this subpart shall include the standard radiation warning trefoil in black or magenta imposed upon a yellow background.

(b) Signs required by this subpart shall be clearly and conspicuously posted and may include radiological protection instructions.

(c) The posting and labeling requirements in this subpart may be modified to reflect the special considerations of DOE activities conducted at private residences or businesses. Such modifications shall provide the same level of protection to individuals as the existing provisions in this subpart.

[63 FR 56884, Nov. 4, 1998]

§ 835.602 Controlled areas.

(a) Each access point to a controlled area (as defined at §835.2) shall be posted whenever radiological areas or radioactive material areas exist in the area. Individuals who enter only controlled areas without entering radiological areas or radioactive material areas are not expected to receive a total effective dose equivalent of more than 0.1 rem (0.001 sievert) in a year.

(b) Signs used for this purpose may be selected by the contractor to avoid conflict with local security requirements.

[58 FR 56485, Dec. 14, 1993, as amended at 63 FR 56884, Nov. 4, 1998]

§ 835.603 Radiological areas and radioactive material areas.

Each access point to radiological areas and radioactive material areas (as defined at §835.2) shall be posted with conspicuous signs bearing the wording provided in this section.

(a) Radiation area. The words “Caution, Radiation Area” shall be posted at each radiation area.

(b) High radiation area. The words “Caution, High Radiation Area” or “Danger, High Radiation Area” shall be posted at each high radiation area.

(c) Very high radiation area. The words “Grave Danger, Very High Radiation Area” shall be posted at each very high radiation area.

(d) Airborne radioactivity area. The words “Caution, Airborne Radioactivity Area” or “Danger, Airborne Radioactivity Area” shall be posted at each airborne radioactivity area.
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(e) Contamination area. The words “Caution, Contamination Area” shall be posted at each contamination area.

(f) High contamination area. The words “Caution, High Contamination Area” or “Danger, High Contamination Area” shall be posted at each high contamination area.

(g) Radioactive material area. The words “Caution, Radioactive Material(s)” shall be posted at each radioactive material area.

[63 FR 59684, Nov. 4, 1998]

§ 835.604 Exceptions to posting requirements.

(a) Areas may be excepted from the posting requirements of §835.603 for periods of less than 8 continuous hours when placed under continuous observation and control of an individual knowledgeable of, and empowered to implement, required access and exposure control measures.

(b) Areas may be excepted from the radioactive material area posting requirements of §835.603(g) when:

(1) Posted in accordance with §§835.603(a) through (f); or

(2) Each item or container of radioactive material is labeled in accordance with this subpart such that individuals entering the area are made aware of the hazard; or

(3) The radioactive material of concern consists solely of structures or installed components which have been activated (i.e., such as by being exposed to neutron radiation or particles produced by an accelerator).

(c) Areas containing only packages received from radioactive material transportation labeled and in non-degraded condition need not be posted in accordance with §835.603 until the packages are monitored in accordance with §835.405.

[63 FR 59684, Nov. 4, 1998]

§ 835.605 Labeling items and containers.

Except as provided at §835.606, each item or container of radioactive material shall bear a durable, clearly visible label bearing the standard radiation warning trefoil and the words “Caution, Radioactive Material” or “Danger, Radioactive Material.” The label shall also provide sufficient information to permit individuals handling, using, or working in the vicinity of the items or containers to take precautions to avoid or control exposures.

[63 FR 59684, Nov. 4, 1998]

§ 835.606 Exceptions to labeling requirements.

(a) Items and containers may be excepted from the radioactive material labeling requirements of §835.605 when:

(1) Used, handled, or stored in areas posted and controlled in accordance with this subpart and sufficient information is provided to permit individuals to take precautions to avoid or control exposures; or

(2) The quantity of radioactive material is less than one tenth of the values specified in appendix E of this part; or

(3) Packaged, labeled, and marked in accordance with the regulations of the Department of Transportation or DOE Orders governing radioactive material transportation; or

(4) Inaccessible, or accessible only to individuals authorized to handle or use them, or to work in the vicinity; or

(5) Installed in manufacturing, process, or other equipment, such as reactor components, piping, and tanks; or

(6) The radioactive material consists solely of nuclear weapons or their components.

(b) Radioactive material labels applied to sealed radioactive sources may be excepted from the color specifications of §835.601(a).

[63 FR 59684, Nov. 4, 1998]

Subpart H—Records

§ 835.701 General provisions.

(a) Records shall be maintained to document compliance with this part and with radiation protection programs required by §835.101.

(b) Unless otherwise specified in this subpart, records shall be retained until final disposition is authorized by DOE.

§ 835.702 Individual monitoring records.

(a) Records shall be maintained to document doses received by all individuals for whom monitoring was required pursuant to §835.402 and to document
§ 835.703 Other monitoring records.

The following information shall be documented and maintained:

(a) Results of monitoring for radiation and radioactive material as required by subparts E and L of this part, except for monitoring required by §835.1102(d);

(b) Results of monitoring used to determine individual occupational dose from external and internal sources;

(c) Results of monitoring for the release and control of material and equipment as required by §835.1101; and

(d) Results of maintenance and calibration performed on instruments and equipment as required by §835.401(b).

§ 835.704 Administrative records.

(a) Training records shall be maintained, as necessary, to demonstrate compliance with §§835.901. 

§ 835.703 Other monitoring records.

The following information shall be documented and maintained:

(a) Results of monitoring for radiation and radioactive material as required by subparts E and L of this part, except for monitoring required by §835.1102(d);

(b) Results of monitoring used to determine individual occupational dose from external and internal sources;

(c) Results of monitoring for the release and control of material and equipment as required by §835.1101; and

(d) Results of maintenance and calibration performed on instruments and equipment as required by §835.401(b).

§ 835.704 Administrative records.

(a) Training records shall be maintained, as necessary, to demonstrate compliance with §§835.901.
(b) Actions taken to maintain occupational exposures as low as reasonably achievable, including the actions required for this purpose by §835.101, as well as facility design and control actions required by §§835.1001, 835.1002, and 835.1003, shall be documented.

(c) Records shall be maintained to document the results of internal audits and other reviews of program content and implementation.

(d) Written declarations of pregnancy, including the estimated date of conception, and revocations of declarations of pregnancies shall be maintained.

(e) Changes in equipment, techniques, and procedures used for monitoring shall be documented.

(f) Records shall be maintained as necessary to demonstrate compliance with the requirements of §§835.1201 and 835.1202 for sealed radioactive source control, inventory, and source leak tests.


Subpart J—Radiation Safety Training

§ 835.901 Radiation safety training.

(a) Each individual shall complete radiation safety training on the topics established at §835.901(c) commensurate with the hazards in the area and the required controls:

(1) Before being permitted unescorted access to controlled areas; and

(2) Before receiving occupational dose during access to controlled areas at a DOE site or facility.

(b) Each individual shall demonstrate knowledge of the radiation safety training topics established at §835.901(c), commensurate with the hazards in the area and required controls, by successful completion of an examination and performance demonstrations:

(1) Before being permitted unescorted access to radiological areas; and

(2) Before performing unescorted assignments as a radiological worker.

(c) Radiation safety training shall include the following topics, to the extent appropriate to each individual’s prior training, work assignments, and degree of exposure to potential radiological hazards:

(1) Risks of exposure to radiation and radioactive materials, including prenatal radiation exposure;
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(2) Basic radiological fundamentals and radiation protection concepts;
(3) Physical design features, administrative controls, limits, policies, procedures, alarms, and other measures implemented at the facility to manage doses and maintain doses ALARA, including both routine and emergency actions;
(4) Individual rights and responsibilities as related to implementation of the facility radiation protection program;
(5) Individual responsibilities for implementing ALARA measures required by §835.101; and
(6) Individual exposure reports that may be requested in accordance with §835.801.

(d) When an escort is used in lieu of training in accordance with paragraph (a) or (b) of this section, the escort shall:

(1) Have completed radiation safety training, examinations, and performance demonstrations required for entry to the area and performance of the work; and
(2) Ensure that all escorted individuals comply with the documented radiation protection program.

(e) Radiation safety training shall be provided to individuals when there is a significant change to radiation protection policies and procedures that may affect the individual and at intervals not to exceed 24 months. Such training provided for individuals subject to the requirements of §835.901(b)(1) and (b)(2) shall include successful completion of an examination.

[63 FR 59685, Nov. 4, 1998]

§§ 835.902–835.903 [Reserved]

Subpart K—Design and Control

§ 835.1001 Design and control.

(a) Measures shall be taken to maintain radiation exposure in controlled areas ALARA through physical design features and administrative control. The primary methods used shall be physical design features (e.g., confinement, ventilation, remote handling, and shielding). Administrative controls shall be employed only as supplemental methods to control radiation exposure.

(b) For specific activities where use of physical design features is demonstrated to be impractical, administrative controls shall be used to maintain radiation exposures ALARA.

[63 FR 59686, Nov. 4, 1998]

§ 835.1002 Facility design and modifications.

During the design of new facilities or modification of existing facilities, the following objectives shall be adopted:

(a) Optimization methods shall be used to assure that occupational exposure is maintained ALARA in developing and justifying facility design and physical controls.

(b) The design objective for controlling personnel exposure from external sources of radiation in areas of continuous occupational occupancy (2000 hours per year) shall be to maintain exposure levels below an average of 0.5 mrem (5 microsieverts) per hour and as far below this average as is reasonably achievable. The design objectives for exposure rates for potential exposure to a radiological worker where occupancy differs from the above shall be ALARA and shall not exceed 20 percent of the applicable standards in §835.202.

(c) Regarding the control of airborne radioactive material, the design objective shall be, under normal conditions, to avoid releases to the workplace atmosphere and in any situation, to control the inhalation of such material by workers to levels that are ALARA; confinement and ventilation shall normally be used.

(d) The design or modification of a facility and the selection of materials shall include features that facilitate operations, maintenance, decontamination, and decommissioning.

[58 FR 65485, Dec. 14, 1993, as amended at 63 FR 59686, Nov. 4, 1998]

§ 835.1003 Workplace controls.

During routine operations, the combination of physical design features and administrative controls shall provide that:

(a) The anticipated occupational dose to general employees shall not exceed the limits established at §835.202; and
Department of Energy

§ 835.1201 Sealed radioactive source control.

Sealed radioactive sources shall be used, handled, and stored in a manner commensurate with the hazards associated with operations involving the sources.
§ 835.1202 Accountable sealed radioactive sources.

(a) Each accountable sealed radioactive source shall be inventoried at intervals not to exceed six months. This inventory shall:

1. Establish the physical location of each accountable sealed radioactive source;

2. Verify the presence and adequacy of associated postings and labels; and

3. Establish the adequacy of storage locations, containers, and devices.

(b) Except for sealed radioactive sources consisting solely of gaseous radioactive material or tritium, each accountable sealed radioactive source shall be subject to a source leak test upon receipt, when damage is suspected, and at intervals not to exceed six months. Source leak tests shall be capable of detecting radioactive material leakage equal to or exceeding 0.005 microcurie.

(c) Notwithstanding the requirements of paragraph (b) of this section, an accountable sealed radioactive source is not subject to periodic source leak testing if that source has been removed from service. Such sources shall be stored in a controlled location, subject to periodic inventory as required by paragraph (a) of this section, and subject to source leak testing prior to being returned to service.

(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, an accountable sealed radioactive source is not subject to periodic source leak testing if that source is located in an area that is unsafe for human entry or otherwise inaccessible.

(e) An accountable sealed radioactive source found to be leaking radioactive material shall be controlled in a manner that minimizes the spread of radioactive contamination.

Subpart N—Emergency Exposure Situations

§ 835.1301 General provisions.

(a) A general employee whose occupational dose has exceeded the numerical value of any of the limits specified in §835.202 as a result of an authorized emergency exposure may be permitted to return to work in radiological areas during the current year providing that all of the following conditions are met:

1. Approval is first obtained from the contractor management and the Head of the responsible DOE field organization;

2. The individual receives counseling from radiological protection and medical personnel regarding the consequences of receiving additional occupational exposure during the year; and

3. The affected employee agrees to return to radiological work.

(b) All doses exceeding the limits specified in §835.202 shall be recorded in the affected individual's occupational dose record.

(c) When the conditions under which a dose was received in excess of the limits specified in §835.202, except those received in accordance with §835.204, have been eliminated, operating management shall notify the Head of the responsible DOE field organization.

(d) Operations after a dose was received in excess of the limits specified in §835.202, except those received in accordance with §835.204, may be resumed only with the approval of DOE.


§ 835.1302 Emergency exposure situations.

(a) The risk of injury to those individuals involved in rescue and recovery operations shall be minimized.

(b) Operating management shall weigh actual and potential risks against the benefits to be gained.

(c) No individual shall be required to perform a rescue action that might involve substantial personal risk.

(d) Each individual authorized to perform emergency actions likely to result in occupational doses exceeding the values of the limits provided at §835.202(a) shall be trained in accordance with §835.901(b) and briefed beforehand on the known or anticipated hazards to which the individual will be subjected.

§ 835.1303 [Reserved]

§ 835.1304 Nuclear accident dosimetry.

(a) Installations possessing sufficient quantities of fissile material to potentially constitute a critical mass, such that the excessive exposure of individuals to radiation from a nuclear accident is possible, shall provide nuclear accident dosimetry for those individuals.

(b) Nuclear accident dosimetry shall include the following:

(1) A method to conduct initial screening of individuals involved in a nuclear accident to determine whether significant exposures to radiation occurred;

(2) Methods and equipment for analysis of biological materials;

(3) A system of fixed nuclear accident dosimeter units; and

(4) Personal nuclear accident dosimeters.


APPENDIX A TO PART 835—DERIVED AIR CONCENTRATIONS (DAC) FOR CONTROLLING RADIATION EXPOSURE TO WORKERS AT DOE FACILITIES

The data presented in appendix A are to be used for controlling individual internal doses in accordance with §835.209, identifying the need for air monitoring in accordance with §835.603(d), and identifying the need for posting of airborne radioactivity areas in accordance with §835.603(e).

The DAC values are given for individual radionuclides. For known mixtures of radionuclides, determine the sum of the ratio of the observed concentration of a particular radionuclide and its corresponding DAC for all radionuclides in the mixture. If this sum exceeds unity (1), then the DAC has been exceeded. For unknown radionuclides, the most restrictive DAC (lowest value) for those isotopes not known to be absent shall be used.

The derived air concentrations (DAC) for limiting radiation exposures through inhalation of radionuclides by workers are listed in this appendix. The values are based on either a stochastic (committed effective dose equivalent) dose limit of 5 rems (0.05 Sv) or a nonstochastic (organ) dose limit of 50 rems (0.5 Sv) per year, whichever is more limiting.

NOTE: the 15 rems [0.15 Sv] dose limit for the lens of the eye does not appear as a critical organ dose limit.)

The columns in this appendix contain the following information: (1) Radionuclide; (2) inhaled air DAC for lung retention class D, W, and Y in units of µCi/ml; (3) inhaled air DAC for lung retention class D, W, and Y in units of Bq/m³; and (4) an indication of whether or not the DAC for each class is controlled by the stochastic (effective dose equivalent) or nonstochastic (tissue) dose.

The classes D, W, and Y have been established to describe the clearance of inhaled radionuclides from the lung. This classification refers to the approximate length of retention in the pulmonary region. Thus, the range of half-times for retention in the pulmonary region is less than 10 days for class D (days), from 10 to 100 days for class W (weeks), and greater than 100 days for class Y (years). The DACs are listed by radionuclide, in order of increasing atomic mass, and are based on the assumption that the particle size distribution of the inhaled material is unknown and an assumed particle size distribution of 1 µm is used. For situations where the particle size distribution is known to differ significantly from 1 µm, appropriate corrections can be made to both the estimated dose to workers and the DACs.

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### Footnotes for Appendix A

1. A determination of whether the DACs are controlled by stochastic (St) or nonstochastic (organ) dose, or if they both give the same result (S), for each lung retention class, is given in this column. The key to the organ notation for nonstochastic dose is:

- BS = Bone surface, K = Kidney, L = Liver, SW = Stomach wall, and T = Thyroid. A blank indicates that no calculations were performed for the lung retention class shown.

2. The ICRP identifies inhaled water and carbon as having immediate uptake and distribution; therefore no solubility classes are designated. For the purposes of this table, the DAC values are shown as being constant, independent of solubility class. For inhaled water, the inhalation DAC values allow for an additional 50% absorption through the skin, as described in ICRP Publication No. 30: Limits for Intakes of Radionuclides by Workers. For elemental tritium, the DAC values are based solely on consideration of the dose-equivalent rate to the tissues of the lung from inhaled tritium gas contained within the lung, without absorption in the tissues.

3. A dash indicates no values given for this data category.

4. These values are appropriate for protection from radon combined with its short-lived daughters and are based on information given in ICRP Publication 52: Limits for Inhalation of Radon Daughters by Workers and General Guidance Report No. 11: Limiting Values of Radionuclide Intake and Air Concentrations, and Dose Conversion Factors for Inhalation. Submission, and Ingestion (EPA 5201 – 88 – 020). The values given are for 100% equilibrium concentration conditions of the radon daughters with the parent. To allow for an actual measured equilibrium concentration or a demonstrated equilibrium concentration, the values given in this table should be multiplied by the ratio (100% /actual %) or (100% /demonstrated %), respectively. Alternatively, the DAC values for Ra-220 and Ra-222 may be replaced by 1 WL* and 1/3 WL*, respectively, for appropriate limiting of daughter concentrations. Because of the dosimetric considerations for radon, no I or lung clearance values are listed.

5. A Working Level (WL) is any combination of short-lived radon daughters, in one liter of air without regard to the degree of equilibrium, that will result in the ultimate emission of 1.3 E+05 MeV of alpha energy.

APPENDIX C TO PART 835—DERIVED AIR CONCENTRATIONS (DAC) FOR WORKERS FROM EXTERNAL EXPOSURE DURING IMMERSION IN A CONTAMINATED ATMOSPHERIC CLOUD

a. The data presented in appendix C are to be used for controlling occupational exposures in accordance with §835.209, identifying the need for air monitoring in accordance with §835.207, and identifying the need for posting of airborne radioactivity areas in accordance with §835.603(d).

b. The air immersion DAC values shown in this appendix are based on a stochastic dose limit of 5 rems (0.05 Sv) per year or a nonstochastic (organ) dose limit of 50 rems (0.5 Sv) per year. Four columns of information are presented: (1) Radionuclide; (2) half-life in units of seconds (s), minutes (min), hours (h), days (d), or years (yr); (3) air immersion DAC in units of µCi/ml; and (4) air immersion DAC in units of Bq/m³. The data are listed by radionuclide in order of increasing atomic mass. The air immersion DACs were calculated for a continuous, non-shielded exposure via immersion in a semi-infinite atmospheric cloud. The DACs listed in this appendix may be modified to allow for submersion in a cloud of finite dimensions.

c. The DAC value for air immersion listed for a given radionuclide is determined either by a yearly limit on effective dose equivalent, which provides a limit on stochastic radiation effects, or by a limit on yearly dose equivalent to any organ, which provides a limit on nonstochastic radiation effects. For most of the radionuclides listed, the DAC value is determined by the yearly limit on effective dose equivalent. Thus, the few cases where the DAC value is determined by the yearly limit on shallow dose equivalent to the skin are indicated in the table by an appropriate footnote. Again, the DACs listed in this appendix account only for immersion in a semi-infinite cloud and do not account for inhalation or ingestion exposures.

d. Three classes of radionuclides are included in the air immersion DACs as described below.

(1) Class 1. The first class of radionuclides includes selected noble gases and short-lived activation products that occur in gaseous form. For these radionuclides, inhalation doses are negligible compared to the external dose from immersion in an atmospheric cloud.

(2) Class 2. The second class of radionuclides includes those for which a DAC value for inhalation has been calculated, but for which the DAC value for external exposure to a contaminated atmospheric cloud is more restrictive (i.e., results in a lower DAC value). These radionuclides generally have half-lives of a few hours or less, or are eliminated from the body following inhalation sufficiently rapidly to limit the inhalation dose.

(3) Class 3. The third class of radionuclides includes selected isotopes with relatively short half-lives. These radionuclides typically have half-lives that are less than 10 minutes, they do not occur as a decay product of a longer lived radionuclide, or they lack sufficient decay data to permit internal dose calculations. These radionuclides are also typified by a radioactive emission of highly intense, high-energy photons and rapid removal from the body following inhalation.

e. The DAC values are given for individual radionuclides. For known mixtures of radionuclides, determine the product of the ratio of the observed concentration of a particular radionuclide and its corresponding DAC for all radionuclides in the mixture. If this sum exceeds unity (1), then the DAC has been exceeded. For unknown radionuclides, the most restrictive DAC (lowest value) for those isotopes not known to be absent shall be used.

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<td>3.16 min</td>
<td>2.0E-06</td>
<td>7.0E+04</td>
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<td>Kr–90</td>
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<td>Rb–81¹</td>
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<td>Rb–82¹</td>
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<td>Rb–84¹</td>
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</tr>
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<td>Rb–90¹</td>
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<td>Sr–93¹</td>
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<td>Y–90m¹</td>
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<td>Y–91¹</td>
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## APPENDIX D TO PART 835—SURFACE CONTAMINATION VALUES

The data presented in appendix D are to be used in identifying the need for posting of contamination and high contamination areas in accordance with §§ 835.108(e) and (f) and identifying the need for surface contamination monitoring and control in accordance with §§ 835.1101 and 835.1102.

<table>
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<td>(µCi/ml)</td>
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<td>I-132 ¹</td>
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</tr>
<tr>
<td>I-135 ¹</td>
<td>6.61 h</td>
<td>7.0E-07</td>
</tr>
<tr>
<td>I-136 ²</td>
<td>8.3 s</td>
<td>1.0E-06</td>
</tr>
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<td>4.5 min</td>
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<td>Xe-123</td>
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<td>7.0E-06</td>
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<tr>
<td>Xe-125</td>
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</tr>
<tr>
<td>Xe-127</td>
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</tr>
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<td>Ba-142 ²</td>
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<td>1.0E-05</td>
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<td>Td-162 ²</td>
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<td>4.0E-06</td>
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<td>Ir-191m ²</td>
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<td>Ti-207 ²</td>
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<tr>
<td>Tm-232 ²</td>
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<td>4.0E-06</td>
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¹ Committed effective dose equivalent from inhalation is calculated in ICRP Publication 30, but the DAC value for external exposure to a contaminated atmospheric cloud is more restrictive than the DAC value for inhalation.
² Committed effective dose equivalent from inhalation is not calculated in ICRP Publication 30, but DAC value for external exposure to contaminated cloud should be more restrictive than DAC value for inhalation due to relatively short half-life of radionuclide.
³ DAC value is determined by limit on annual shallow dose equivalent to skin, rather than yearly limit on effective dose equivalent.
⁴ DAC value applies to radionuclide in vapor form only; DAC value for inhalation is more restrictive for radionuclide in inorganic form.
⁵ DAC value applies to radionuclide in inorganic or vapor form.
⁶ DAC value for exposure to contaminated atmospheric cloud is the same as DAC value for inhalation.

APPENDIX E TO PART 835—VALUES FOR ESTABLISHING SEALED RADIOACTIVE SOURCE ACCOUNTABILITY AND RADIOACTIVE MATERIAL POSTING AND LABELING REQUIREMENTS

The data presented in this appendix E are to be used for identifying accountable sealed radioactive sources as defined at §835.2(a), establishing the need for radioactive material posting in accordance with §835.603(g), and establishing the need for radioactive material labeling in accordance with §835.605.

Note: The data are listed in alphabetical order by nuclide.
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<th>Nuclide</th>
<th>Activity (µCi)</th>
<th>Nuclide</th>
<th>Activity (µCi)</th>
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<td>Mo-93</td>
<td>7.7E+01</td>
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<td>Pm-147</td>
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<td>U-232</td>
<td>1.5E+01</td>
</tr>
<tr>
<td>Co-137</td>
<td>6.0E+01</td>
<td>Pm-148m</td>
<td>1.1E+02</td>
<td>U-233</td>
<td>7.4E+01</td>
</tr>
<tr>
<td>Dy-159</td>
<td>4.1E+06</td>
<td>Pb-209</td>
<td>6.3E+03</td>
<td>U-234</td>
<td>7.5E+01</td>
</tr>
<tr>
<td>Es-254</td>
<td>6.3E+01</td>
<td>Pb-210</td>
<td>1.1E+03</td>
<td>U-235</td>
<td>6.7E+01</td>
</tr>
<tr>
<td>Es-255</td>
<td>4.6E+04</td>
<td>Pb-193</td>
<td>4.4E+07</td>
<td>U-236</td>
<td>8.0E+01</td>
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<tr>
<td>Eu-148</td>
<td>7.0E+05</td>
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<td>8.4E+01</td>
</tr>
<tr>
<td>Eu-149</td>
<td>5.3E+06</td>
<td>Pu-237</td>
<td>3.3E+02</td>
<td>V-49</td>
<td>2.9E+07</td>
</tr>
<tr>
<td>Eu-152</td>
<td>3.1E+01</td>
<td>Pu-238</td>
<td>2.5E+01</td>
<td>W-181</td>
<td>1.1E+03</td>
</tr>
<tr>
<td>Eu-154</td>
<td>3.1E+01</td>
<td>Pu-239</td>
<td>2.3E+01</td>
<td>W-185</td>
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<tr>
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<td>3.7E+02</td>
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<td>2.3E+01</td>
<td>W-188</td>
<td>6.4E+04</td>
</tr>
<tr>
<td>Fe-55</td>
<td>3.7E+06</td>
<td>Pu-241</td>
<td>1.2E+02</td>
<td>Y-88</td>
<td>3.4E+01</td>
</tr>
<tr>
<td>Fe-59</td>
<td>2.0E+02</td>
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<td>2.4E+01</td>
<td>Y-91</td>
<td>5.0E+04</td>
</tr>
<tr>
<td>Fe-60</td>
<td>1.3E+04</td>
<td>Pu-244</td>
<td>2.5E+01</td>
<td>Yb-169</td>
<td>5.5E+02</td>
</tr>
<tr>
<td>Fe-65</td>
<td>4.3E+02</td>
<td>Ra-226</td>
<td>1.2E+03</td>
<td>Zr-86</td>
<td>1.2E+02</td>
</tr>
<tr>
<td>Gd-146</td>
<td>2.6E+05</td>
<td>Ra-228</td>
<td>2.1E+03</td>
<td>Zr-93</td>
<td>3.1E+04</td>
</tr>
<tr>
<td>Gd-148</td>
<td>3.0E+01</td>
<td>Ra-83</td>
<td>9.2E+01</td>
<td>Zr-95</td>
<td>2.0E+02</td>
</tr>
<tr>
<td>Gd-151</td>
<td>1.1E+06</td>
<td>Ra-84</td>
<td>2.0E+02</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gd-153</td>
<td>2.1E+02</td>
<td>Re-183</td>
<td>5.4E+02</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ge-68</td>
<td>5.7E+02</td>
<td>Re-184</td>
<td>2.6E+02</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Any alpha emitting radionuclide not listed above and mixtures of alpha emitters of unknown composition have a value of 10 microcuries.

Any radionuclide other than alpha emitting radionuclides not listed above and mixtures of unknown composition have a value of 100 microcuries.

**NOTE:** Where there is involved a combination of radionuclides in known amounts, derive the value for the combination as follows: determine, for each radionuclide in the combination, the ratio of the quantity present in the combination and the value otherwise established for the specific radionuclide when not in combination. If the sum of such ratios for all radionuclides in the combination exceeds unity (1), then the accountability criterion has been exceeded.

[83 FR 59688, Nov. 4, 1998]
§ 840.1 Scope and purpose.

(a) Scope. This subpart applies to those DOE contractor activities to which the nuclear hazards indemnity provisions in 41 CFR 9–50.704–6 apply, and to other persons indemnified with respect to such activities.

(b) Purpose. One purpose of this subpart is to set forth the criteria which the DOE proposes to follow in order to determine whether there has been an "extraordinary nuclear occurrence." The other purpose is to establish the conditions of the waivers of defenses proposed for incorporation in indemnity agreements.

(1) The system is to come into effect only where the discharge or dispersal constitutes a substantial amount of source, special nuclear or byproduct material, or has caused substantial radiation levels offsite. The various limits in present DOE regulations are not appropriate for direct application in the determination of an "extraordinary nuclear occurrence," for they were arrived at with other purposes in mind, and those limits have been set at a level which is conservatively arrived at by incorporating a significant safety factor. Thus, a discharge or dispersal which exceeds the limits in DOE regulations, or in DOE orders, although possible cause for concern, is not one which would be expected to cause substantial injury or damage unless it exceeds by some significant multiple the appropriate regulatory limit. Accordingly, in arriving at the values in the criteria to be deemed "substantial" it is more appropriate to adopt values separate from DOE health and safety orders, and, of course the selection of these values will not in any way affect such orders. A substantial discharge, for purposes of the criteria, represents a perturbation of the environment which is clearly above that which could be anticipated from the conduct of normal activities. The criteria are intended solely for the purposes of administration of DOE statutory responsibilities under Pub. L. 89–645, and are not intended to indicate a level of discharge or dispersal at which damage is likely to occur, or even a level at which some type of protective action is indicated. It should be clearly understood that the criteria in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place. It cannot be emphasized too frequently that the levels set to be used as criteria for the first part of the determination, that is, the criteria for amounts offsite or radiation levels offsite which are substantial, are not meant to indicate that, because such amounts or levels are determined to be substantial for purposes of administration, they are "substantial" in terms of their propensity for causing injury or damage.

(2) It is the purpose of the second part of the determination that DOE decide whether there have in fact been or will probably be substantial damages to persons offsite or property offsite. The criteria for substantial damages were formulated, and the numerical values selected, on a wholly different basis from that on which the criteria used for the first part of the determination with respect to substantial discharge were derived. The only interrelation between the values selected for the discharge criteria and the damage criteria is that the discharge values are set so low that it is extremely unlikely the damage criteria could be satisfied unless the discharge values have been exceeded.

(3) The first part of the test is designed so that DOE can assure itself that something exceptional has occurred; that something untoward and unexpected has in fact taken place and that this event is of sufficient significance to raise the possibility that some damage to persons or property offsite has resulted or may result. If there appears to be no damage, the waivers will not apply because DOE will be unable, under the second part of the test, to make a determination that "substantial damages" have resulted or will probably result. If damages have resulted or will probably result, they could vary from de minimis to serious, and the waivers will not apply until the damages, both actual and probable, are determined to be "substantial" within the second part of the test.
§ 840.4

(a) DOE may initiate, on its own motion, the making of a determination as to whether or not there has been an extraordinary nuclear occurrence. In the event DOE does not so initiate the making of a determination, any affected person, or any person with whom an indemnity agreement is executed may petition DOE for a determination of whether or not there has been an extraordinary nuclear occurrence. If DOE does not have, or does not expect to have, within 7 days after it has received notification of an alleged event, enough information available to make a determination that there has been an extraordinary nuclear occurrence, DOE will publish a notice in the Federal Register setting forth the date and place of the alleged event and requesting any persons having knowledge thereof to submit their information to DOE.

(b) When a procedure is initiated under paragraph (a) of this section, the principal staff which will begin immediately to assemble the relevant information and prepare a report on which the DOE can make its determination will consist of the Directors or their designees of the following Divisions or Offices: Office of Nuclear Safety, Office of Operational Safety, Office of Health and Environmental Research, the General Counsel or his designee, and a representative of the program division whose facility or device may be involved.

§ 840.3 Determination of extraordinary nuclear occurrence.

If the DOE determines that both of the criteria set forth in § 840.4 and § 840.5 have been met, it will make the determination that there has been an extraordinary nuclear occurrence. If the DOE publishes a notice in the Federal Register in accordance with § 840.2(a) and does not make a determination within 90 days thereafter that there has been an extraordinary nuclear occurrence, the alleged event will be deemed not to be an extraordinary nuclear occurrence. The time for the making of a determination may be extended by DOE by notice published in the Federal Register.

§ 840.4 Criterion I—Substantial discharge of radioactive material or substantial radiation levels offsite.

DOE will determine that there has been a substantial discharge or dispersal of radioactive material offsite, or that there have been substantial levels of radiation offsite, when as a result of an event comprised of one or more related happenings, radioactive material is released from its intended place of confinement or radiation levels occur offsite and either of the following findings are also made:

(a) DOE finds that one or more persons offsite were, could have been, or might be exposed to radiation or to radioactive material, resulting in a dose or in a projected dose in excess of one of the levels in the following table:
§ 840.5

TOTAL PROJECTED RADIATION DOSES

<table>
<thead>
<tr>
<th>Critical organ</th>
<th>Dose (rems)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thyroid</td>
<td>30</td>
</tr>
<tr>
<td>Whole Body</td>
<td>20</td>
</tr>
<tr>
<td>Bone Marrow</td>
<td>20</td>
</tr>
<tr>
<td>Skin</td>
<td>60</td>
</tr>
<tr>
<td>Other organs or tissues</td>
<td>30</td>
</tr>
</tbody>
</table>

Exposures from the following types of sources of radiation shall be included:

1. Radiation from sources external to the body;
2. Radioactive material that may be taken into the body from its occurrence in air or water; and
3. Radioactive material that may be taken into the body from its occurrence in food or on terrestrial surfaces.

(b) DOE finds that—

1. Surface contamination of at least a total of any 100 square meters of off-site property has occurred as the result of a release of radioactive material from a production or utilization facility or device and such contamination is characterized by levels of radiation in excess of one of the values listed in column 1 or column 2 of the following table, or
2. Surface contamination of any off-site property has occurred as the result of a release of radioactive material in the course of transportation and such contamination is characterized by levels of radiation in excess of one of the values listed in column 2 of the following table:

TOTAL SURFACE CONTAMINATION LEVELS

<table>
<thead>
<tr>
<th>Type of emitter</th>
<th>Column 1—Offsite property</th>
<th>Column 2—Other offsite property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alpha emission from transuranic isotopes</td>
<td>3.5 microcuries per square meter.</td>
<td>0.35 microcuries per square meter.</td>
</tr>
<tr>
<td>Alpha emission from isotopes other than transuranic isotopes</td>
<td>35 microcuries per square meter.</td>
<td>3.5 microcuries per square meter.</td>
</tr>
<tr>
<td>Beta or gamma emission</td>
<td>40 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber).</td>
<td>4 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber).</td>
</tr>
</tbody>
</table>

*1 The maximum levels (above background), observed or projected, 8 or more hours after initial deposition.

§ 840.5 Criterion II—Substantial damages to persons offsite or property offsite.

(a) After DOE has determined that an event has satisfied Criterion I, DOE will determine that the event has resulted or will probably result in substantial damages to persons offsite or property offsite if any of the following findings are made:

1. DOE finds that such event has resulted in the death or hospitalization, within 30 days of the event, of five or more people located offsite showing objective clinical evidence of physical injury from exposure to the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material; or
2. DOE finds that $2,500,000 or more of damage offsite has been or will probably be sustained by any one person, or $5 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event; or
3. DOE finds that $5,000 or more of damage offsite has been or will probably be sustained by each of 50 or more persons, provided that $1 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event.

(b) As used in paragraphs (a) (2) and (3) of this section “damage” shall be that arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material, and shall be based upon estimates of one or more of the following:

1. Total cost necessary to put affected property back into use.
2. Loss of use of affected property.
3. Value of affected property where not practical to restore to use.
4. Financial loss resulting from protective actions appropriate to reduce or avoid exposure to radiation or to radioactive materials.
Department of Energy

PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

Subpart A—General Provisions

§ 850.1 Scope.
This part establishes a chronic beryllium disease prevention program (CBDPP) that supplements and is inte-
grated into existing worker protection programs that are established for Department of Energy (DOE) employees and DOE contractor employees.

§ 850.2 Applicability.
(a) This part applies to:
(1) DOE offices responsible for operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities;
(2) DOE contractors with operations or activities that involve present or past exposure, or the potential for exposure, to beryllium at DOE facilities; and
(3) Any current DOE employee, DOE contractor employee, or other worker at a DOE facility who is or was exposed or potentially exposed to beryllium at a DOE facility.

(b) This part does not apply to:
(1) Beryllium articles; and
(2) DOE laboratory operations that meet the definition of laboratory use of hazardous chemicals in 29 CFR 1910.1450, Occupational Exposure to Hazardous Chemicals in Laboratories.

§ 850.3 Definitions.
(a) As used in this part:
Action level means the level of airborne concentration of beryllium established pursuant to section 850.23 of this part that, if met or exceeded, requires the implementation of worker protection provisions specified in that section.

Authorized person means any person required by work duties to be in a regulated area.

Beryllium means elemental beryllium and any insoluble beryllium compound or alloy containing 0.1 percent beryllium or greater that may be released as an airborne particulate.

Beryllium activity means an activity taken for, or by, DOE at a DOE facility that can expose workers to airborne beryllium, including but not limited to design, construction, operation, maintenance, or decommissioning, and which may involve one DOE facility or operation or a combination of facilities and operations.

Beryllium article means a manufactured item that is formed to a specific shape or design during manufacture,
§ 850.3

that has end-use functions that depend in whole or in part on its shape or design during end use, and that does not release beryllium or otherwise result in exposure to airborne concentrations of beryllium under normal conditions of use.

Beryllium-associated worker means a current worker who is or was exposed or potentially exposed to airborne concentrations of beryllium at a DOE facility, including:

1. A beryllium worker;
2. A current worker whose work history shows that the worker may have been exposed to airborne concentrations of beryllium at a DOE facility; and
3. A current worker who exhibits signs or symptoms of beryllium exposure;
4. A current worker who is receiving medical removal protection benefits.

Beryllium emergency means any occurrence such as, but not limited to, equipment failure, container rupture, or failure of control equipment or operations that results in an unexpected and significant release of beryllium at a DOE facility.

Beryllium-induced lymphocyte proliferation test (Be-LPT) is an in vitro measure of the beryllium antigen-specific, cell-mediated immune response.

Beryllium worker means a current worker who is regularly employed in a DOE beryllium activity.

Breathing zone is defined as a hemisphere forward of the shoulders, centered on the mouth and nose, with a radius of 6 to 9 inches.

DOE means the U.S. Department of Energy.

DOE contractor means any entity under contract with DOE (or its subcontractor) that has responsibility for performing beryllium activities at DOE facilities.

DOE facility means any facility operated by or for DOE.

Head of DOE Field Element means an individual who is the manager or head of the DOE operations office or field office, or any official to whom the Head of DOE Field Element delegates his or her functions under this part.

High-efficiency particulate air (HEPA) filter means a filter capable of trapping and retaining at least 99.97 percent of 0.3 micrometer monodispersed particles.

Immune response refers to the series of cellular events by which the immune system reacts to challenge by an antigen.

Medical removal protection benefits means the employment rights established by section 850.35 of this part for beryllium-associated workers who voluntarily accept temporary or permanent medical removal from beryllium areas following a recommendation by the Site Occupational Medicine Director.

Operational area means an area where workers are routinely in the presence of beryllium as part of their work activity.

Regulated area means an area demarcated by the responsible employer in which the airborne concentration of beryllium exceeds, or can reasonably be expected to exceed, the action level.

Removable contamination means beryllium contamination that can be removed from surfaces by nondestructive means, such as casual contact, wiping, brushing or washing.

Responsible employer means:

1. For DOE contractor employees, the DOE contractor office that is directly responsible for the safety and health of DOE contractor employees while performing a beryllium activity or other activity at a DOE facility; or
2. For DOE employees, the DOE office that is directly responsible for the safety and health of DOE Federal employees while performing a beryllium activity or other activity at a DOE facility; and
3. Any person acting directly or indirectly for such office with respect to terms and conditions of employment of beryllium-associated workers.

Site Occupational Medical Director (SOMD) means the physician responsible for the overall direction and operation of the site occupational medicine program.

Unique identifier means the part of a paired set of labels, used in records that contain confidential information, that does not identify individuals except by using the matching label.

Worker means a person who performs work for or on behalf of DOE, including...
§ 850.11 General CBDPP requirements.

(a) The CBDPP must specify the existing and planned operational tasks

(b) The responsibility employer at a DOE facility must ensure that a CBDPP is prepared for the facility and submitted to the appropriate Head of DOE Field Element before beginning beryllium activities, by no later than April 6, 2000 of this part.

(c) If the CBDPP has separate sections addressing the activities of multiple contractors at the facility, the Head of DOE Field Element will designate a single DOE contractor to review and approve the sections prepared by other contractors, so that a single consolidated CBDPP for the facility is submitted to the Head of DOE Field Element for review and approval.

§ 850.4 Enforcement.

DOE may take appropriate steps under its contracts with DOE contractors to ensure compliance with this part. These steps include, but are not limited to, contract termination or reduction in fee.

§ 850.5 Dispute resolution.

(a) Subject to paragraphs (b) and (c) of this section, any worker who is adversely affected by an action taken, or failure to act, under this part may petition the Office of Hearings and Appeals for relief in accordance with 10 CFR part 1003, Subpart G.

(b) The Office of Hearings and Appeals may not accept a petition from a worker unless the worker requested the responsible employer to correct the violation, and the responsible employer refused or failed to take corrective action within a reasonable time.

(c) If the dispute relates to a term or condition of employment that is covered by a grievance-arbitration provision in a collective bargaining agreement, the worker must exhaust all applicable grievance-arbitration procedures before filing a petition for relief with the Office of Hearings and Appeals. A worker is deemed to have exhausted all applicable grievance-arbitration procedures if 150 days have passed since the filing of a grievance and a final decision on it has not been issued.

Subpart B—Administrative Requirements

§ 850.10 Development and approval of the CBDPP.

(a) Preparation and submission of initial CBDPP to DOE. (1) The responsible

(b) The Office of Hearings and Appeals may not accept a petition from a worker unless the worker requested the responsible employer to correct the violation, and the responsible employer refused or failed to take corrective action within a reasonable time.
§ 850.12 Implementation.

(a) The responsible employer must manage and control beryllium exposures in all DOE beryllium activities consistent with the approved CBDPP.

(b) No person employed by DOE or a DOE contractor may take or cause any action inconsistent with the requirements of:

(1) This part,

(2) An approved CBDPP, and

(3) Any other Federal statute or regulation concerning the exposure of workers to beryllium at DOE facilities.

(c) No task involving potential exposure to airborne beryllium that is outside the scope of the existing CBDPP may be initiated until an update of the CBDPP is approved by the Head of DOE Field Element, except in an unexpected situation and, then, only upon approval of the Head of DOE Field Element.

(d) Nothing in this part precludes a responsible employer from taking any additional protective action that it determines to be necessary to protect the health and safety of workers.

(e) Nothing in this part affects the responsibilities of DOE officials under the Federal Employee Occupational Safety and Health Program (29 CFR part 1960) and related DOE directives.

§ 850.13 Compliance.

(a) The responsible employer must conduct activities in compliance with its CBDPP.

(b) The responsible employer must achieve compliance with all elements of its CBDPP no later than January 7, 2002.

(c) With respect to a particular beryllium activity, the contractor in charge of the activity is responsible for complying with this part. If no contractor is responsible for a beryllium activity, DOE must ensure implementation of, and compliance with, this part.

Subpart C—Specific Program Requirements

§ 850.20 Baseline beryllium inventory.

(a) The responsible employer must develop a baseline inventory of the locations of beryllium operations and other locations of potential beryllium contamination, and identify the workers exposed or potentially exposed to beryllium at those locations.

(b) In conducting the baseline inventory, the responsible employer must:

(1) Review current and historical records;

(2) Interview workers;

(3) Document the characteristics and locations of beryllium at the facility; and

(4) Conduct air, surface, and bulk sampling.

(c) The responsible employer must ensure that:

(1) The baseline beryllium inventory is managed by a qualified individual (e.g., a certified industrial hygienist); and

(2) The individuals assigned to this task have sufficient knowledge and experience to perform such activities properly.
§ 850.21 Hazard assessment.
    (a) If the baseline inventory establishes the presence of beryllium, the responsible employer must conduct a beryllium hazard assessment that includes an analysis of existing conditions, exposure data, medical surveillance trends, and the exposure potential of planned activities. The exposure determinants, characteristics and exposure potential of activities must be prioritized so that the activities with the greatest risks of exposure are evaluated first.
    (b) The responsible employer must ensure that:
        (1) The hazard assessment is managed by a qualified individual (e.g., a certified industrial hygienist); and
        (2) The individuals assigned to this task have sufficient industrial hygiene knowledge and experience to perform such activities properly.

§ 850.22 Permissible exposure limit.
The responsible employer must assure that no worker is exposed to an airborne concentration of beryllium greater than the permissible exposure limit established in 29 CFR 1910.1000, as measured in the worker’s breathing zone by personal monitoring, or a more stringent TWA PEL that may be promulgated by the Occupational Safety and Health Administration as a health standard.

§ 850.23 Action level.
    (a) The responsible employer must include in its CBDPP an action level that is no greater than 0.2 µg/m³, calculated as an 8-hour TWA exposure, as measured in the worker’s breathing zone by personal monitoring.
    (b) If an airborne concentration of beryllium is at or above the action level, the responsible employer must implement §§ 850.24(c) (periodic monitoring), 850.25 (exposure reduction and minimization), 850.26 (regulated areas), 850.27 (hygiene facilities and practices), 850.28 (respiratory protection), 850.29 (protective clothing and equipment), and 850.38 (warning signs) of this part.

§ 850.24 Exposure monitoring.
    (a) General. The responsible employer must ensure that:
        (1) Exposure monitoring is managed by a qualified individual (e.g., a certified industrial hygienist); and
        (2) The individuals assigned to this task have sufficient industrial hygiene knowledge and experience to perform such activities properly.
    (b) Initial monitoring. The responsible employer must perform initial monitoring in areas that may have airborne beryllium, as shown by the baseline inventory and hazard assessment. The responsible employer must apply statistically-based monitoring strategies to obtain a sufficient number of sample results to adequately characterize exposures, before reducing or terminating monitoring.
        (1) The responsible employer must determine workers’ 8-hour TWA exposure levels by conducting personal breathing zone sampling.
        (2) Exposure monitoring results obtained within the 12 months preceding the effective date of this part may be used to satisfy this requirement if the measurements were made as provided in paragraph (b)(1) of this section.
    (c) Periodic exposure monitoring. The responsible employer must conduct periodic monitoring of workers who work in areas where airborne concentrations of beryllium are at or above the action level. The monitoring must be conducted in a manner and at a frequency necessary to represent workers’ exposure, as specified in the CBDPP. This periodic exposure monitoring must be performed at least every 3 months (quarterly).
    (d) Additional exposure monitoring. The responsible employer must perform additional monitoring if operations, maintenance or procedures change, or when the responsible employer has any reason to suspect such a change has occurred.
    (e) Accuracy of monitoring. The responsible employer must use a method of monitoring and analysis that has an accuracy of not less than plus or minus 25 percent, with a confidence level of 95 percent, for airborne concentrations of beryllium at the action level.
    (f) Analysis. The responsible employer must have all samples collected to satisfy the monitoring requirements of this part analyzed in a laboratory accredited for metals by the American
§ 850.25 Exposure reduction and minimization.

(a) The responsible employer must ensure that no worker is exposed above the exposure limit prescribed in §850.22.

(b) The responsible employer must, in addition:

(1) Where exposure levels are at or above the action level, establish a formal exposure reduction and minimization program to reduce exposure levels to below the action level, if practicable. This program must be described in the responsible employer’s CBDPP and must include:

(i) Annual goals for exposure reduction and minimization;

(ii) A rationale for and a strategy for meeting the goals;

(iii) Actions that will be taken to achieve the goals; and

(iv) A means of tracking progress towards meeting the goals or demonstrating that the goals have been met.

(2) Where exposure levels are below the action level, implement actions for reducing and minimizing exposures, if practicable. The responsible employer must include in the CBDPP a description of the steps to be taken for exposure reduction and minimization and a rationale for those steps.

(c) The responsible employer must implement exposure reduction and minimization actions using the conventional hierarchy of industrial hygiene controls (i.e., engineering controls, administrative controls, and personal protective equipment in that order).

§ 850.26 Regulated areas.

(a) If airborne concentrations of beryllium in areas in DOE facilities are measured at or above the action level, the responsible employer must establish regulated areas for those areas.

(b) The responsible employer must demarcate regulated areas from the rest of the workplace in a manner that adequately alerts workers to the boundaries of such areas.

(c) The responsible employer must limit access to regulated areas to authorized persons.

(d) The responsible employer must keep records of all individuals who enter regulated areas. These records must include the name, date, time in and time out, and work activity.

§ 850.27 Hygiene facilities and practices.

(a) General. The responsible employer must assure that in areas where workers are exposed to beryllium at or above the action level, without regard to the use of respirators:

(1) Food or beverage and tobacco products are not used; and

(2) Cosmetics are not applied, except in change rooms or areas and shower facilities required under paragraphs (b) and (c) of this section; and

(3) Beryllium workers are prevented from exiting areas that contain beryllium with contamination on their bodies or their personal clothing.

(b) Change rooms or areas. The responsible employer must provide clean
§ 850.29 Protective clothing and equipment.

(a) The responsible employer must provide personal protective clothing and equipment to beryllium workers and ensure its appropriate use and maintenance, where dispersible forms of beryllium may contact worker’s skin, enter openings in workers’ skin, or contact workers’ eyes, including where:

(1) Exposure monitoring has established that airborne concentrations of beryllium are at or above the action level;

(2) Surface contamination levels measured or presumed prior to initiating work are above the level prescribed in §850.30; and

(4) Any beryllium-associated worker who requests the use of protective clothing and equipment for protection against airborne beryllium, regardless of measured exposure levels.

(b) The responsible employer must comply with 29 CFR 1910.132, Personal Protective Equipment General Requirements, when workers use personal protective clothing and equipment.

§ 850.28 Respiratory protection.

(a) The responsible employer must establish a respiratory protection program that complies with the respiratory protection program requirements of 29 CFR 1910.134, Respiratory Protection.

(b) The responsible employer must provide respirators to, and ensure that they are used by, all workers who:

(1) Are exposed to an airborne concentration of beryllium at or above the action level, or

(2) Are performing tasks for which analyses indicate the potential for exposures at or above the action level.

(c) The responsible employer must include in the respiratory protection program any beryllium-associated worker who requests to use a respirator for protection against airborne beryllium, regardless of measured exposure levels.

(d) The responsible employer must select for use by workers:

(1) Respirators approved by the National Institute for Occupational Safety and Health (NIOSH) if NIOSH-approved respirators exist for a specific DOE task; or

(2) Respirators that DOE has accepted under the DOE Respiratory Protection Acceptance Program if NIOSH-approved respirators do not exist for specific DOE tasks.

§ 850.29 Protective clothing and equipment.

(a) The responsible employer must provide protective clothing and equipment to beryllium workers who work in regulated areas.

(1) Separate facilities free of beryllium must be provided for beryllium workers to change into, and store, personal clothing, and clean protective clothing and equipment to prevent cross-contamination.

(2) The change rooms or areas that are used to remove beryllium-contaminated clothing and protective equipment must be maintained under negative pressure or located so as to minimize dispersion of beryllium into clean areas; and

(c) Showers and handwashing facilities.

(1) The responsible employer must provide handwashing and shower facilities for beryllium workers who work in regulated areas.

(2) The responsible employer must assure that beryllium workers who work in regulated areas shower at the end of the work shift.

(d) Lunchroom facilities.

(1) The responsible employer must provide lunchroom facilities that are readily accessible to beryllium workers, and ensure that tables for eating are free of beryllium, and that no worker in a lunchroom facility is exposed at any time to beryllium at or above the action level.

(2) The responsible employer must assure that beryllium workers do not enter lunchroom facilities with protective work clothing or equipment unless the surface beryllium has been removed from clothing and equipment by HEPA vacuuming or other method that removes beryllium without dispersing it.

(e) The change rooms or areas, shower and handwashing facilities, and lunchroom facilities must comply with 29 CFR 1910.141, Sanitation.

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§ 850.30 Housekeeping.

(a) Where beryllium is present in operational areas of DOE facilities, the responsible employer must conduct routine surface sampling to determine housekeeping conditions. Surfaces contaminated with beryllium dusts and waste must not exceed a removable contamination level of 3 µg/100 cm² during non-operational periods. This sampling would not include the interior of installed closed systems such as enclosures, glove boxes, chambers, or ventilation systems.

(b) When cleaning floors and surfaces in areas where beryllium is present at DOE facilities, the responsible employer must clean beryllium-contaminated floors and surfaces using a wet method, vacuuming or other cleaning methods, such as sticky tack cloths, that avoid the production of airborne dust. Compressed air or dry methods must not be used for such cleaning.

(c) The responsible employer must equip the portable or mobile vacuum units that are used to clean beryllium-contaminated areas with HEPA filters, and change the filters as often as needed to maintain their capture efficiency.

(d) The responsible employer must ensure that the cleaning equipment that is used to clean beryllium-contaminated surfaces is labeled, controlled, and not used for non-hazardous materials.

§ 850.31 Release criteria.

(a) The responsible employer must clean beryllium-contaminated equipment and other items to the lowest contamination level practicable, but not to exceed the levels established in paragraphs (b) and (c) of this section, and label the equipment or other items, before releasing them to the general public or a DOE facility for non-beryllium use, or to another facility for work involving beryllium.

(b) Before releasing beryllium-contaminated equipment or other items to the general public or for use in a non-beryllium area of a DOE facility, the responsible employer must ensure that:
   (1) The removable contamination level of equipment or item surfaces does not exceed the higher of 0.2 µg/100 cm² or the concentration level of beryllium in soil at the point or release, whichever is greater;
   (2) The equipment or item is labeled in accordance with §850.38(b); and
   (3) The release is conditioned on the recipient’s commitment to implement controls that will prevent foreseeable beryllium exposure, considering the nature of the equipment or item and its future use and the nature of the beryllium contamination.
§ 850.34 Medical surveillance.

(a) General. (1) The responsible employer must establish and implement a medical surveillance program for beryllium-associated workers who voluntarily participate in the program.

(2) The responsible employer must designate a Site Occupational Medical Director (SOMD) who is responsible for administering the medical surveillance program.

(3) The responsible employer must ensure that the medical evaluations and procedures required by this section are performed by, or under the supervision of, a licensed physician who is familiar with the health effects of beryllium.

(4) The responsible employer must establish, and maintain, a list of beryllium-associated workers who may be eligible for protective measures under this part. The list must be:

(i) Based on the hazard assessment, exposure records, and other information regarding the identity of beryllium-associated workers; and

(ii) Adjusted at regular intervals based on periodic evaluations of beryllium-associated workers performed under paragraph (b)(2) of this section.

(5) The responsible employer must provide the SOMD with the information needed to operate and administer the medical surveillance program, including the:

(i) List of beryllium-associated workers required by paragraph (a)(4) of this section;

(ii) Baseline inventory;

(iii) Hazard assessment and exposure monitoring data;

(iv) Identity and nature of activities or operations on the site that are covered under the CBDPP, related duties of beryllium-associated workers; and

(v) Type of personal protective equipment used.

(6) The responsible employer must provide the following information to the SOMD and the examining physician:

(i) A copy of this rule and its preamble;

(ii) A description of the worker’s duties as they pertain to beryllium exposure;

(iii) Records of the worker’s beryllium exposure; and

(iv) A description of the personal protective and respiratory protective equipment used by the worker in the past, present, or anticipated future use.

(b) Medical evaluations and procedures. The responsible employer must provide, to beryllium-associated workers who voluntarily participate in the medical surveillance program, the medical evaluations and procedures required by this section at no cost and at
§ 850.34 a time and place that is reasonable and convenient to the worker.

(1) Baseline medical evaluation. The responsible employer must provide a baseline medical evaluation to beryllium-associated workers. This evaluation must include:

(i) A detailed medical and work history with emphasis on past, present, and anticipated future exposure to beryllium;
(ii) A respiratory symptoms questionnaire;
(iii) A physical examination with special emphasis on the respiratory system, skin and eyes;
(iv) A chest radiograph (posterior-anterior, 14 × 17 inches) interpreted by a National Institute for Occupational Safety and Health (NIOSH) B-reader of pneumoconiosis or a board-certified radiologist (unless a baseline chest radiograph is already on file);
(v) Spirometry consisting of forced vital capacity (FVC) and forced expiratory volume at 1 second (FEV1);
(vi) A Be-LPT; and
(vii) Any other tests deemed appropriate by the examining physician for evaluating beryllium-related health effects.

(2) Periodic evaluation. (i) The responsible employer must provide to beryllium workers a medical evaluation annually, and to other beryllium-associated workers a medical evaluation every three years. The periodic medical evaluation must include:

(A) A detailed medical and work history with emphasis on past, present, and anticipated future exposure to beryllium;
(B) A respiratory symptoms questionnaire;
(C) A physical examination with emphasis on the respiratory system;
(D) A Be-LPT; and
(E) Any other medical evaluations deemed appropriate by the examining physician for evaluating beryllium-related health effects.

(ii) The responsible employer must provide to beryllium-associated workers a chest radiograph every five years.

(3) Emergency evaluation. The responsible employer must provide a medical evaluation as soon as possible to any worker who may have been exposed to beryllium because of a beryllium emergency. The medical evaluation must include the requirements of paragraph (b)(2) of this section.

(c) Multiple physician review. The responsible employer must establish a multiple physician review process for beryllium-associated workers that allows for the review of initial medical findings, determinations, or recommendations from any medical evaluation conducted pursuant to paragraph (b) of this section.

(1) If the responsible employer selects the initial physician to conduct any medical examination or consultation provided to a beryllium-associated worker, the worker may designate a second physician to:

(i) Review any findings, determinations, or recommendations of the initial physician; and
(ii) Conduct such examinations, consultations and laboratory tests, as the second physician deems necessary to facilitate this review.

(2) The responsible employer must promptly notify a beryllium-associated worker in writing of the right to seek a second medical opinion after the initial physician provided by the responsible employer conducts a medical examination or consultation.

(3) The responsible employer may condition its participation in, and payment for, multiple physician review upon the beryllium-associated worker doing the following within fifteen (15) days after receipt of the notice, or receipt of the initial physician’s written opinion, whichever is later:

(i) Informing the responsible employer in writing that he or she intends to seek a second medical opinion; and
(ii) Initiating steps to make an appointment with a second physician.

(4) If the findings, determinations, or recommendations of the second physician differ from those of the initial physician, then the responsible employer and the beryllium-associated worker must make efforts to encourage and assist the two physicians to resolve any disagreement.

(5) If, despite the efforts of the responsible employer and the beryllium-associated worker, the two physicians are unable to resolve their disagreement, then the responsible employer
§ 850.35 Medical removal.

(a) Medical removal protection. The responsible employer must offer a beryllium-associated worker medical removal from exposure to beryllium if the SOMD determines in a written

and the worker, through their respective physicians, must designate a third physician to:

(i) Review any findings, determinations, or recommendations of the other two physicians; and

(ii) Conduct such examinations, consultations, laboratory tests, and consultations with the other two physicians, as the third physician deems necessary to resolve the disagreement among them.

(b) The SOMD must act consistently with the findings, determinations, and recommendations of the third physician, unless the SOMD and the beryllium-associated worker reach an agreement that is consistent with the recommendations of at least one of the other two physicians.

(c) Alternate physician determination. The responsible employer and the beryllium-associated worker or the worker’s designated representative may agree upon the use of any alternate form of physician determination in lieu of the multiple physician review process provided by paragraph (c) of this section, so long as the alternative is expeditious and at least as protective of the worker.

(d) Written medical opinion and recommendation. (1) Within two weeks of receipt of results, the SOMD must provide to the responsible employer a written, signed medical opinion for each medical evaluation performed on each beryllium-associated worker. The SOMD’s opinion must contain:

(i) The diagnosis of the worker’s condition relevant to occupational exposure to beryllium, and any other medical condition that would place the worker at increased risk of material impairment to health from further exposure to beryllium;

(ii) Any recommendation for removal of the worker from DOE beryllium activities, or limitation on the worker’s activities or duties or use of personal protective equipment, such as a respirator; and

(iii) A statement that the SOMD or examining physician has clearly explained to the worker the results of the medical evaluation, including all tests results and any medical condition related to beryllium exposure that requires further evaluation or treatment.

(2) The SOMD’s written medical opinion must not reveal specific records, findings, and diagnoses that are not related to medical conditions that may be affected by beryllium exposure.

(e) Information provided to the beryllium-associated worker. (1) The responsible employer must, within 30 days after a request by a beryllium-associated worker, provide the worker with the information the responsible employer is required to provide the examining physician under paragraph (a)(6) of this section.

(g) Reporting. The responsible employer must report on the applicable OSHA reporting form beryllium sensitization, CBD, or any other abnormal condition or disorder of workers caused or aggravated by occupational exposure to beryllium.

(h) Data analysis. (1) The responsible employer must routinely and systematically analyze medical, job, and exposure data with the aim of identifying individuals or groups of individuals potentially at risk for CBD and working conditions that are contributing to that risk.

(2) The responsible employer must use the results of these analyses to identify additional workers to whom the responsible employer must provide medical surveillance and to determine the need for additional exposure controls.

§ 850.36 Reporting.

(1) The responsible employer must report to OSHA any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(2) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(3) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(4) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(5) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(6) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(7) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(8) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(9) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(10) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(11) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(12) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(13) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(14) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(15) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(16) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(17) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(18) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(19) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.

(20) The responsible employer must report to any authorized Federal, State, or local health or safety agency any occupational exposure incident or event that results in the exposure of any worker to a hazardous chemical under the current OSHA reporting regulations.
medical opinion that it is medically appropriate to remove the worker from such exposure. The SOMD’s determination must be based on one or more positive Be-LPT results, chronic beryllium disease diagnosis, an examining physician’s recommendation, or any other signs or symptoms that the SOMD deems medically sufficient to remove a worker.

(1) Temporary removal pending final medical determination. The responsible employer must offer a beryllium-associated worker temporary medical removal from exposure to beryllium on each occasion that the SOMD determines in a written medical opinion that the worker should be temporarily removed from such exposure pending a final medical determination of whether the worker should be removed permanently.

(i) In this section, “final medical determination” means the outcome of the multiple physician review process or the alternate medical determination process provided for in paragraphs (c) and (d) of §850.34.

(ii) If a beryllium-associated worker is temporarily removed from beryllium exposure pursuant to this section, the responsible employer must transfer the worker to a comparable job for which the worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level.

(iii) The responsible employer must maintain the beryllium-associated worker’s total normal earnings, seniority, and other worker rights and benefits as if the worker had not been removed.

(iv) If there is no such job available, the responsible employer must provide to the beryllium-associated worker the medical removal protection benefits specified in paragraph (b)(2) of this section, until a job becomes available or for one year, whichever comes first.

(2) Permanent medical removal. (i) The responsible employer must offer a beryllium-associated worker permanent medical removal from exposure to beryllium if the SOMD determines in a written medical opinion that the worker should be permanently removed from exposure to beryllium.

(ii) If a beryllium-associated worker is removed permanently from beryllium exposure based on the SOMD’s recommendation pursuant to this section, the responsible employer must provide the worker the medical removal protection benefits specified in paragraph (b) of this section.

(3) Worker consultation before temporary or permanent medical removal. If the SOMD determines that a beryllium-associated worker should be temporarily or permanently removed from exposure to beryllium, the SOMD must:

(i) Advise the beryllium-associated worker of the determination that medical removal is necessary to protect the worker’s health;

(ii) Provide the beryllium-associated worker with a copy of this rule and its preamble, and any other information the SOMD deems necessary on the risks of continued exposure to beryllium and the benefits of removal;

(iii) Provide the beryllium-associated worker the opportunity to have any questions concerning medical removal answered; and

(iv) Obtain the beryllium-associated worker’s signature acknowledging that the worker has been advised to accept medical removal from beryllium exposure as provided in this section, and has been provided with the information specified in this paragraph, on the benefits of removal and the risks of continued exposure to beryllium.

(4) Return to work after medical removal. (i) The responsible employer, subject to paragraph (a)(4)(ii) of this section, must not return a beryllium-associated worker who has been permanently removed under this section to the worker’s former job status unless the SOMD first determines in a written medical opinion that continued medical removal is no longer necessary to protect the worker’s health.

(ii) Notwithstanding paragraph (a)(4)(i) of this section, if, in the SOMD’s opinion, continued exposure to beryllium will not pose an increased risk to the beryllium-associated worker’s health, and medical removal is an inappropriate remedy in the circumstances, the SOMD must fully discuss these matters with the worker and then, in a written determination, may authorize
the responsible employer to return the worker to his or her former job status. Thereafter, the returned beryllium-associated worker must continue to be provided with medical surveillance under §850.34 of this part.

(b) **Medical removal protection benefits.**

(1) If a beryllium-associated worker has been permanently removed from beryllium exposure pursuant to paragraph (a)(2) of this section, the responsible employer must provide the beryllium-associated worker:

(i) The opportunity to transfer to another position which is available, or later becomes available, for which the beryllium-associated worker is qualified (or for which the worker can be trained in a short period) and where beryllium exposures are as low as possible, but in no event at or above the action level; or

(ii) If the beryllium-associated worker cannot be transferred to a comparable job where beryllium exposures are below the action level, a maximum of 2 years of permanent medical removal protection benefits (specified in paragraph (b)(2) of this section).

(2) If required by this section to provide medical removal protection benefits, the responsible employer must maintain the removed worker’s total normal earnings, seniority and other worker rights and benefits, as though the worker had not been removed.

(3) If a removed beryllium-associated worker files a claim for workers’ compensation payments for a beryllium-related disability, then the responsible employer must continue to provide medical removal protection benefits pending disposition of the claim. The responsible employer must receive no credit for the workers’ compensation payments received by the worker for treatment related expenses.

(4) The responsible employer’s obligation to provide medical removal protection benefits to a removed beryllium-associated worker is reduced to the extent that the worker receives compensation for earnings lost during the period of removal either from a publicly- or employer-funded compensation program, or from employment with another employer made possible by virtue of the worker’s removal.

(5) For the purposes of this section, the requirement that a responsible employer provide medical removal protection benefits is not intended to expand upon, restrict, or change any rights to a specific job classification or position under the terms of an applicable collective bargaining agreement.

(6) The responsible employer may condition the provision of medical removal protection benefits upon the beryllium-associated worker’s participation in medical surveillance provided in accordance with §850.34 of this part.

§ 850.36 **Medical consent.**

(a) The responsible employer must provide each beryllium-associated worker with a summary of the medical surveillance program established in §850.34 at least one week before the first medical evaluation or procedure or at any time requested by the worker. This summary must include:

(1) The type of data that will be collected in the medical surveillance program;

(2) How the data will be collected and maintained;

(3) The purpose for which the data will be used; and

(4) A description of how confidential data will be protected.

(b) Responsible employers must also provide each beryllium-associated worker with information on the benefits and risks of the medical tests and examinations available to the worker at least one week prior to any such examination or test, and an opportunity to have the worker’s questions answered.

(c) The responsible employer must have the SOMD obtain a beryllium-associated worker’s signature on the informed consent form found in Appendix A to this part, before performing medical evaluations or any tests.

§ 850.37 **Training and counseling.**

(a) The responsible employer must develop and implement a beryllium training program and ensure participation for:

(1) Beryllium-associated workers;

(2) All other individuals who work at a site where beryllium activities are conducted.
§850.38 Warning signs and labels.

(a) Warning signs. The responsible employer must post warning signs at each access point to a regulated area with the following information:

DANGER
BERYLLIUM CAN CAUSE LUNG DAMAGE
CANCER HAZARD
AUTHORIZED PERSONNEL ONLY

(b) Warning labels. (1) The responsible employer must affix warning labels to all containers of beryllium, beryllium compounds, or beryllium-contaminated clothing, equipment, waste, scrap, or debris.

(2) Warning labels must contain the following information:

DANGER
CONTAMINATED WITH BERYLLIUM
DO NOT REMOVE DUST BY BLOWING OR SHAKING
CANCER AND LUNG DISEASE HAZARD

(c) Warning signs and labels must be in accordance with 29 CFR 1910.1200, Hazard Communication.

§850.39 Recordkeeping and use of information.

(a) The responsible employer must establish and maintain accurate records of all beryllium inventory information, hazard assessments, exposure measurements, exposure controls, and medical surveillance.

(b) Heads of DOE Departmental Elements must:

(1) Designate all record series as required under this rule as agency records and, therefore, subject to all applicable agency records management and access laws; and

(2) Ensure that these record series are retained for a minimum of seventy-five years.

(c) The responsible employer must convey to DOE or its designee all record series required under this rule if the employer ceases to be involved in the CBDPP.

(d) The responsible employer must link data on workplace conditions and
health outcomes in order to establish a basis for understanding the beryllium health risk.

(e) The responsible employer must ensure the confidentiality of all work-related records generated under this rule by ensuring that:

(1) All records that are transmitted to other parties do not contain names, social security numbers or any other variables, or combination of variables, that could be used to identify particular individuals; and

(2) Individual medical information generated by the CBDPP is:

(i) Either included as part of the worker’s site medical records and maintained by the SOMD, or is maintained by another physician designated by the responsible employer;

(ii) Maintained separately from other records; and

(iii) Used or disclosed by the responsible employer only in conformance with any applicable requirements imposed by the Americans with Disabilities Act, the Privacy Act of 1974, the Freedom of Information Act, and any other applicable law.

(f) The responsible employer must maintain all records required by this part in current and accessible electronic systems, which include the ability readily to retrieve data in a format that maintains confidentiality.

(g) The responsible employer must transmit all records generated as required by this rule, in a format that protects the confidentiality of individuals, to the DOE Assistant Secretary for Environment, Safety and Health on request.

(h) The responsible employer must semi-annually transmit to the DOE Office of Epidemiologic Studies within the Office of Environment, Safety and Health an electronic registry of beryllium-associated workers that protects confidentiality, and the registry must include, but is not limited to, a unique identifier, date of birth, gender, site, job history, medical screening test results, exposure measurements, and results of referrals for specialized medical evaluations.

§ 850.40 Performance feedback.

(a) The responsible employer must conduct periodic analyses and assessments of monitoring activities, hazards, medical surveillance, exposure reduction and minimization, and occurrence reporting data.

(b) To ensure that information is available to maintain and improve all elements of the CBDPP continuously, the responsible employer must give results of periodic analyses and assessments to the line managers, planners, worker protection staff, workers, medical staff, and labor organizations representing beryllium-associated workers who request such information.

APPENDIX A TO PART 850—CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM INFORMED CONSENT FORM

I, __________________ have carefully read and understand the attached information about the Be-LPT and other medical tests. I have had the opportunity to ask any questions that I may have had concerning these tests.

I understand that this program is voluntary and I am free to withdraw at any time from all or any part of the medical surveillance program. I understand that the tests are confidential, but not anonymous. I understand that if the results of any test suggest a health problem, the examining physician will discuss the matter with me, whether or not the result is related to my work with beryllium. I understand that my employer will be notified of my diagnosis only if I have a beryllium sensitization or chronic beryllium disease. My employer will not receive the results or diagnoses of any health conditions not related to beryllium exposure.

I understand that, if the results of one or more of these tests indicate that I have a health problem that is related to beryllium, additional examinations will be recommended. If additional tests indicate I do have a beryllium sensitization or CBD, the Site Occupational Medical Director may recommend that I be removed from working with beryllium. If I agree to be removed, I understand that I may be transferred to another job for which I am qualified (or can be trained for in a short period) and where my beryllium exposures will be as low as possible, but in no case above the action level. I will maintain my total normal earnings, seniority, and other benefits for up to two years if I agree to be permanently removed.

I understand that if I apply for another job or for insurance, I may be requested to release my medical records to a future employer or an insurance company.

I understand that my employer will maintain all medical information relative to the tests performed on me in segregated medical
files separate from my personnel files, treated as confidential medical records, and used or disclosed only as provided by the Americans with Disability Act, the Privacy Act of 1974, or as required by a court order or under other law.

I understand that the results of my medical tests for beryllium will be included in the Beryllium Registry maintained by DOE, and that a unique identifier will be used to maintain the confidentiality of my medical information. Personal identifiers will not be included in any reports generated from the DOE Beryllium Registry. I understand that the results of my tests and examinations may be published in reports or presented at meetings, but that I will not be identified.

I consent to having the following medical evaluations:

// Physical examination concentrating on my lungs and breathing
// Chest X-ray
// Spirometry (a breathing test)
// Blood test called the beryllium-induced lymphocyte proliferation test or Be-LPT
// Other test(s). Specify:

Signature of Participant:

Date: __________________

I have explained and discussed any questions that the employee expressed concerning the Be-LPT, physical examination, and other medical testing as well as the implications of those tests.

Name of Examining Physician:

Signature of Examining Physician:

Dated: __________________

**PART 860—TRESPASSING ON DEPARTMENT OF ENERGY PROPERTY**

Sec.
860.1 Purpose.
860.2 Scope.
860.3 Trespass.
860.4 Unauthorized introduction of weapons or dangerous materials.
860.5 Violations and penalties.
860.7 Effective date of prohibition on designated locations.
860.8 Applicability of other laws.


**SOURCE:** 58 FR 47985, Sept. 14, 1993, unless otherwise noted.

§ 860.1 Purpose.

The regulations in this part are issued for the protection and security of facilities, installations and real property subject to the jurisdiction or administration, or in the custody of, the Department of Energy.

§ 860.2 Scope.

The regulations in this part apply to all facilities, installations and real property subject to the jurisdiction or administration of the Department of Energy or in its custody which have been posted with a notice of the prohibitions and penalties set forth in this part.

§ 860.3 Trespass.

Unauthorized entry upon any facility, installation or real property subject to this part is prohibited.

§ 860.4 Unauthorized introduction of weapons or dangerous materials.

Unauthorized carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation or real property subject to this part, is prohibited.

§ 860.5 Violations and penalties.

(a) Whoever willfully violates either §860.3 or §860.4 shall, upon conviction, be guilty of an infraction punishable by a fine of not more than $5,000.

(b) Whoever willfully violates either §860.3 or §860.4 with respect to any facility, installation or real property enclosed by a fence, wall, floor, roof, or other structural barrier shall upon conviction, be guilty of a Class A misdemeanor punishable by a fine not to exceed $100,000 or imprisonment for not more than one year, or both.

§ 860.6 Posting.

Notices stating the pertinent prohibitions of §§860.3 and 860.4 and penalties of §860.5 will be conspicuously posted at all entrances of each designated facility, installation or parcel of real
property and at such intervals along
the perimeter as will provide reason-
able assurance of notice to persons
about to enter.

§ 860.7 Effective date of prohibition on
designated locations.

The prohibitions in §§860.3 and 860.4
shall take effect as to any facility, in-
stallation or real property on publica-
tion in the FEDERAL REGISTER of the
notice designating the facility, instal-
luration or real property and posting in
accordance with §860.6.

§ 860.8 Applicability of other laws.

Nothing in this part shall be con-
strued to affect the applicability of the
provisions of State or other Federal
laws.

PART 861—CONTROL OF TRAFFIC
AT NEVADA TEST SITE

Sec.
861.1 Purpose.
861.2 Scope.
861.3 Definitions.
861.4 Use of site streets.
861.5 Penalties.
861.6 Posting and distribution.
861.7 Applicability of other laws.

APPENDIX A TO PART 861—PERIMETER
DESCRIPTION OF DOE’S NEVADA TEST SITE

AUTHORITY: 62 Stat. 281, as amended; sec.
389; sec. 161, 68 Stat. 948, as amended, sec. 1,
81 Stat. 54; 40 U.S.C. 318; 42 U.S.C. 2201; 5
U.S.C. 552; Federal Property Management
Regulations T.R. D–11, 34 FR 1997, and Dele-
gation of Authority to Manager, Nevada Op-
erations Office.

SOURCE: 41 FR 56788, Dec. 30, 1976, unless
otherwise noted.

§ 861.1 Purpose.

The regulations in this part are de-
signed to facilitate the control of traf-
cic at the Nevada Test Site.

§ 861.2 Scope.

This part applies to all persons who
use the streets of the Nevada Test Site.

§ 861.3 Definitions.

As used in this part:
(a) DOE means the Department of
Energy.
(b) Nevada Test Site means DOE’s Ne-
veda Test Site located in Nye County,
§ 861.5 Penalties.

Any person doing any act forbidden or failing to do any act required by the Nevada Test Site Traffic Regulations shall, upon conviction, be punishable by a fine of not more than $50 or imprisonment for not more than 30 days, or both.

§ 861.6 Posting and distribution.

Notices including the provisions of the Nevada Test Site Traffic Regulations will be conspicuously posted at the Nevada Test Site. Such other distribution of the Nevada Test Site Regulations will be made by the Manager as will provide reasonable assurance of notice to persons subject to the regulations.

§ 861.7 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State laws or of other Federal laws.

APPENDIX A TO PART 861—PERIMETER DESCRIPTION OF DOE’S NEVADA TEST SITE

The Nevada Test Site, containing approximately 858,764 acres located in Nye County, Nev., is described as follows:

Beginning at the northwesterly corner of the tract of land hereinafter described, said corner being at latitude 37°28′04″, longitude 116°34′20″;

Thence easterly approximately 6.73 miles, to a point at latitude 37°20′45″ longitude 116°27′00″;

Thence northeasterly approximately 4.94 miles to a point at latitude 37°23′07″, longitude 116°22′30″;

Thence easterly approximately 4.81 miles to a point at latitude 37°23′07″, longitude 116°17′15″;

Thence southeasterly approximately 6.77 miles to a point at latitude 37°19′47″, longitude 116°11′10″;

Thence southerly approximately 5.27 miles to a point at latitude 37°15′12″, longitude 116°11′10″;

Thence easterly approximately 14.21 miles to a point at latitude 37°15′07″, longitude 115°55′42″;

Thence southerly approximately 39.52 miles to a point at latitude 36°40′43″, longitude 115°55′37″;

Thence westerly approximately 2.87 miles to a point at latitude 36°49′10″, longitude 115°58′43″;

Thence southerly approximately 5.23 miles to a point at latitude 36°36′07″, longitude 115°56′11″;

Thence southwesterly along a perimeter distance approximately 5.62 miles to a point at latitude 36°34′39″, longitude 116°04′11″;

Thence northerly approximately 3.20 miles to a point at latitude 36°37′26″, longitude 116°04′11″;

Thence northwesterly approximately 5.16 miles to a point at latitude 36°40′28″, longitude 116°17′37″;

Thence westerly approximately 8.63 miles to a point at latitude 36°40′23″, longitude 116°17′37″;

Thence southerly approximately 0.19 mile to a point at latitude 36°40′13″, longitude 116°17′37″.
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§ 862.4

Thence westerly approximately 8.49 miles to a point at latitude 36°40′13.666″, longitude 116°36′47.915″;
Thence northerly approximately 32.87 miles to a point at latitude 37°08′50″, longitude 116°26′44.125″;
Thence northwesterly approximately 15.37 miles to a point at latitude 37°20′45″, longitude 116°34′20″, the point of beginning herein.


PART 862—RESTRICTIONS ON AIRCRAFT LANDING AND AIR DELIVERY AT DEPARTMENT OF ENERGY NUCLEAR SITES

Sec.
862.1 Purpose.
862.2 Scope.
862.3 Definitions.
862.4 Prohibitions and penalties.
862.5 Procedures for removal of downed aircraft.
862.6 Voluntary minimum altitude.
862.7 Designation of sites.

AUTHORITY: 42 U.S.C. 2201(b), 2201(i) and 2278(a).

SOURCE: 52 FR 29838, Aug. 12, 1987, unless otherwise noted.

§ 862.4

The purpose of this part is to set forth Department of Energy, hereinafter “DOE”, security policy regarding aircraft and air delivery on nuclear sites under the jurisdiction of DOE pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

§ 862.2 Scope.

(a) This part applies to all persons or aircraft entering or otherwise within or above areas within the boundaries of lands or waters subject to the jurisdiction, administration, or in the custody of the DOE at sites designated by DOE.

(b) This part is not applicable to:

(1) Aircraft operating pursuant to official business of the Federal Government;

(2) Aircraft over-flying or in the process of landing pursuant to official business of a state or local law enforcement authority with prior notification to DOE; or

(3) Aircraft in the process of landing on a DOE site due to circumstances beyond the control of the operator and with prior notification to DOE, if possible.

(c) Aircraft in paragraphs (b)(2) and (b)(3) of this section are within the scope of this part upon landing at a DOE designated site.

§ 862.3 Definitions.

(a) Air delivery. Delivering or retrieving a person or object by airborne means, including but not limited to, aircraft.

(b) Aircraft. A manned or unmanned device or any portion thereof, that is commonly used or intended to be used for flight in the air, including powerless flight. Such devices include but are not limited to any parachute, hovercraft, helicopter, glider, airplane or lighter than air vehicle.

(c) Boundary. A delineation on a map of Federal interest in land or water utilized by DOE pursuant to the Atomic Energy Act of 1954, as amended:

(1) Authorized by Congress, or

(2) Published pursuant to law in the Federal Register, or

(3) Filed or recorded with a State or political subdivision in accordance with applicable law.

(d) Designated site. An area of land or water identified in accordance with §862.7 of this part.

(e) Downed aircraft. An aircraft that is on a designated site due to emergency landing or for any other reason.

(f) Manager of Operations. The Manager of a DOE Operations Office, the Manager of the Pittsburgh Naval Reactors Office, the Manager of the Schenectady Naval Reactors Office and, for designated sites administered directly by DOE Headquarters, the Director of the Office of Safeguards and Security.

§ 862.4 Prohibitions and penalties.

(a) The following activities are prohibited by his part:

(1) Operation or use of aircraft on lands or waters of designated sites.

(2) Air delivery to or from designated sites.

(3) Removal or movement of downed aircraft, or participation in the removal or movement of downed aircraft, from or on a designated site unless
§ 862.5 Prior authorization is obtained pursuant to § 862.5 of this part.

(4) Failure to remove a downed aircraft from a designated site in accordance with an order issued by the cognizant DOE Manager of Operations under § 862.5 of this part.

(5) Violation of Federal Aviation Administration regulations regarding minimum altitudes and prohibited flight maneuvers over a designated site.

(b) A person willfully engaging in activities prohibited by this part may be subject to the imposition of criminal penalties set forth in sections 223 and 229 of the Atomic Energy Act, as amended (42 U.S.C. 2273 and 2278(a)).

§ 862.5 Procedures for removal of downed aircraft.

(a) An aircraft on or brought on to a designated site, except as provided in § 862.2(b)(1), shall not be moved within or removed from such areas except as provided for in this section. All such aircraft are subject to full inspection by DOE security personnel upon landing upon order of the Manager of Operations or his designee. Any attempt to depart or remove the aircraft from a designated site without clearance obtained pursuant to this section, may be assumed to be indicative of hostile intent by security forces at such sites.

(b) (1) The cognizant DOE Manager of Operations for a designated site may, on his own initiative, issue a written order to the owner or operator of a downed aircraft to require the removal of that aircraft from the site within 20 days of this notice. Such an order shall specify:

(i) The date upon which removal operations must be completed;

(ii) The times and means of access to and from the downed aircraft to be removed;

(iii) The manner of removal; and

(iv) An estimate of the cost of removal to DOE for which the owner or operator will be held liable if removal is accomplished by DOE.

(2) The owner or operator of the downed aircraft may file a written petition, supported by affidavits, to the cognizant Manager of Operations requesting that the order be modified or set aside. The petition may be granted by the Manager of Operations for good cause shown, upon a finding that it is clearly consistent with the national security, public safety, and federal property interests. Such petition must be filed at least 10 days prior to the date upon which removal is to be initiated, as specified in the order. The written decision of the Manager of Operations shall be a final agency action.

(c) (1) The owner of a downed aircraft may petition the cognizant Manager of Operations of permission to move or remove the downed aircraft from or within a designated site. The petition must provide assurances that the owner will fully compensate DOE for all costs incurred or damages experienced as a result of landing or removal through a contract for services. The Manager of Operations may, for good cause shown, waive part or all of the compensation which might otherwise be due DOE.

(2) The Manager of Operations may deny such petition in whole or part and prohibit removal of a downed aircraft upon finding that:

(i) The removal of a downed aircraft would create an unacceptable safety or security risk;

(ii) The removal of a downed aircraft would result in excessive resource loss of property damage or an unacceptable disruption of federal activities;

(iii) The removal of downed aircraft is impracticable or impossible;

(iv) The owner has failed to provide adequate assurances that all costs incurred or damages experienced by DOE due to landing or removal of aircraft will be fully paid immediately upon removal by the owner under a contract for services;

(v) An inspection of the aircraft has not been conducted by DOE security personnel.

(3) In the event that such petition is granted in whole or part, the cognizant Manager of Operations may issue an order, as set forth in (b)(1) (i) through (iv) of this section. In the event that a petition is denied in whole or part, the Manager of Operations shall issue a written decision which shall set forth the reasons for such denial.

(d) Failure to comply with an order issued by the Manager of Operations pursuant to this section is basis for DOE to consider the downed aircraft to
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be abandoned property. DOE may take whatever measures it deems necessary when it determines that downed aircraft is abandoned property.

(e) Notwithstanding paragraphs (b) and (c) of this section, the Manager of Operations may move or remove a downed aircraft from such an area upon oral or written notification to the owner or operator of such aircraft upon a finding that national security or operational requirements necessitate expedited movement or removal. The owner or operator may be held jointly and separately liable for all expenses incurred by DOE in the movement or removal of such aircraft. Such expenses shall be deemed to be incurred through an implied contract at law for services.

§ 862.6 Voluntary minimum altitude.

In addition to complying with all applicable FAA prohibitions or restrictions, aircraft are requested to maintain a minimum altitude of 2,000 feet above the terrain of a designated site. Applicable FAA prohibitions or restrictions take precedence over this voluntary minimum altitude.

§ 862.7 Designation of sites.

(a) DOE shall designate sites covered by this part as deemed necessary, consistent with the national security and public safety, through notice in the FEDERAL REGISTER.

(b) This part shall be effective as to any facility, installation, or real property on publication in the FEDERAL REGISTER of the notice designating the site.

(c) Upon designation of a site, the cognizant Manager of Operations may inform the public of such designation through press release or posting of notice at airfields in the vicinity of the designated site.

PART 871—AIR TRANSPORTATION OF PLUTONIUM

Sec.

871.1 National security exemption.

871.2 Public health and safety exemption.

871.3 Records.

871.4 Limitation on redelegation of authority.


SOURCE: 42 FR 48332, Sept. 23, 1977, unless otherwise noted.

§ 871.1 National security exemption.

(a) The following DOE air shipments of plutonium are considered as being made for the purposes of national security within the meaning of section 502(2) of Public Law 94–187:

(1) Shipments made in support of the development, production, testing, sampling, maintenance, repair, modification, or retirement of atomic weapons or devices;

(2) Shipments made pursuant to international agreements for cooperation for mutual defense purposes; and

(3) Shipments necessary to respond to an emergency situation involving a possible threat to the national security.

(b) The Managers of DOE’s Albuquerque, San Francisco, Oak Ridge, Savannah River, and Nevada Operations Offices may authorize air shipments falling within paragraph (a)(1) of this section, on a case-by-case basis: Provided, That the matter falls within their respective scopes of responsibility and that they determine such shipment is required to be made by aircraft either because:

(1) The delay resulting from using ground transportation methods would have serious adverse impact upon a national security requirement;

(2) Safeguards or safety considerations dictate the use of air transportation;

(3) The nature of the item to be shipped necessitates the use of air transportation in order to avoid possible damage which may be expected from other available transportation environments; or

(4) The nature of the item being shipped necessitates rapid shipment by air in order to preserve the chemical, physical, or isotopic properties of the item.

They may also authorize air shipments falling within paragraph (a)(2) of this section in all cases since the inherent time delays of surface transportation...
§ 871.2 Public health and safety exemption.

The Managers of DOE’s Albuquerque, San Francisco, Oak Ridge, Savannah River, Nevada, Idaho, and Richland Operations Offices may authorize, on a case-by-case basis, DOE air shipments of plutonium where they determine that rapid shipment by air is required to respond to an emergency situation involving possible loss of life, serious personal injuries, considerable property damage, or other significant threat to the public health and safety.

§ 871.3 Records.

Determinations made by the authorizing officials pursuant to these rules shall be matters of record. Such authorizations shall be reported to the Assistant Administrator for National Security within twenty-four hours after authorization is granted.

§ 871.4 Limitation on redelegation of authority.

The authority delegated in this part may not be redelegated without the prior approval of the Assistant Administrator for National Security.

PART 903—POWER AND TRANSMISSION RATES

Subpart A—Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations

§ 903.1 Purpose and scope; application.

(a) Except as otherwise provided herein, these regulations establish procedures for the development of power and transmission rates by the Administrators of the Alaska, Southeastern, Southwestern, and Western Area Power Administrations; for the providing of opportunities for interested members of the public to participate in the development of such rates; for the confirmation, approval, and placement in effect on an interim basis by the Deputy Secretary of the Department of Energy of such rates; and for the submission of such rates to the Federal Energy Regulatory Commission with or without prior interim approval. These regulations supplement Delegation Order No. 0204-108 of the Secretary of Energy, which was published in the FEDERAL REGISTER and became effective on December 14, 1983 (48 FR 55664), with respect to the activities of the Deputy Secretary and the Administrators.

(b) These procedures shall apply to all power and transmission rate adjustment proceedings for the Power Marketing Administrations (PMAs) which are commenced after these regulations become effective or were in process on the effective date of these regulations.
but for which the FERC had not issued any substantive orders on or before December 14, 1983. These procedures supersede “Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations” published in 45 FR 86983 (December 31, 1980) and amended at 46 FR 6864 (January 22, 1981) and 46 FR 25427 (May 7, 1981).

(c) Except to the extent deemed appropriate by the Administrator in accordance with applicable law, these procedures do not apply to rates for short term sales of capacity, energy, or transmission service.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

§ 903.2 Definitions.

As used herein—

(a) Administrator means the Administrator of the PMA whose rate is involved in the rate adjustment, or anyone acting in such capacity.

(b) Department means the Department of Energy, including the PMAs but excluding the Federal Energy Regulatory Commission.

(c) Deputy Secretary means the Deputy Secretary of the Department of Energy, or anyone acting in such capacity.

(d) FERC means the Federal Energy Regulatory Commission.

(e) Major rate adjustment means a rate adjustment other than a minor rate adjustment.

(f) Minor rate adjustment means a rate adjustment which (1) will produce less than 1 percent change in the annual revenues of the power system or (2) is for a power system which has either annual sales normally less than 100 million kilowatt hours or an installed capacity of less than 20,000 kilowatts.

(g) Notice means the statement which informs customers and the general public of Proposed Rates or proposed rate extensions, opportunities for consultation and comment, and public forums. The Notice shall be by and effective on the date of publication in the Federal Register. Whenever a time period is provided, the date of publication in the Federal Register shall determine the commencement of the time period, unless otherwise provided in the Notice. The Notice shall include the name, address, and telephone number of the person to contact if participation or further information is sought.

(h) Power Marketing Administration or PMA means the Alaska Power Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration.

(i) Power system means a powerplant or a group of powerplants and related facilities, including transmission facilities, or a transmission system, that the PMA treats as one unit for the purposes of establishing rates and demonstrating repayment.

(j) Proposed Rate means a rate revision or a rate for a new service which is under consideration by the Department on which public comment is invited.

(k) Provisional Rate means a rate which has been confirmed, approved, and placed in effect on an interim basis by the Deputy Secretary.

(l) Rate means the monetary charge or the formula for computing such a charge for any electric service provided by the PMA, including but not limited to charges for capacity (or demand), energy, or transmission service; however, it does not include leasing fees, service facility charges, or other types of facility use charges. A rate may be set forth in a rate schedule or in a contract.

(m) Rate adjustment means a change in an existing rate or rates, or the establishment of a rate or rates for a new service. It does not include a change in rate schedule provisions or in contract terms, other than changes in the price per unit of service, nor does it include changes in the monetary charge pursuant to a formula stated in a rate schedule or a contract.

(n) Rate schedule means a document identified as a “rate schedule,” “schedule of rates,” or “schedule rate” which designates the rate or rates applicable to a class of service specified therein and may contain other terms and conditions relating to the service.

(o) Short term sales means sales that last for no longer than one year.
§ 903.11 Substitute Rate

(p) Substitute Rate means a rate which has been developed in place of the rate that was disapproved by the FERC.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

§ 903.11 Advance announcement of rate adjustment.

The Administrator may announce that the development of rates for a new service or revised rates for an existing service is under consideration. The announcement shall contain pertinent information relevant to the rate adjustment. The announcement may be through direct contact with customers, at public meetings, by press release, by newspaper advertisement, and/or by FEDERAL REGISTER publication. Written comments relevant to rate policy and design and to the rate adjustment process may be submitted by interested parties in response to the announcement. Any comments received shall be considered in the development of Proposed Rates.

§ 903.13 Notice of proposed rates.

(a) The Administrator shall give Notice that Proposed Rates have been prepared and are under consideration. The Notice shall include:

(1) The Proposed Rates;
(2) An explanation of the need for and derivation of the Proposed Rates;
(3) The locations at which data, studies, reports, or other documents used in developing the Proposed Rates are available for inspection and/or copying;
(4) The dates, times, and locations of any initially scheduled public forums; and
(5) Address to which written comments relative to the Proposed Rates and requests to be informed of FERC actions concerning the rates may be submitted.

(b) Upon request, customers of the power system and other interested persons will be provided with copies of the principal documents used in developing the Proposed Rates.

§ 903.14 Consultation and comment period.

All interested persons will have the opportunity to consult with and obtain information from the PMA, to examine backup data, and to make suggestions for modification of the Proposed Rates for a period ending (a) 90 days in the case of major rate adjustments, or 30 days in the case of minor rate adjustments, after the Notice of Proposed Rates is published in the FEDERAL REGISTER, except that such periods may be shortened for good cause shown; (b) 15 days after any answer which may be provided pursuant to §903.15(b) hereof; (c) 15 days after the close of the last public forum; or (d) such other time as the Administrator may designate; whichever is later. At anytime during this period, interested persons may submit written comments to the PMA regarding the Proposed Rates. The Administrator may also provide additional time for the submission of written rebuttal comments. All written comments shall be available at a designated location for inspection, and copies also will be furnished on request for which the Administrator may assess a fee. Prior to the action described in §903.21, the Administrator may, by appropriate announcement postpone any procedural date or make other procedural changes for good cause shown at the request of any party or on the Administrator’s own motion. The Administrator shall maintain, and distribute on request, a list of interested persons.

§ 903.15 Public information forums.

(a) One or more public information forums shall be held for major rate adjustments, except as otherwise provided in paragraph (c) of this section, and may be held for minor adjustments, to explain, and to answer questions concerning, the Proposed Rates and the basis of and justification for proposing such rates. The number, dates, and locations of such forums will be determined by the Administrator in accordance with the anticipated or demonstrated interest in the Proposed Rates. Notice shall be given in advance of such forums. A public information forum may be combined with a public comment forum held in accordance with §903.16.

(b) The Administrator shall appoint a forum chairperson. Questions raised at the forum concerning the Proposed Rates and the studies shall be answered by PMA representatives at the forum.
at a subsequent forum, or in writing at least 15 days before the end of the consultation and comment period. However, questions that involve voluminous data contained in the PMA records may be answered by providing an opportunity for consultation and for a review of the records at the PMA offices. As a minimum, the proceedings of the forum held at the principal location shall be transcribed. Copies of all documents introduced, and of questions and written answers shall be available at a designated location for inspection and copies will be furnished by the Administrator on request, for which a fee may be assessed. Copies of the transcript may be obtained from the transcribing service.

(c) No public information forum need be held for major rate adjustments if, after the Administrator has given Notice of a scheduled forum, no person indicates in writing by a prescribed date an intent to appear at such public forum.

§ 903.21 Completion of rate development; provisional rates.

(a) Following completion of the consultation and comment period and review of any oral and written comments on the Proposed Rates, the Administrator may revise the Proposed Rates. If the Administrator determines that further public comment should be invited, the Administrator shall afford interested persons an appropriate period to submit further written comments to the PMA regarding the revised Proposed Rates. The Administrator may convene one or more additional public information and/or public comment forums. The Administrator shall give Notice of any such additional forums.

§ 903.17 Informal public meetings for minor rate adjustments.

In lieu of public information or comment forums in conjunction with a minor rate adjustment, informal public meetings may be held if deemed appropriate by the Administrator. Such informal meetings will not require a Notice or a transcription.

§ 903.18 Revision of proposed rates.

During or after the consultation and comment period and review of the oral and written comments on the Proposed Rates, the Administrator may revise the Proposed Rates. If the Administrator determines that further public comment should be invited, the Administrator shall afford interested persons an appropriate period to submit further written comments to the PMA regarding the revised Proposed Rates. The Administrator may convene one or more additional public information and/or public comment forums. The Administrator shall give Notice of any such additional forums.
§ 903.22 Final rate approval.

(a) Any rate submitted to the FERC for confirmation and approval on a final basis shall be accompanied with such supporting data, studies, and documents as the FERC may require, and also with the transcripts of forums, written answers to questions, written comments, the Administrator’s certification, and the statement of principal factors leading to the decision. The FERC shall also be furnished a listing of those customers and other participants in the rate proceeding who have requested they be informed of FERC action concerning the rates.

(b) If the FERC confirms and approves Provisional Rates on a final basis, such confirmation and approval shall be effective as of the date such rates were placed in effect by the Deputy Secretary, as such date may have been adjusted by the Administrator. If the FERC confirms and approves on a final basis rates submitted by the Administrator without interim approval, such confirmation and approval shall be effective on a date set by the FERC.

(c) If the FERC disapproves Provisional Rates or other submitted rates, the Administrator shall develop Substitute Rates which take into consideration the reasons given by the FERC for its disapproval. If, in the Administrator’s judgment, public comment should be invited upon proposed Substitute Rates, the Administrator may provide for a public consultation and comment period before submitting the Substitute Rates. Whether or not public consultation and comment periods are provided, the Administrator will, upon request, provide customers of the power system and other interested persons with copies of the principal documents used in the development of the Substitute Rates. Within 120 days of the date of FERC disapproval of submitted rates, including Substitute Rates, or such additional time periods as the FERC may provide, the Administrator will submit the Substitute Rates to the FERC. A statement explaining the Administrator’s decision shall accompany the submission.

(d) A Provisional Rate that is disapproved by the FERC shall remain in effect until higher or lower rates are confirmed and approved by the FERC or are superseded by other rates placed into effect by the Deputy Secretary on an interim basis: Provided, That if the Administrator does not file a Substitute Rate within 120 days of the disapproval or such greater time as the FERC may provide,
and if the rate has been disapproved because the FERC determined that it would result in total revenues in excess of those required by law, the rate last previously confirmed and approved on a final basis will become effective on a date and for a period determined by the FERC and revenues collected in excess of such rate during such period will be refunded in accordance with paragraph (g) of this section.

(e) If a Substitute Rate confirmed and approved on a final basis by the FERC is higher than the provisional rate which was disapproved, the Substitute Rate shall become effective on a subsequent date set by the FERC, unless a subsequent Provisional Rate even higher than the Substitute Rate has been put into effect. FERC confirmation and approval of the higher Substitute Rate shall constitute final confirmation and approval of the lower disapproved Provisional Rate during the interim period that it was in effect.

(f) If a Substitute Rate confirmed and approved by the FERC on a final basis is lower than the disapproved provisional rate, such lower rate shall be effective as of the date the higher disapproved rate was placed in effect.

(g) Any overpayment shall be refunded with interest unless the FERC determines that the administrative cost of a refund would exceed the amount to be refunded, in which case no refund will be required. The interest rate applicable to any refund will be determined by the FERC.

(h) A rate confirmed and approved by the FERC on a final basis shall remain in effect for such period or periods as the FERC may provide or until a different rate is confirmed, approved and placed in effect on an interim or final basis: Provided, That the Deputy Secretary may extend a rate on an interim basis.

§ 903.23 Rate extensions.

(a) The following regulations shall apply to the extension of rates which were previously confirmed and approved by the FERC or the Federal Power Commission, or established by the Secretary of the Interior, and for which no adjustment is contemplated:

1. The Administrator shall give Notice of the proposed extension at least 30 days before the expiration of the prior confirmation and approval, except that such period may be shortened for good cause shown.

2. The Administrator may allow for consultation and comment, as provided in these procedures, for such period as the Administrator may provide. One or more public information and comment forums may be held, as provided in these procedures, at such times and locations and with such advance Notice as the Administrator may provide.

3. Following notice of the proposed extension and the conclusion of any consultation and comment period, the Deputy Secretary may extend the rates on an interim basis.

(b) Provisional Rates and other existing rates may be extended on a temporary basis by the Deputy Secretary without advance notice or comment pending further action pursuant to these regulations or by the FERC. The Deputy Secretary shall publish notice in the FEDERAL REGISTER of such extension and shall promptly advise the FERC of the extension.

PART 904—GENERAL REGULATIONS FOR THE CHARGES FOR THE SALE OF POWER FROM THE BOULDER CANYON PROJECT

Subpart A—Power Marketing

Sec.

904.1 Purpose.
904.2 Scope.
904.3 Definitions.
904.4 Marketing responsibilities.
904.5 Revenue requirements.
904.6 Charge for capacity and firm energy.
904.7 Base charge.
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904.9 Excess capacity.
904.10 Excess energy.
904.11 Lay off of energy.
904.12 Payments to contractors.
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904.14 Future regulations.

§ 904.1 Purpose.

(a) The Secretary of Energy, acting by and through the Administrator of the Western Area Power Administration (Administrator), is authorized and directed to promulgate charges for the sale of power generated at the Boulder Canyon Project powerplant, and also to promulgate such general regulations as the Secretary finds necessary and appropriate in accordance with the power marketing authorities in the Reclamation Act of 1902 (32 Stat. 388) and all acts amendatory thereof and supplementary thereto, and the Department of Energy Organization Act (42 U.S.C. 7101 et seq.).

(b) In accordance with the Boulder Canyon Project Act of 1928 (43 U.S.C. 617 et seq.), as amended and supplemented (Project Act); the Boulder Canyon Project Adjustment Act of 1940 (43 U.S.C. 618 et seq.), as amended and supplemented (Adjustment Act); the Department of Energy Organization Act (42 U.S.C. 7101 et seq.); and the Hoover Power Plant Act of 1984 (43 U.S.C. 619 et seq.) (Hoover Power Plant Act), the Western Area Power Administration (Western) promulgates these General Regulations for the Charges for the Sale of Power From the Boulder Canyon Project (General Regulations) defining the methodology to be used in the computation of the charges for the sale of power from the Boulder Canyon Project.

§ 904.2 Scope.


§ 904.3 Definitions.

The following terms wherever used herein shall have the following meanings:
(a) Billing Period shall mean the service period beginning on the first day and extending through the last day of any calendar month.
(b) Boulder City Area Projects shall mean the Boulder Canyon Project, the Parker-Davis Project, and the United States entitlement in the Navajo Generating Station (a feature of the Central Arizona Project).
(c) Capacity shall mean the aggregate of contingent capacity specified in section 105(a)(1)(A) and the contingent capacity specified in section 105(A)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619).
(d) Central Arizona Project shall mean those works as described in section 1521(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 et seq.), as amended.
(e) Colorado River Dam Fund or Fund shall mean that special fund established by section 2 of the Project Act and which is to be used only for the purposes specified in the Project Act, the Adjustment Act, the Colorado River Basin Project Act of 1968, and the Hoover Power Plant Act.
(f) Contract shall mean any contract for the sale of Boulder Canyon Project capacity and energy for delivery after May 31, 1987, between Western and any contractor.
(g) Contractor shall mean the entities entering into contracts with Western for electric service pursuant to the Hoover Power Plant Act.
(h) Excess Capacity shall mean capacity which is in excess of the lesser of: (1) Capacity that Hoover Powerplant is capable of generating with all units in service at a net effective head of 498 feet, or (2) 1,951,000 kW.
(i) Excess Energy shall mean energy obligated from the Project pursuant to
§ 904.5 Revenue requirements.

(a) Western shall collect all electric service revenues from the Project in accordance with applicable statutes and regulations and deposit such revenues into the Colorado River Dam Fund. All receipts from the Project shall be available for payment of the costs and financial obligations associated with the Project. The Secretary of the Interior is responsible for the administration of the Colorado River Dam Fund.

(b) The electric service revenue of the Project shall be collected through a charge, computed to be sufficient, together with other net revenues from the Project, to recover the following costs and financial obligations associated with the Project over the appropriate repayment periods set out in paragraph (c) of this section:

(1) Annual costs of operation and maintenance;
(2) Annual interest on unpaid investments in accordance with appropriate statutory authorities;
(3) Annual repayment of funds, and all reasonable costs incurred in obtaining such funds, advanced by non-Federal Contractors to the Secretary of the Interior for the Uprating Program;
(4) The annual payment of $300,000 to each of the States of Arizona and Nevada provided for in section 618(c) of the Adjustment Act and section 1543(c)(2) of the Colorado River Basin Project Act (43 U.S.C. 1501 et seq.) (Basin Act), as amended or supplemented;
(5) Capital costs of investments and Replacements, including amounts readvanced from the United States Treasury (Treasury);
(6) Repayment to the Treasury of the advances to the Colorado River Dam Project or Boulder Canyon Project shall mean all works authorized by the Project Act, the Hoover Power Plant Act, and any future additions authorized by Congress, to be constructed and owned by the United States, but exclusive of the main canal and appurtenances authorized by the Project Act, now known as the All-American Canal.

(m) Replacements shall mean such work, materials, equipment, or facilities as determined by the United States to be necessary to keep the Project in good operating condition, but shall not include (except where used in conjunction with the word “emergency” or the phrase “however necessitated”) work, materials, equipment, or facilities made necessary by any act of God, or of the public enemy, or by any major catastrophe.

(n) Uprating Program shall mean the program authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) for increasing the capacity of existing generating equipment and appurtenances at the Hoover Powerplant, as generally described in the report of the Department of the Interior, Bureau of Reclamation, entitled “Hoover Powerplant Uprating, Special Report,” issued in May 1980, as supplemented in the report entitled, “January 1985 Supplement (revised September 1985) to Hoover Powerplant Uprating, Special Report—May 1980.”

§ 904.4 Marketing responsibilities.

(a) Capacity and energy available from the Project will be marketed by Western under terms of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Criteria) published in the Federal Register (50 FR 50582) on December 28, 1984. Western shall dispose of capacity and energy from the Project in accordance with section 105(a)(1) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)), these General Regulations, and the Contracts between the Contractors and Western.

(b) Procedures for the scheduling and delivery of capacity and energy shall be provided for in the Contracts between the Contractors and Western.
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Fund for the Project made prior to May 31, 1987, for which payment was deferred because of a deficiency in firm energy generation due to a shortage of available water, as provided for in article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958 (72 Stat. 1726), as shown on the books of accounts of Reclamation as of May 31, 1987;

(7) Repayment to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(b) of the Project Act as provided by section 618f of the Adjustment Act; and

(8) Any other financial obligations of the Project imposed in accordance with law.

(c) The Project repayment period shall extend to the final year allowed under applicable cost recovery criteria. The revenue for the costs and financial obligations set out in paragraph (b) of this section shall be collected over the following repayment periods:

(1) The repayment period for advances made to the Colorado River Dam Fund from funds advanced to the Secretary of the Interior by non-Federal entities for the Uprating Program and associated work shall be the period commencing with the first day of the month following completion of each segment of the Uprating Program, or June 1, 1987, whichever is later, and ending September 30, 2017;

(2) The repayment period for the payments to the Treasury of the advances to the Colorado River Dam Fund for the Project which were payable prior to May 31, 1987, but which were deferred pursuant to article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958, shall be the power contract period beginning June 1, 1987, and ending September 30, 2017. Such repayment period is based on a 50-year repayment period beginning June 1, 1987, adjusted for the periods the initial payments were deferred;

(3) The repayment period for the payments to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(h) of the Project Act and deferred by section 618(f) of the Adjustment Act shall be the 50-year period beginning June 1, 1987;

(4) The repayment period for advances to the Colorado River Dam Fund for the Project made on or after June 1, 1937, and prior to June 1, 1987, shall be the 50-year period beginning June 1 immediately following the year of operation in which the funds were advanced;

(5) The repayment period for investments, other than for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)), made from Federal appropriations on or after June 1, 1987, shall be a 50-year period beginning with the first day of the fiscal year following the fiscal year the investment is placed in service; and

(6) The repayment period for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) shall be the 50-year period beginning June 1, 1987, or when substantially completed, as determined by the Secretary of the Interior, if later.

(d) Annual costs for operation and maintenance and payments to States as set out in paragraph (b) of this section shall be collected as long as revenues accrue from the operation of the Project.

(e) Surplus revenues will also be collected for transfer from the Colorado River Dam Fund for contribution to the Lower Colorado River Basin Development Fund pursuant to section 1543(c)(2) of the Basin Act as amended by the Hoover Power Plant Act to provide revenue for the purposes of sections 1543(f) and 1543(g) of the Basin Act.

(f) All annual costs will be calculated based on a Federal fiscal year. To accommodate the transition from the pre-1987 operating year of June 1 to May 31 to a fiscal year, there will be a 4-month transition period beginning June 1, 1987, and ending September 30, 1987.

(g) If integrated operation of the Boulder Canyon Project with other Boulder City Area Projects and other Federal projects on the Colorado River, as provided in §904.9 of these General Regulations, confers a direct power benefit upon such other Boulder City
Area Projects and such other Federal projects, or if a direct power benefit is conferred by other Boulder City Area Projects or other Federal projects on the Colorado River upon the Boulder Canyon Project, Western shall equitably apportion such benefits and appropriate charges among the Boulder Canyon Project, other Boulder City Area Projects, and other Federal projects on the Colorado River.

§ 904.6 Charge for capacity and firm energy.

The charge for Capacity and Firm Energy from the Project shall be composed of two separate charges; a charge to provide for the basic revenue requirements, as identified in paragraphs (b), (c), and (d) of § 904.5 of these General Regulations (Base Charge), and a charge to provide the surplus revenue for the Lower Colorado River Basin Development Fund contribution, as identified in paragraph (e) of § 904.5 of these General Regulations (Lower Basin Development Fund Contribution Charge).

§ 904.7 Base charge.

(a) The Base Charge shall be developed by the Administrator and promulgated in accordance with appropriate DOE regulations. The Base Charge shall be composed of a capacity component and an energy component.

(b) The capacity component of the Base Charge shall be a dollar per kilowatt-month amount determined by (1) multiplying the estimated average annual revenue requirement developed pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations (Base Charge), and a charge to provide the surplus revenue for the Lower Colorado River Basin Development Fund contribution, as identified in paragraph (e) of § 904.5 of these General Regulations (Lower Basin Development Fund Contribution Charge).

§ 904.8 Lower basin development fund contribution charge.

(a) The Lower Basin Development Fund Contribution Charge will be developed by the Administrator of Western on the basis that the equivalent of 4½ mills or 2½ mills per kWh, as appropriate, required to be included in the rates charged to purchasers pursuant to section 1543(c)(2) of the Basin Act, as amended by the Hoover Power Plant Act.
Act, shall be collected from the energy sales of the Project.

(b) The Lower Basin Development Fund Contribution Charge shall be applied to each kWh made available to each Contractor, as provided for by Contract, except for the energy purchased by Western at the request of a Contractor to meet:

(1) That Contractor’s deficiency in Firm Energy, pursuant to section 105(a)(2) of the Hoover Power Plant Act (43 U.S.C. 619(a)(2)) and section F of the Conformed Criteria; and

(2) That Contractor’s Uprating Program credit carry forward as provided by Contract. A 4½ mills per kWh charge shall be applied to each kWh made available to an Arizona Contractor, and a 2½ mills per kWh charge shall be applied to each kWh made available to a California or Nevada Contractor; provided, that after the repayment period of the Central Arizona Project, a 2½ mills per kWh charge shall be applied to each kWh made available to the Arizona, California, and Nevada Contractors. The Lower Basin Development Fund Contribution Charge shall be applied to energy overruns. The Lower Basin Development Fund Contribution Charge shall be applied each billing period for each Contractor.

§ 904.10 Excess energy.

(a) If excess Energy is determined by the United States to be available, it shall be made available to the Contractors, in accordance with the priority entitlement of section 105(a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)(c)). After the annual first- and second-priority entitlement to excess energy has been obligated for delivery, Western will make available one-third of the third-priority excess energy to the Arizona Power Authority, one-third to the Colorado River Commission of Nevada, and one-third to the California Contractors.

(b) Western will make available third-priority excess energy to the California Contractors based on the following formula:

\[ F = \frac{1}{3} \left( \frac{A}{B+C/D} \right) \times E \]

Where:

- \( A \) = Contractor’s allocated Capacity
- \( B \) = Total California allocated Capacity
- \( C \) = Contractor’s allocated Firm Energy
- \( D \) = Total California allocated Firm Energy
- \( E \) = Third-priority Excess Energy available to California
- \( F \) = Contractor’s third-priority Excess Energy

(c) The charge for all Excess Energy shall be the charge for Boulder Canyon Project Firm Energy existing at the time the Excess Energy is made available to the Contractor, including the appropriate Lower Basin Development Fund Contribution Charge.

§ 904.11 Lay off of energy.

(a) If any Contractor determines that it is temporarily unable to utilize Firm Energy or Excess Energy, Western will, at the Contractor’s request, attempt to lay off the Firm Energy or Excess Energy the Contractor declares to be available for lay off, pursuant to the provisions for lay off of energy specified in the Contract.

(b) If Western is unable to lay off such energy, or if the Contractor fails to request Western to attempt to lay off the energy, the Contractor will be billed for the Firm Energy or Excess Energy that was available to the Contractor but could not be delivered to the Contractor or sold to another customer.
(c) In the event that Western must lay off the Firm Energy or Excess Energy at a rate lower than the effective Firm Energy rate, the Contractor will be billed for the difference between the amount that Western would have received at the then existing Firm Energy rate, including the appropriate Lower Basin Development Fund Contribution Charge, and the amount actually received.

§ 904.12 Payments to contractors.

(a) Funds advanced to the Secretary of the Interior for the Uprating Program and costs reasonably incurred by the Contractor in advancing such funds, as approved by Western, shall be returned to the Contractor advancing the funds during the Contract period through credits on that Contractor’s power bills. Appropriate credits will be developed and applied pursuant to terms and conditions agreed to by contract or agreement.

(b) All other obligations of the United States to return funds to a Contractor shall be repaid to such Contractor through credits on power bills, with or without interest, pursuant to terms and conditions agreed to by contract or agreement.

§ 904.13 Disputes.

(a) All actions by the Secretary of Energy, acting by and through the Administrator of Western, shall be binding unless or until reversed or modified in accordance with provisions contained herein.

(b) Any disputes or disagreements as to interpretation or performance of the provisions of these General Regulations under the responsibility of Western shall first be presented to and decided by the Administrator. The Administrator shall be deemed to have denied the Contractor’s contention or claim if it is not acted upon within ninety (90) days of its having been presented.

(c) The decision of the Administrator shall be final unless, within thirty (30) days from the date of receipt of a request for arbitration either to concur in or deny in writing the request for such arbitration. Failure by the Administrator to take any action within the ninety (90) day period shall be deemed a denial of the request for arbitration. In the event of a denial of a request for arbitration, the decision of the Administrator shall become final. Upon a decision becoming final, the disputing Contractor’s remedy lies with the appropriate Federal court. Any claim that a final decision of the Administrator violates any right accorded the Contractor under the Project Act, the Adjustment Act, or Title I of the Hoover Power Plant Act is barred unless suit asserting such claim is filed in a Federal court of competent jurisdiction within one (1) year after final refusal by the Administrator to correct the action complained of, in accordance with section 105(h) of the Hoover Power Plant Act.

(d) When a timely request for arbitration is received by the Administrator and the Administrator concurs in writing, the disputing Contractor and the Administrator shall, within thirty (30) days after receipt of notice of such concurrence, each name one arbitrator to the panel of arbitrators which will decide the dispute. All arbitrators shall be skilled and experienced in the field pertaining to the dispute. In the event there is more than one disputing Contractor, the disputing Contractors shall collectively name one arbitrator to the panel of arbitrators. In the event of their failure collectively to name such an arbitrator within fifteen (15) days after their first meeting, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The two arbitrators thus selected shall name a third arbitrator within thirty (30) days of their first meeting. In the event of their failure collectively to name such an arbitrator within fifteen (15) days after their first meeting, the third arbitrator shall act as chairperson of the panel. The arbitration shall be governed by the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be limited to the issue submitted. The panel of arbitrators shall not rewrite,
change, or amend these General Regulations or the Contracts of any of the parties to the dispute. The panel of arbitrators shall render a final decision in this dispute within sixty (60) days after the date of the naming of the third arbitrator. A decision of any two of the three arbitrators named to the panel shall be final and binding on all parties involved in the dispute.

§ 904.14 Future regulations.
(a) Western may from time to time promulgate such additional or amendatory regulations as deemed necessary for the administration of the Project in accordance with applicable law; Provided, That no right under any Contract shall be impaired or obligation thereunder be extended thereby.
(b) Any modification, extension, or waiver of any provision of these General Regulations granted for the benefit of any one or more Contractors shall not be denied to any other Contractor.
(c) Western reserves the right to terminate, modify, or extend these regulations, either partially or in their entirety, to the extent permitted by law or existing contract.

PART 905—ENERGY PLANNING AND MANAGEMENT PROGRAM

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Sec.
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SOURCE: 60 FR 54174, Oct. 20, 1995, unless otherwise noted.

Subpart A—General Provisions
SOURCE: 65 FR 16795, Mar. 30, 2000, unless otherwise noted.

§ 905.1 What are the purposes of the Energy Planning and Management Program?

The purposes of the Energy Planning and Management Program (EPAMP) are to meet the objectives of Section 114 of the Energy Policy Act of 1992 (EPAct) and to extend long-term firm power resource commitments while supporting customer integrated resource planning (IRP); demand-side management (DSM), including energy efficiency, conservation, and load management; and the use of renewable energy. Subpart B, Integrated Resource Planning, allows customers of the Western Area Power Administration (Western) to meet the objectives of section 114 of EPAct through integrated resource planning or by other means, such as attaining a minimum level of
§ 905.2 What are the key definitions of this part?

Administrator means Western’s Administrator.

Customer means any entity that purchases firm capacity, with or without energy, from Western under a long-term firm power contract. The term also includes a member-based association (MBA) and its distribution or user members that receive direct benefit from Western’s power, regardless of which holds the contract with Western.

Energy efficiency and/or renewable energy (EE/RE) report means the report documenting energy efficiency and/or renewable energy activities imposed by a State, Tribal, or the Federal Government upon a State, Tribal, or Federal end-use customer within its jurisdiction.

Integrated resource planning means a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, to provide adequate and reliable service to a customer’s electric consumers.

Integrated resource planning cooperative (IRP cooperative) means a group of Western’s customers and/or their distribution or user members with geographic, resource supply, or other similarities that have joined together, with Western’s approval, to complete an IRP.

Member-based association (MBA) means:

(1) An entity composed of member utilities or user members, or

(2) An entity that acts as an agent for, or subcontracts with, but does not assume power supply responsibility for its principals or subcontractors, who are its members.

Minimum investment report means the report documenting a mandatory minimum level of financial or resource investment in demand-side management (DSM) initiatives, including energy efficiency and load management, and/or renewable energy activities, such as investment of a set minimum percentage of the utility’s gross revenues in renewable energy, which is imposed by State, Tribal, or Federal law upon a customer under its jurisdiction. For the purposes of this part, the minimum investment report includes reports about public benefits charges, as well.

Public benefits charge means a mandatory financial charge imposed by State, Tribal, or Federal law upon a customer under its jurisdiction to support one or more of the following: energy efficiency, conservation, or demand-side management; renewable energy; efficiency or alternative energy-related research and development; low-income energy assistance; and/or other similar programs defined by applicable State, Tribal, or Federal law. This term is also known as a public goods or system benefit charge in the utility industry.

Region means a Western regional office or management center, and the geographic territory served by that regional office or management center: the Desert Southwest Customer Service Region, the Rocky Mountain Customer Service Region, the Sierra Nevada Customer Service Region, the Upper Great Plains Customer Service Region, or the Colorado River Storage Project Management Center.

Renewable energy means any source of electricity that is self-renewing, including plant-based biomass, waste-based biomass, geothermal, hydro-power, ocean thermal, solar (active and passive), and wind.

Small customer means a utility customer with total annual sales and usage of 25 gigawatthours (GWh) or less, as averaged over the previous 5 years, which is not a member of a joint-action agency or generation and transmission cooperative with power supply responsibility; or any end-use customer.

Western means the Western Area Power Administration.
§ 905.10 Who must comply with the integrated resource planning and reporting regulations in this subpart?

(a) Integrated resource plans (IRP) and alternatives. Each Western customer must address its power resource needs in an IRP prepared and submitted to Western as described in this subpart. Alternatively, Western customers may submit a small customer plan, minimum investment report or EE/RE report as provided in this subpart.

(b) Rural Utility Service and state utility commission reports. For customers subject to IRP filings or other electrical resource use reports from the Rural Utilities Service or a state utility commission, nothing in this part requires a customer to take any action inconsistent with those requirements.

§ 905.11 What must an IRP include?

(a) General. Integrated resource planning is a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, to provide adequate and reliable service to a customer's electric consumers. An IRP supports customer-developed goals and schedules. The plan must take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other risk factors; must take into account the ability to verify energy savings achieved through energy efficiency and the projected durability of such savings measured over time; and must treat demand and supply resources on a consistent and integrated basis.

1. IRP criteria. IRPs must consider electrical energy resource needs and may consider, at the customer's option, water, natural gas, and other energy resources. Each IRP submitted to Western must include:

   (1) Identification of resource options. Identification and comparison of resource options is an assessment and comparison of existing and future supply-and demand-side resource options available to a customer based upon its size, type, resource needs, geographic area, and competitive situation. Resource options evaluated by the specific customer must be identified. The options evaluated should relate to the resource situation unique to each Western customer as determined by profile data (such as service area, geographical characteristics, customer mix, historical loads, projected growth, existing system data, rates, and financial information) and load forecasts. Specific details of the customer's resource comparison need not be provided in the IRP itself. They must, however, be made available to Western upon request.

   (i) Supply-side options include, but are not limited to, purchased power contracts and conventional and renewable generation options.

   (ii) Demand-side options alter the customer's use pattern to provide for an improved combination of energy services to the customer and the ultimate consumer.

   (iii) Considerations that may be used to develop potential options include cost, market potential, consumer preferences, environmental impacts, demand or energy impacts, implementation issues, revenue impacts, and commercial availability.

   (iv) The IRP discussion of resource options must describe the options chosen by the customer, clearly demonstrating that decisions were based on a reasonable analysis of the options. The IRP may strike a balance among the applicable resource evaluation factors.

2. Action plan. IRPs must include an action plan describing specific actions the customer will take to implement its IRP.

   (i) The IRP must state the time period that the action plan covers, and the action plan must be updated and resubmitted to Western when this time period expires. The customer may submit a revised action plan with the annual IRP progress report discussed in §905.14.

   (ii) For those customers not experiencing or anticipating load growth, the
action plan requirement for the IRP may be satisfied by a discussion of current actions and procedures in place to periodically reevaluate the possible future need for new resources. The action plan must include a summary of:

(A) Actions the customer expects to take in accomplishing the goals identified in the IRP;

(B) Milestones to evaluate accomplishment of those actions during implementation; and

(C) Estimated energy and capacity benefits for each action planned.

(3) Environmental effects. To the extent practical, the customer must minimize adverse environmental effects of new resource acquisitions and document these efforts in the IRP. Customers are neither precluded from nor required to include a quantitative analysis of environmental externalities as part of the IRP process. IRPs must include a qualitative analysis of environmental effects in summary format.

(4) Public participation. The customer must provide ample opportunity for full public participation in preparing and developing an IRP (or any IRP revision or amendment). The IRP must include a brief description of public involvement activities, including how the customer gathered information from the public, identified public concerns, shared information with the public, and responded to public comments. Customers must make additional documentation identifying or supporting the full public process available to Western upon request.

(i) As part of the public participation process, the governing body of an MBA and each MBA member (such as a board of directors or city council) must approve the IRP, confirming that all requirements have been met. To indicate approval, a responsible official must sign the IRP submitted to Western or the customer must document passage of an approval resolution by the appropriate governing body included or referred to in the IRP.

(ii) For Western customers that do not purchase electricity for resale, such as some State, Tribal, and Federal agencies, the customer can satisfy the public participation requirement by having a top management official with resource acquisition responsibility review and concur on the IRP. The customer must note this concurrence in the IRP.

(5) Load forecasting. An IRP must include a statement that the customer conducted load forecasting. Load forecasting should include data that reflects the size, type, resource conditions, and demographic nature of the customer using an accepted load forecasting method, including but not limited to the time series, end-use, and econometric methods. The customer must make the load forecasting data available to Western upon request.

(6) Measurement strategies. The IRP must include a brief description of measurement strategies for options identified in the IRP to determine whether the IRP’s objectives are being met. These validation methods must include identification of the baseline from which a customer will measure the benefits of its IRP implementation. A reasonable balance may be struck between the cost of data collection and the benefits resulting from obtaining exact information. Customers must make performance validation and evaluation data available to Western upon request.

(c) IRP criteria for certain customers not qualifying for “small customer” status. Customers with limited economic, managerial, and resource capability and total annual sales and usage of 25 gigawatthours (GWh) or less who are members of joint-action agencies and generation and transmission cooperatives with power supply responsibility are eligible for the criteria specified in paragraphs (c)(1) and (c)(2) of this section.

(1) Each IRP submitted by a customer under paragraph (c) of this section must:

(i) Consider all reasonable opportunities to meet future energy service requirements using DSM techniques, renewable energy resources, and other programs; and

(ii) Minimize, to the extent practical, adverse environmental effects.

(2) Each IRP submitted by a customer under paragraph (c) of this section must include, in summary form:

(i) Customer name, address, phone number, email and Website if applicable, and contact person;
§ 905.12 How must IRPs be submitted?

(a) Number of IRPs submitted. Except as provided in paragraph (c) of this section, one IRP is required per customer, regardless of the number of long-term firm power contracts between the customer and Western.

(b) Method of submitting IRPs. Customers must submit IRPs to Western under one of the following options:

(1) Customers may submit IRPs individually.

(2) MBAs may submit IRPs for each of their members or submit one IRP on behalf of all or some of their members. An IRP submitted by an MBA must specify the responsibilities and participation levels of individual members and the MBA. Any member of an MBA may submit an individual IRP to Western instead of being included in an MBA IRP.

(3) Customers may submit IRPs as IRP cooperatives when previously approved by Western. IRP cooperatives may also submit small customer plans, minimum investment reports and EE/RE reports on behalf of eligible IRP cooperative members.

(c) Alternatives to submitting individual IRPs. Customers with Western approval to submit small customer plans, minimum investment report or EE/RE report on behalf of eligible IRP cooperative members may resubmit an IRP or notify Western of its plan to change its compliance method at any time so long as there is no period of noncompliance.

§ 905.13 When must IRPs be submitted?

(a) Submitting the initial IRP. Except as provided in paragraph (c) of this section, customers that have not previously had an IRP approved by Western must submit the initial IRP to the appropriate Regional Manager no later than 1 year after May 1, 2000, or after becoming a customer, whichever is later.

(b) Updates and amendments to IRPs. Customers must submit updated IRPs to the appropriate Regional Manager every 5 years after Western’s approval of the initial IRP. Customers that complied with Western’s IRP regulations in effect before May 1, 2000 must maintain their submission and resubmission schedules previously in effect. Customers may submit amendments and revisions to IRPs at any time.

(c) IRP cooperatives. Customers with geographic, resource supply, and other similarities may join together and request, in writing, Western’s approval to become an IRP cooperative. Western will respond to IRP cooperative status requests within 30 days of receiving a request. If Western disapproves a request for IRP cooperative status, the requesting participants must maintain their currently applicable integrated resource or small customer plans, or submit the initial IRPs no later than 1 year after the date of the disapproval letter. Western’s approval of IRP cooperative status will not be based on any potential participant’s contractual status with Western. Each IRP cooperative must submit an IRP for its participants within 18 months after Western approves IRP cooperative status.

§ 905.14 Does Western require annual IRP progress reports?

Yes, customers must submit IRP progress reports each year within 30 days of the anniversary date of the approval of the currently applicable IRP. The reports must describe the customer’s accomplishments achieved
under the action plan, including projected goals and implementation schedules, and energy and capacity benefits and renewable energy developments achieved as compared to those anticipated. Western prefers measured values, but will accept reasonable estimates if measurement is infeasible or not cost-effective. Instead of a separate progress report, the customer may use any other annual report that the customer submits to Western or another entity, at the customer’s discretion, if that report contains all required data for the previous full year and is submitted within 30 days of the approval anniversary date of the currently applicable IRP. With Western’s approval, customers may submit reports outside of the 30-day anniversary date window.

§ 905.15 What are the requirements for the small customer plan alternative?

(a) Requesting small customer status. Small customers may submit a request to prepare a small customer plan instead of an IRP. Requests for small customer status from electric utilities must include data on total annual energy sales and usage for the 5 years prior to the request. Western will average this data to determine overall annual energy sales and usage for the 5 years prior to the request. Western will average these data to determine overall annual energy sales and usage so that uncontrollable events, such as extreme weather, do not distort levelized energy sales and usage. Requests from end-use customers must only document that the customer does not purchase electricity for resale. Western will respond to small customer status requests within 30 days of receiving the request. If Western disapproves a request, the customer must maintain its currently applicable IRP, or submit the initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for minimum investment report or EE/RE report status, as appropriate.

(b) Small customer plan contents. Small customer plans must:

1. Consider all reasonable opportunities to meet future energy service requirements using demand-side management techniques, renewable energy resources, and other programs that provide retail consumers with electricity at reasonable cost;

2. Minimize, to the extent practical, adverse environmental effects; and

3. Present in summary form the following information:

   (i) Customer name, address, phone number, email and Website if applicable, and contact person;

   (ii) Type of customer;

   (iii) Current energy and demand profiles and data on total annual energy sales and usage for the previous 5 years for utility customers, or current energy and demand use for end-use customers;

   (iv) Future energy services projections;

   (v) How items in paragraphs (b)(1) and (b)(2) of this section were considered; and

   (vi) Actions to be implemented over the customer’s planning timeframe.

(c) When to submit small customer plans. Small customers must submit the first small customer plan to the appropriate Western Regional Manager within 1 year after Western approves the request for small customer status. Small customers must submit, in writing, a small customer plan every 5 years.

(d) Maintaining small customer status.

1. Every year on the anniversary of Western’s approval of the plan, small customers must submit a letter to Western verifying that either their annual energy sales and usage is 25 GWh or less averaged over the previous 5 years, or they continue to be end-use customers. The letter must also identify their achievements against targeted action plans, as well as the revised summary of actions if the previous summary of actions has expired.

2. Western will use the letter for overall program evaluation and comparison with the customer’s plan, and for verification of continued small customer status. Customers may submit annual update letters outside of the anniversary date if previously agreed to by Western so long as the letter contains all required data for the previous full year.

(e) Losing eligibility for small customer status.

1. A customer ceases to be a small customer if it:
§ 905.16 What are the requirements for the minimum investment report alternative?

(a) Request to submit the minimum investment report. Customers may submit a request to prepare a minimum investment report instead of an IRP. Minimum investment reports may be submitted by MBAs on behalf of the MBA or its members, and by IRP cooperatives on behalf of its participants. Requests to submit minimum investment reports must include data on:

(1) The source of the minimum investment requirement (number, title, date, and jurisdiction of law);

(2) The initial, annual, and other reporting requirement(s) of the mandate, if any; and

(3) The mandated minimum level of investment or public benefits charge for DSM and/or renewable energy.

(b) Minimum investment requirement. The minimum investment must be either:

(1) A mandatory set percentage of customer gross revenues or other specific minimum investment in DSM and/or renewable energy mandated by a State, Tribal, or Federal Government with jurisdictional authority; or

(2) A required public benefits charge, including charges to be collected for and spent on DSM; renewable energy; efficiency and alternative energy-related research and development; low-income energy assistance; and any other applicable public benefits category, mandated by a State, Tribal, or Federal Government with jurisdictional authority. Participation in a public benefits program requires either a mandatory set percentage of customer gross revenues or other specific charges to be applied toward the programs as determined by the applicable State, Tribal, or Federal authority. The revenues from the public benefits charge may be expended directly by the customer, or by another entity on behalf of the customer as determined by the applicable State, Tribal, or Federal authority.

(c) Multi-state entities. For those customers with service territories lying in more than one State or Tribal jurisdiction, and where at least one of the States or Tribal jurisdictions has a mandated minimum investment requirement, to meet this alternative customers must use the highest requirement from the State or Tribe within the customer’s service territory and additionally apply it to all members in those States or Tribal jurisdictions in which there is no requirement. Alternatively, if each State or Tribe has a requirement, customers may satisfy Western’s requirement by reporting on compliance with each applicable minimum investment requirement. Western will work with multi-state entities to ensure the most effective, and least burdensome, compliance mechanism.

(d) Western’s response to minimum investment report requests. Western will respond to requests to accept minimum investment reports within 30 days of receiving the request. If Western disapproves a request to allow use of the minimum investment report, the customer must maintain its currently applicable IRP or small customer plan, or submit its initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for small customer plan or EE/RE report status, as appropriate.

(e) Minimum investment report contents. Reports documenting compliance with a minimum level of investment in DSM and/or renewable energy must include:

(1) Customer name, address, phone number, email and Website if applicable, and contact person;

(2) Authority or requirement to undertake a minimum investment, including the source of the minimum investment requirement (number, title, date, and jurisdiction of law or regulation); and

(3) A description of the minimum investment, including:
§ 905.17 What are the requirements for the energy efficiency and/or renewable energy report (EE/RE report) alternative?

(a) Requests to submit an EE/RE report. End-use customers may submit a request to prepare an EE/RE report instead of an IRP. Requests to submit EE/RE reports must include data on:

(1) The source of the EE/RE reporting requirement (number, title, date, and jurisdiction of law or regulation);

(2) The initial, annual, and other reporting requirement(s) of the report;

and

(3) A summary outline of the EE/RE report’s required data or components, including any requirements for documenting customer energy efficiency and renewable energy activities.

(b) EE/RE report requirement. The EE/RE report is based on a mandate by a
§ 905.17

State, Tribal, or Federal Government to implement energy efficiency and/or renewable energy activities within a specified timeframe, for which there is also an associated reporting requirement. The EE/RE report may include only electrical resource use and energy efficiency and/or renewable energy activities, or may additionally include other resource information, such as water and natural gas data. At a minimum, the EE/RE report must annually document energy efficiency and/or renewable energy activities undertaken by the end-use customer.

(c) Western’s response to EE/RE report requests. Western will respond to requests to accept EE/RE reports within 30 days of receiving the request. If Western disapproves a request to allow use of the EE/RE report, the customer must maintain its currently applicable IRP or small customer plan, or submit its initial IRP no later than 1 year after the date of the disapproval letter. Alternatively, the customer may submit a request for small customer plan or minimum investment report, as appropriate, within 30 days after the date of the disapproval letter.

(d) EE/RE report contents. EE/RE reports must include:
(1) Customer name, address, phone number, email and Website if applicable, and contact person;
(2) Authority or requirement to complete the EE/RE report, including the source of the requirement (number, title, date, and jurisdiction of law); and
(3) A description of the customer’s required energy efficiency and/or renewable energy activities, including:
   (i) Level of investment or expenditure in energy efficiency and/or renewable energy, and quantifiable energy savings or use goals, if defined by the EE/RE reporting requirement;
   (ii) Annual actual or estimated energy and/or capacity savings, if any, associated with energy efficiency and resulting from the EE/RE reporting requirement;
   (iii) Actual or estimated energy and/or capacity, if any, associated with renewable energy and resulting from the EE/RE reporting requirement;
   (iv) A description of the energy efficiency and/or renewable energy activities to be undertaken over the next 2 years as a result of the EE/RE reporting requirement.

(e) EE/RE report approval. Western will approve the EE/RE report when the report meets the requirements in paragraph (d) of this section.

(f) When to submit the EE/RE report. The customer must submit the first EE/RE report to the appropriate Western Regional Manager within 1 year after Western approves the request to accept the EE/RE report. Customers choosing this option must maintain IRP or small customer plan compliance with Western’s IRP regulations in effect before May 1, 2000, including submitting annual progress reports or update letters, until submitting the first EE/RE report to ensure there is no gap in complying with section 114 of EPAct. Customers must submit, in writing, an EE/RE report every 5 years.

(g) Maintaining EE/RE reports. (1) Every year on the anniversary of Western’s approval of the first EE/RE report, customers choosing this option must submit an annual EE/RE letter to Western. The letter must contain summary information identifying customer annual energy and capacity savings associated with energy efficiency, if any, and annual customer energy and capacity associated with renewable energy, if any. The letter must also verify that the customer remains in compliance with the EE/RE reporting requirement. Additionally, the letter must include a revised description of customer DSM and/or renewable energy activities if the description from the EE/RE report has changed or expired. If this information is contained in an EE/RE report sent to another authority, the customer may submit that report instead of a separate letter.
(2) Customers may submit annual EE/RE letters outside of the anniversary date if previously agreed to by Western if the letter contains all required data for the previous full year.

(h) Loss of eligibility to submit the EE/RE report. (1) A customer ceases to be eligible to submit a EE/RE report if:
   (i) The EE/RE reporting requirement no longer applies to the customer; or
   (ii) The customer does not comply with the EE/RE reporting requirements in applicable State, Tribal, or Federal law.
§ 905.20 When are customers in non-compliance with the regulations in this subpart, and how does Western ensure compliance?

(a) Good faith effort to comply. If it appears that a customer’s activities may be inconsistent with the applicable IRP, small customer plan, minimum investment report or EE/RE report, Western will notify the customer and offer the customer 30 days to provide evidence of its good faith effort to comply. If the customer does not correct the specified deficiency or submit such evidence, or if Western finds, after receiving information from the customer, that a good faith effort has not been made, Western will impose a penalty.

(b) Penalties for noncompliance. Western will impose a penalty on long-term firm power customers for failing to submit or resubmit an acceptable IRP and action plan, small customer plan, minimum investment report or EE/RE report as required by this subpart. Western will also impose a penalty when the customer’s activities are not consistent with the applicable plan or report unless Western finds that a good faith effort has been made to comply with the approved plan or report.

(c) Written notification of penalty. Western will provide written notice of a penalty to the customer, and to the MBA or IRP cooperative when applicable. The notice will specify the reasons for the penalty.

(d) Penalty options. (1) Beginning with the first full billing period following the notice specified in paragraph (c) of this section, Western will impose a surcharge of 10 percent of the monthly power charges until the deficiency specified in the notice is cured, or until 12 months pass. However, Western will not immediately impose a penalty if the customer or its MBA or IRP cooperative requests reconsideration by filing a written appeal under §905.21.
§ 905.21 What is the administrative appeal process?

(a) Filing written appeals with Western. If a customer disagrees with Western's decision on the acceptability of its IRP, small customer plan, minimum investment report or EE/RE report submittal, its compliance with an approved plan or report, or any other compliance issue, the customer may request reconsideration by filing a written appeal with the appropriate Regional Manager. Customers may submit appeals any time such disagreements occur and should be specific as to the nature of the issue, the reasons for the disagreement, and any other pertinent facts the customer believes should be brought to Western's attention. The Regional Manager will respond within 45 days of receiving the appeal. If resolution is not achieved at the Regional Office level, the customer may appeal to the Administrator, who will respond within 30 days of receiving the appeal.

(b) Alternative dispute resolution. Upon request, Western will agree to use mutually agreeable alternative dispute resolution procedures, to the extent allowed by law, to resolve issues or disputes relating to compliance with the regulations in this subpart.

(c) Penalties during appeal. Western will not impose a penalty while an appeal process is pending. However, if the appeal is unsuccessful for the customer, Western will impose the penalty retroactively from the date the penalty would have been assessed if an appeal had not been filed.

(d) Meeting other requirements during appeal process. A written appeal or use of alternative dispute resolution procedures does not suspend other reporting and compliance requirements.

§ 905.22 How does Western periodically evaluate customer actions?

(a) Periodic review of customer actions. Western will periodically evaluate customer actions to determine whether they are consistent with the approved IRP or minimum investment report. Small customer plans and EE/RE reports are not subject to this periodic review.

(b) Reviewing representative samples of plans and reports. Western will periodically review a representative sample of IRPs and minimum investment reports, and the customer's implementation of the applicable plan or report from each of Western's Regions. The
samples will reflect the diverse characteristics and circumstances of the customers that purchase power from Western. These reviews will be in addition to, and separate and apart from, the review of initial and updated IRPs and minimum investment reports to ensure compliance with this subpart.

(c) Scope of periodic reviews. Periodic reviews may consist of any combination of review of the customer’s annual IRP progress reports, minimum investment letters, telephone interviews, or on-site visits. Western will document these periodic reviews and may report on the results of the reviews in Western’s annual report.

§ 905.23 What are the opportunities for using the Freedom of Information Act to request plan and report data?

IRPs, small customer plans, minimum investment reports and EE/RE reports and associated data submitted to Western are subject to the Freedom of Information Act (FOIA) and may be made available to the public upon request. Customers may request confidential treatment of all or part of a submitted document under applicable FOIA exemptions. Western will make its own determination whether particular information is exempt from public access. Western will not disclose to the public information it has determined to be exempt, recognizing that certain competition-related customer information may be proprietary.

§ 905.24 Will Western conduct reviews of this program?

Yes, Western may periodically initiate a public process to review the regulations in this subpart to determine whether they should be revised to reflect changes in technology, needs, or other developments.

Subpart C—Power Marketing Initiative

§ 905.30 Purpose and applicability.

(a) The Power Marketing Initiative (PMI) provides a framework for marketing Western’s long-term firm hydroelectric resources. For covered projects, Western will make a major portion of the resources currently under contract available to existing long-term firm power customers for a period of time beyond the expiration date of their current contracts.

(b) The Western projects covered by this subpart are the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects (LAP). The PMI applies to covered projects to the extent it is consistent with other contractual and legal rights, and subject to any applicable project-specific environmental requirements.

§ 905.31 Term.

Western will extend resource commitments for 20 years from the date existing contracts expire to existing customers with long-term firm power contracts from projects identified in section 905.30(b).

§ 905.32 Resource extensions and resource pool size.

(a) Western will extend a project-specific percentage of the marketable resource, determined to be available at the time future resource extensions begin, to existing customers with long-term firm power contracts. The remaining unextended power will be used to establish project-specific resource pools. An initial level of 96 percent of the marketable resource will be extended for the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects.

(b) At two 5-year intervals after the effective date of the extension to existing customers, Western shall create a project-specific resource pool increment of up to an additional 1 percent of the long-term marketable resource under contract at the time. The size of the additional resource pool increment shall be determined by Western based on consideration of the actual fair-share needs of eligible new customers and other appropriate purposes.

(c) The initial pool percentages shall be applied to the marketable resource determined to be available at the time future resource extensions begin. Subsequent percentages shall be applied to the resource under contract at the time.

(d) The additional resource pool increments shall be established by pro rata withdrawals, on 2 years’ notice,
§ 905.33 Extension formula.

(a) The amount of power to be extended to an existing customer shall be determined according to this formula:

Customer Contract Rate of Delivery (CROD) today/total project CROD under contract today x project-specific percentage x marketable resource determined to be available at the time future resource extensions begin = CROD extended.

(b) Where contract rates of delivery vary by season, the formula shall be used on a seasonal basis to determine the extended power resource. A similar pro rata approach shall be used for energy extensions.

(c) Determination of the amount of resource available after existing contracts expire, if significantly different from existing resource commitments, shall take place only after an appropriate public process.

(d) The formula set forth in paragraph (a) of this section also should be used to determine the amounts of firm power subject to withdrawal at 5-year intervals after the effective date of the extension to existing customers, except that the percentage used would be up to 1 percent for each of the two withdrawal opportunities, and the formula would use the customer CROD, project CROD and the resource under contract at the time.

§ 905.34 Adjustment provisions.

Western reserves the right to adjust marketable resources committed to all customers with long-term firm power contracts only as required to respond to changes in hydrology and river operations, except as otherwise expressly provided in these regulations. Under contracts that extend resources under this PMI, existing customers shall be given at least 5 years’ notice before adjustments are made. New customers may receive less notice. The earliest that any notice under this section shall become effective is the date that existing contractual commitments expire. Any adjustment shall only take place after an appropriate public process. Withdrawals to serve project use and other purposes provided for by contract shall continue to take place based on existing contract/marketing criteria principles.

§ 905.35 New customer eligibility.

(a) Allocations to new customers from the project-specific resource pools established under § 905.32 shall be determined through separate public processes in each project’s marketing area. New customers receiving an allocation must execute a long-term firm power contract to receive the allocated power and are required to comply with the IRP requirements in this part. Contracts with new customers shall expire on the same date as firm power contracts with all other customers of a project.

(b) To be eligible for an allocation, a potential new customer must be a preference entity, as defined in Reclamation law, within the currently established marketing area for a project.
(c) Entities that desire to purchase power from Western for resale to consumers, including municipalities, cooperatives, public utility districts and public power districts, must have utility status. Native American tribes are not subject to this requirement. Utility status means that the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase power from Western on a wholesale basis for resale to retail consumers. To be eligible to apply for power available from a project’s initial resource pool, those entities that desire to purchase Western power for resale to consumers must have attained utility status by December 31, 1996, for the Pick-Sloan Missouri Basin Program—Eastern Division, and by September 30, 2000, for the Loveland Area Projects. To be eligible to apply for power from subsequent resource pool increments, these entities must have attained utility status no later than 3 years prior to availability of the incremental addition to the resource pool. Deadlines for attaining utility status for other projects will be established at a later date.

§ 905.36 Marketing criteria.

Western shall retain applicable provisions of existing marketing criteria for projects where resource commitments are extended beyond the current expiration date of long-term firm power sales contracts. Western must retain important marketing plan provisions such as classes of service, marketing area, and points of delivery, to the extent that these provisions are consistent with the PMI. The PMI, eligibility and allocation criteria for potential new customers, retained or amended provisions of existing marketing criteria, the project-specific resource definition, and the size of a project-specific resource pool shall constitute the future marketing plan for each project.

§ 905.37 Process.

Modified contractual language shall be required to place resource extensions under contract. Resource extensions and allocations to new customers from the initial resource pool will take effect when existing contracts expire. These dates are December 31, 2000, for the Pick-Sloan Missouri Basin Program—Eastern Division and September 30, 2004, for the Loveland Area Projects. For the Pick-Sloan Missouri Basin Program—Eastern Division, Western will offer contracts to existing customers for resource extensions no sooner than the effective date of the final regulations. For the Loveland Area Projects, existing contracts provide for potential adjustments to marketable resources in 1999. No contracts will be offered to existing customers for post-2004 Loveland Area Projects resources until the analysis of potential resource adjustments in 1999 has been completed and any adjustments are implemented. Existing power sales contracts require that this analysis be completed by 1996.

Subpart D—Energy Services

§ 905.40 Technical assistance.

Western shall establish a program that provides technical assistance to customers to conduct integrated resource planning, implement applicable IRPs and small customer plans, and otherwise comply with the requirements of these regulations.
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960.3-2-2 Nomination of sites as suitable for characterization.
960.3-2-2-1 Evaluation of all potentially acceptable sites.
960.3-2-2-2 Selection of sites within geohydrologic settings.
960.3-2-2-3 Comparative evaluation of all sites proposed for nomination.
960.3-2-2-4 The environmental assessment.
960.3-2-2-5 Formal site nomination.
960.3-2-3 Recommendation of sites for characterization.
960.3-2-3 Consultation.
960.3-4 Environmental impacts.

Subpart C—Postclosure Guidelines

960.4 Postclosure guidelines.
960.4-1 System guidelines.
960.4-2 Technical guidelines.
960.4-2-1 Geohydrology.
960.4-2-2 Geochemistry.
960.4-2-3 Rock characteristics.
960.4-2-4 Climatic changes.
960.4-2-5 Erosion.
960.4-2-6 Dissolution.
960.4-2-7 Tectonics.
960.4-2-8 Human interference.
960.4-2-8-1 Natural resources.
960.4-2-8-2 Site ownership and control.

Subpart D—Preclosure Guidelines

960.5 Preclosure guidelines.
960.5-1 System guidelines.
960.5-2 Technical guidelines.

Preclosure Radiological Safety

960.5-2-1 Population density and distribution.
960.5-2-2 Site ownership and control.
960.5-2-3 Meteorology.
960.5-2-4 Offsite installations and operations.

Environment, Socioeconomics, and Transportation

960.5-2-5 Environmental quality.
960.5-2-6 Socioeconomic impacts.
960.5-2-7 Transportation.

Ease and Cost of Siting, Construction, Operation, and Closure

960.5-2-8 Surface characteristics.
960.5-2-9 Rock characteristics.
960.5-2-10 Hydrology.
960.5-2-11 Tectonics.

Appendix I to Part 960—NRC and EPA Requirements for Postclosure Repository Performance

Appendix II to Part 960—NRC and EPA Requirements for Preclosure Repository Performance

Appendix III to Part 960—Application of the System and Technical Guidelines During the Siting Process

APPENDIX IV TO PART 960—TYPES OF INFORMATION FOR THE NOMINATION OF SITES AS SUITABLE FOR CHARACTERIZATION


SOURCE: 49 FR 47752, Dec. 6, 1984, unless otherwise noted.

Subpart A—General Provisions

§ 960.1 Applicability.

These guidelines were developed in accordance with the requirements of Section 112(a) of the Nuclear Waste Policy Act of 1982 for use by the Secretary of Energy in evaluating the suitability of sites. The guidelines will be used for suitability evaluations and determinations made pursuant to Section 112(b). The guidelines set forth in this part are intended to complement the requirements set forth in the Act, 10 CFR part 60, and 40 CFR part 191.

The DOE recognizes NRC jurisdiction for the resolution of differences between the guidelines and 10 CFR part 60. The guidelines have received the concurrence of the NRC. The DOE contemplates revising the guidelines from time to time, as permitted by the Act, to take into account revisions made to the above regulations and to otherwise update the guidelines as necessary. The DOE will submit the revisions to the NRC and obtain its concurrence before issuance.


§ 960.2 Definitions.

As used in this part:

Accessible environment means the atmosphere, the land surface, surface water, oceans, and the portion of the lithosphere that is outside the controlled area.


Active fault means a fault along which there is recurrent movement, which is usually indicated by small, periodic displacements or seismic activity.

Affected area means either the area of socioeconomic impact or the area of environmental impact, each of which will vary in size among potential repository sites.
Affected Indian tribe means any Indian tribe (1) within whose reservation boundaries a repository for radioactive waste is proposed to be located or (2) whose federally defined possessory or usage rights to other lands outside the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: Provided, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

Affected State means any State that (1) has been notified by the DOE in accordance with Section 116(a) of the Act as containing a potentially acceptable site; (2) contains a candidate site for site characterization or repository development; or (3) contains a site selected for repository development.

Application means the act of making a finding of compliance or noncompliance with the qualifying or disqualifying conditions specified in the guidelines of subparts C and D of this part.

Aquifer means a formation, a group of formations, or a part of a formation that contains sufficient saturated permeable material to yield significant quantities of water to wells and springs.

Barrier means any material or structure that prevents or substantially delays the movement of water or radionuclides.

Candidate site means an area, within a geohydrologic setting, that is recommended by the Secretary of Energy under section 112 of the Act for site characterization, approved by the President under section 112 of the Act for characterization, or undergoing site characterization under section 113 of the Act.

Closure means final backfilling of the remaining open operational areas of the underground facility and boreholes after the termination of waste emplacement, culminating in the sealing of shafts.

Confining unit means a body of impermeable or distinctly less permeable material stratigraphically adjacent to one or more aquifers.

Containment means the confinement of radioactive waste within a designated boundary.

Controlled area means a surface location, to be marked by suitable monuments, extending horizontally no more than 10 kilometers in any direction from the outer boundary of the underground facility, and the underlying subsurface, which area has been committed to use as a geologic repository and from which incompatible activities would be prohibited before and after permanent closure.

Cumulative releases of radionuclides means the total number of curies of radionuclides entering the accessible environment in any 10,000-year period, normalized on the basis of radiotoxicity in accordance with 40 CFR part 191. The peak cumulative release of radionuclides refers to the 10,000-year period during which any such release attains its maximum predicted value.

Decommissioning means the permanent removal from service of surface facilities and components necessary for preclosure operations only, after repository closure, in accordance with regulatory requirements and environmental policies.

Determination means a decision by the Secretary that a site is suitable for site characterization for the selection of a repository, consistent with applications of the guidelines of subparts C and D of this part in accordance with the provisions set forth in subpart B of this part.

Disposal means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste, and the isolation of such waste from the accessible environment.

Disqualifying condition means a condition that, if present at a site, would eliminate that site from further consideration.

Disturbed zone means that portion of the controlled area, excluding shafts, whose physical or chemical properties are predicted to change as a result of underground facility construction or
heat generated by the emplaced radioactive waste such that the resultant change of properties could have a significant effect on the performance of the geologic repository.

DOE means the U.S. Department of Energy or its duly authorized representatives.

Effective porosity means the amount of interconnected pore space and fracture openings available for the transmission of fluids, expressed as the ratio of the volume of interconnected pores and openings to the volume of rock.

Engineered-barrier system means the manmade components of a disposal system designed to prevent the release of radionuclides from the underground facility or into the geohydrologic setting. Such term includes the radioactive-waste form, radioactive-waste canisters, materials placed over and around such canisters, any other components of the waste package, and barriers used to seal penetrations in and into the underground facility.


Environmental impact statement means the document required by section 102(2)(C) of the National Environmental Policy Act of 1969. Sections 114(a) and 114(f) of the Nuclear Waste Policy Act of 1982 include certain limitations on the National Environmental Policy Act requirements as they apply to the preparation of an environmental impact statement for the development of a repository at a characterized site.

EPA means the U.S. Environmental Protection Agency or its duly authorized representatives.

Evaluation means the act of carefully examining the characteristics of a site in relation to the requirements of the qualifying or disqualifying conditions specified in the guidelines of subparts C and D. Evaluation includes the consideration of favorable and potentially adverse conditions.

Excepted means assumed to be probable or certain on the basis of existing evidence and in the absence of significant evidence to the contrary.

Expected repository performance means the manner in which the repository is predicted to function, consideration those conditions, processes, and events that are likely to prevail or may occur during the time period of interest.

Facility means any structure, system, or system component, including engineered barriers, created by the DOE to meet repository-performance or functional objectives.

Fault means a fracture or a zone of fractures along which there has been displacement of the side relative to one another parallel to the fracture or zone of fractures.

Faulting means the process of fracturing and displacement that produces a fault.

Favorable condition means a condition that, though not necessary to qualify a site, is presumed, if present, to enhance confidence that the qualifying condition of a particular guideline can be met.

Finding means a conclusion that is reached after evaluation.

Geohydrologic setting means the system of geohydrologic units that is located within a given geologic setting.

Geohydrologic system means the geohydrologic units within a geologic setting, including any recharge, discharge, interconnections between units, and any natural or man-induced processes or events that could affect ground-water flow within or among those units.

Geohydrologic unit means an aquifer, a confining unit, or a combination of aquifers and confining units comprising a framework for a reasonably distinct geohydrologic system.

Geologic repository means a system, requiring licensing by the NRC, that is intended to be used, or may be used, for the disposal of radioactive waste in excavated geologic media. A geologic repository includes (1) the geologic-repository operations area and (2) the portion of the geologic setting that provides isolation of the radioactive waste and is located within the controlled area.

Geologic-repository operations area means a radioactive-waste facility that is part of the geologic repository, including both surface and subsurface areas and facilities where waste-handling activities are conducted.

Geologic setting means the geologic, hydrologic, and geochemical systems.
of the region in which a geologic-repository operations area is or may be located.

Geomorphic processes means geologic processes that are responsible for the general configuration of the Earth’s surface, including the development of present landforms and their relationships to underlying structures, and are responsible for the geologic changes recorded by these surface features.

Ground water means all subsurface water as distinct from surface water.

Ground-water flux means the rate of ground-water flow per unit area of porous or fractured media measured perpendicular to the direction of flow.

Ground-water sources means aquifers that have been or could be economically and technologically developed as sources of water in the foreseeable future.

Ground-water travel time means the time required for a unit volume of ground water to travel between two locations. The travel time is the length of the flow path divided by the velocity, where velocity is the average ground-water flux passing through the cross-sectional area of the geologic medium through which flow occurs, perpendicular to the flow direction, divided by the effective porosity along the flow path. If discrete segments of the flow path have different hydrologic properties, the total travel time will be the sum of the travel times for each discrete segment.

Guideline means a statement of policy or procedure that may include, when appropriate, qualifying, disqualifying, favorable, or potentially adverse conditions as specified in the “guidelines.”


High-level radioactive waste means (1) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations and (2) other highly radioactive material that the NRC, consistent with existing law, determines by rule requires permanent isolation.

Highly populated area means any incorporated place (recognized by the decennial reports of the U.S. Bureau of the Census) of 2,500 or more persons, or any census designated place (as defined and delineated by the Bureau) of 2,500 or more persons, unless it can be demonstrated that any such place has a lower population density than the mean value for the continental United States. Counties or county equivalents, whether incorporated or not, are specifically excluded from the definition of “place” as used herein.

Host rock means the geologic medium in which the waste is emplaced, specifically the geologic materials that directly encompass and are in close proximity to the underground facility.

Hydraulic conductivity means the volume of water that will move through a medium in a unit of time under a unit hydraulic gradient through a unit area measured perpendicular to the direction of flow.

Hydraulic gradient means a change in the static pressure of ground water, expressed in terms of the height of water above a datum, per unit of distance in a given direction.

Hydrologic process means any hydrologic phenomenon that exhibits a continuous change in time, whether slow or rapid.

Hydrologic properties means those properties of a rock that govern the entrance of water and the capacity to hold, transmit, and deliver water, such as porosity, effective porosity, specific retention, permeability, and the directions of maximum and minimum permeabilities.

Igneous activity means the emplacement (intrusion) of molten rock material (magma) into material in the Earth’s crust or the expulsion (extrusion) of such material onto the Earth’s surface or into its atmosphere or surface water.

Isolation means inhibiting the transport of radioactive material so that the amounts and concentrations of this material entering the accessible environment will be kept within prescribed limits.
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Likely means processing or displaying the qualities, characteristics, or attributes that provide a reasonable basis for confidence that what is expected indeed exists or will occur.

Lithosphere means the solid part of the Earth, including any ground water contained within it.

Member of the public means any individual who is not engaged in operations involving the management, storage, and disposal of radioactive waste. A worker so engaged is a member of the public except when on duty at the geologic-repository operations area.

Mitigation means: (1) Avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments.

Model means a conceptual description and the associated mathematical representation of a system, subsystem, component, or condition that is used to predict changes from a baseline state as a function of internal and/or external stimuli and as a function of time and space.

NRC means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

Perched ground water means unconfined ground water separated from an underlying body of ground water by an unsaturated zone. Its water table is a perched water table. Perched ground water is held up by a perching bed whose permeability is so low that water percolating downward through it is not able to bring water in the underlying unsaturated zone above atmospheric pressure.

Performance assessment means any analysis that predicts the behavior of a system or system component under a given set of constant and/or transient conditions. Performance assessments will include estimates of the effects of uncertainties in data and modeling.

Permanent closure is synonymous with “closure.”

Postclosure means the period of time after the closure of the geologic repository.

Potentially acceptable site means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the DOE undertakes preliminary drilling and geophysical testing for the definition of site location.

Potentially adverse condition means a condition that is presumed to detract from expected system performance, but further evaluation, additional data, or the identification of compensating or mitigating factors may indicate that its effect on the expected system performance is acceptable.

Preclosure means the period of time before and during the closure of the geologic repository.

Pre-waste-emplacement means before the authorization of repository construction by the NRC.

Qualifying condition means a condition that must be satisfied for a site to be considered acceptable with respect to a specific guideline.

Quaternary Period means the second period of the Cenozoic Era, following the Tertiary, beginning 2 to 3 million years ago and extending to the present.

Radioactive waste or “waste” means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in a geologic repository.

Radioactive-waste facility means a facility subject to the licensing and related regulatory authority of the NRC pursuant to Sections 202(3) and 202(4) of the Energy Reorganization Act of 1974 (88 Stat. 1244).

Radionuclide retardation means the process or processes that cause the time required for a given radionuclide to move between two locations to be greater than the ground-water travel time, because of physical and chemical interactions between the radionuclide and the geohydrologic unit through which the radionuclide travels.

Reasonably available technology means technology which exists and has been demonstrated or for which the results...
of any requisite development, demonstration, or confirmatory testing efforts before application will be available within the required time period.

Repository is synonymous with “geologic repository.”

Repository construction means all excavation and mining activities associated with the construction of shafts, shaft stations, rooms, and necessary openings in the underground facility, preparatory to radioactive-waste emplacement, as well as the construction of necessary surface facilities, but excluding site-characterization activities.

Repository operation means all of the functions at the site leading to and involving radioactive-waste emplacement in the underground facility, including receiving, transportation, handling, emplacement, and, if necessary, retrieval.

Repository support facilities means all permanent facilities constructed in support of site-characterization activities and repository construction, operation, and closure activities, including surface structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

Restricted area means any area access to which is controlled by the DOE for purposes of protecting individuals from exposure to radiation and radioactive materials before repository closure, but not including any areas used as residential quarters, although a separate room or rooms in a residential building may be set apart as a restricted area.

Retrieval means the act of intentionally removing radioactive waste before repository closure from the underground location at which the waste had been previously emplaced for disposal.

Saturated zone means that part of the Earth’s crust beneath the water table in which all voids, large and small, are ideally filled with water under pressure greater than atmospheric.

Secretary means the Secretary of Energy.

Site means a potentially acceptable site or a candidate site, as appropriate, until such time as the controlled area has been established, at which time the site and the controlled area are the same.

Site characterization means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

Siting means the collection of exploration, testing, evaluation, and decision-making activities associated with the process of site screening, site nomination, site recommendation, and site approval for characterization or repository development.

Source term means the kinds and amounts of radionuclides that make up the source of a potential release of radioactivity.

Spent nuclear fuel means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

Surface facilities means repository support facilities within the restricted area.

Surface water means any waters on the surface of the Earth, including fresh and salt water, ice, and snow.

System means the geologic setting at the site, the waste package, and the repository, all acting together to contain and isolate the waste.

System performance means the complete behavior of a repository system in response to the conditions, processes, and events that may affect it.

Tectonic means of, or pertaining to, the forces involved in, or the resulting structures or features of, tectonics.

Tectonics means the branch of geology dealing with the broad architecture of the outer part of the Earth, that is, the regional assembling of structural or deformational features and the study of their mutual relations, origin, and historical evolution.
§ 960.3 To the extent practicable means the degree to which an intended course of action is capable of being effected in a manner that is reasonable and feasible within a framework of constraints.

Underground facility means the underground structure and the rock required for support, including mined openings and backfill materials, but excluding shafts, boreholes, and their seals.

Unsaturated zone means the zone between the land surface and the water table. Generally, water in this zone is under less than atmospheric pressure, and some of the voids may contain air or other gases at atmospheric pressure. Beneath flooded areas or in perched water bodies, the water pressure locally may be greater than atmospheric.

Waste form means the radioactive waste materials and any encapsulating or stabilizing matrix.

Waste package means the waste form and any containers, shielding, packing, and other sorbent materials immediately surrounding an individual waste container.

Water table means that surface in a body of ground water at which the water pressure is atmospheric.

Subpart B—Implementation Guidelines

§ 960.3 Implementation guidelines.

The guidelines of this subpart establish the procedure and basis for applying the postclosure and the preclosure guidelines of subparts C and D, respectively, to evaluations of the suitability of sites. As may be appropriate during the siting process, this procedure requires consideration of a variety of geohydrologic settings and rock types, regionality, and environmental impacts and consultation with affected States, affected Indian tribes, and Federal agencies.


§ 960.3–1 Siting provisions.

The siting provisions establish the framework for the implementation of the siting process specified in §960.3–2. Sections 960.3–1–1 and 960.3–1–2 require that consideration be given to sites situated in different geohydrologic settings and different types of host rock, respectively. These diversity guidelines are intended to balance the process of site selection by requiring consideration of a variety of geologic conditions and media, and thereby enhance confidence in the technical suitability of sites selected for the development of repositories. As required by the Act, §960.3–1–3 specifies consideration of a regional distribution of repositories after recommendation of a site for development of the first repository. Section 960.3–1–4 describes the evidence that is required to support siting decisions. Section 960.3–1–5 establishes the basis for site evaluations against the postclosure and the preclosure guidelines of subparts C and D during the various phases of the siting process.

§ 960.3–1–1 Diversity of geohydrologic settings.

Consideration shall be given to a variety of geohydrologic settings in which sites for the development of repositories may be located. To the extent practicable, sites recommended as candidate sites for characterization shall be located in different geohydrologic settings.

§ 960.3–1–2 Diversity of rock types.

Consideration shall be given to a variety of geologic media in which sites for the development of repositories may be located. To the extent practicable, and with due consideration of candidate sites characterized previously or approved for such characterization if the circumstances apply, sites recommended as candidate sites for characterization shall have different types of host rock.

§ 960.3–1–3 Regionality.

In making site recommendations for repository development after the site for the first repository has been recommended, the Secretary shall give due consideration to the need for, and the advantages of, a regional distribution in the siting of subsequent repositories. Such consideration shall take into account the proximity of sites to locations at which waste is generated or temporarily stored and at which...
other repositories have been or are being developed.

§ 960.3-1-4 Evidence for siting decisions.

The siting process involves a sequence of four decisions: The identification of potentially acceptable sites; the nomination of sites as suitable for characterization; the recommendation of sites as candidate sites for site characterization; and after the completion of site characterization and nongeologic data gathering, the recommendation of a candidate site for the development of a repository. Each of these decisions will be supported by the evidence specified below.

§ 960.3-1-4-1 Site identification as potentially acceptable.

The evidence for the identification of a potentially acceptable site shall be the types of information specified in appendix IV of this part. Such evidence will be relatively general and less detailed than that required for the nomination of a site as suitable for characterization. Because the gathering of detailed geologic data will not take place until after the recommendation of a site for characterization, the levels of information may be relatively greater for the evaluation of those guidelines in subparts C and D that pertain to surface-identifiable factors for such site. The sources of information shall include the literature in the public domain and the private sector, when available, and will be supplemented in some instances by surface investigations and conceptual engineering design studies conducted by the DOE. Geologic surface investigations may include the mapping of identifiable rock masses, fracture and joint characteristics, and fault zones. Other surface investigations will consider the aquatic and terrestrial ecology; water rights and uses; topography; potential offsite hazards; natural resource concentrations; national or State protected resources; existing transportation systems; meteorology and climatology; population densities, centers, and distributions; and general socioeconomic characteristics.

§ 960.3-1-4-2 Site nomination for characterization.

The evidence required to support the nomination of a site as suitable for characterization shall include the types of information specified in appendix IV of this part and shall be contained or referenced in the environmental assessments to be prepared in accordance with the requirements of the Act. The source of this information shall include the literature and related studies in the public domain and the private sector, when available, and various meteorological, environmental, socioeconomic, and transportation studies conducted by the DOE in the affected area; exploratory boreholes in the region of such site, including lithologic logging and hydrologic and geophysical testing of such boreholes, laboratory testing of core samples for the evaluation of geochemical and engineering rock properties, and chemical analyses of water samples from such boreholes; surface investigations, including geologic mapping and geophysical surveys, and compilations of satellite imagery data; in situ or laboratory testing of similar rock types under expected repository conditions; evaluations of natural and man-made analogs of the repository and its subsystems, such as geothermally active areas, underground excavations, and case histories of socioeconomic cycles in areas that have experienced intermittent large-scale construction and industrial activities; and extrapolations of regional data to estimate site-specific characteristics and conditions. The exact types and amounts of information to be collected within the above categories, including such details as the specific types of hydrologic tests, combinations of geophysical tests, or number of exploratory boreholes, are dependent on the site-specific needs for the application of the guidelines of subparts C and D, in accordance with the provisions of this subpart and the application requirements set forth in appendix III of this part. The evidence shall also include those technical evaluations that use the information specified above and that provide additional bases for evaluating the ability of a site to meet the qualifying conditions of the guidelines.
§ 960.3–1–4–3 Site recommendation for characterization.

The evidence required to support the recommendation of a site as a candidate site for characterization shall consist of the evaluations and data contained or referenced in the environmental assessment for such site, unless the Secretary certifies that such information, in the absence of additional preliminary borings or excavations, will not be adequate to satisfy applicable requirements of the Act.

§ 960.3–1–5 Basis for site evaluations.

(a) Evaluations of individual sites and comparisons between and among sites shall be based on the postclosure and preclosure guidelines specified in subparts C and D of this part, respectively. Except for screening for potentially acceptable sites as specified in §960.3–2–1, such evaluations shall place primary significance on the postclosure guidelines and secondary significance on the preclosure guidelines, with each set of guidelines considered collectively for such purposes. Both the postclosure and the preclosure guidelines consist of a system guideline or guidelines and corresponding groups of technical guidelines.

(b) The postclosure guidelines of subpart C of this part contain eleven technical guidelines in one group. The preclosure guidelines of subpart D of this part contain eleven technical guidelines separated into three groups that represent, in decreasing order of importance, preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure.

(c) The relative significance of any technical guideline to its corresponding system guideline is site specific. Therefore, for each technical guideline, an evaluation of compliance with the qualifying condition shall be made in the context of the collection of system elements and the evidence related to that guideline, considering on balance the favorable conditions and the potentially adverse conditions identified at a site. Similarly, for each system guideline, such evaluation shall be made in the context of the group of technical guidelines and the evidence related to that system guideline.

(d) For purposes of recommending sites for development as repositories, such evidence shall include analyses of expected repository performance to assess the likelihood of demonstrating compliance with 40 CFR part 191 and 10 CFR part 60, in accordance with §960.4–1. A site shall be disqualified at any time during the siting process if the evidence supports a finding by the DOE that a disqualifying condition exists or the qualifying condition of any system or technical guideline cannot be met.

(e) Comparisons between and among sites shall be based on the system guidelines, to the extent practicable and in accordance with the levels of relative significance specified above for the postclosure and the preclosure guidelines. Such comparisons are intended to allow comparative evaluations of sites in terms of the capabilities of the natural barriers for waste isolation and to identify innate deficiencies that could jeopardize compliance with such requirements. If the evidence for the sites is not adequate to substantiate such comparisons, then the comparisons shall be based on the groups of technical guidelines under the postclosure and the preclosure guidelines, considering the levels of relative significance appropriate to the postclosure and the preclosure guidelines and the order of importance appropriate to the subordinate groups within the preclosure guidelines. Comparative site evaluations shall place primary importance on the natural barriers of the site. In such evaluations for the postclosure guidelines of subpart C of this part, engineered barriers shall be considered only to the extent
necessary to obtain realistic source terms for comparative site evaluations based on the sensitivity of the natural barriers to such realistic engineered barriers. For a better understanding of the potential effects of engineered barriers on the overall performance of the repository system, these comparative evaluations shall consider a range of levels in the performance of the engineered barriers. That range of performance levels shall vary by at least a factor of 10 above and below the engineered-barrier performance requirements set forth in 10 CFR 60.113, and the range considered shall be identical for all sites compared. The comparisons shall assume equivalent engineered barrier performance for all sites compared and shall be structured so that engineered barriers are not relied upon to compensate for deficiencies in the geologic media. Furthermore, engineered barriers shall not be used to compensate for an inadequate site; mask the innate deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared. Releases of different radionuclides shall be combined by the methods specified in appendix A of 40 CFR part 191.

(f) The comparisons specified in paragraph (e) of this section shall consist of two comparative evaluations that predict radionuclide releases for 100,000 years after repository closure and shall be conducted as follows. First, the sites shall be compared by means of evaluations that emphasize the performance of the natural barriers at the site. Second, the sites shall be compared by means of evaluations that emphasize the performance of the total repository system. These second evaluations shall consider the expected performance of the repository system; be based on the expected performance of waste packages and waste forms, in compliance with the requirements of 10 CFR 60.113, and on the expected hydrological and geochemical conditions at each site; and take credit for the expected performance of all other engineered components of the repository system. The comparison of isolation capability shall be one of the significant considerations in the recommendation of sites for the development of repositories. The first of the two comparative evaluations specified in the paragraph (e) of this section shall take precedence unless the second comparative evaluation would lead to substantially different recommendations. In the latter case, the two comparative evaluations shall receive comparable consideration. Sites with predicted isolation capabilities that differ by less than a factor of 10, with similar uncertainties, may be assumed to provide equivalent isolation.

[66 FR 57334, Nov. 14, 2001]

§ 960.3–2 Siting process.

The siting process begins with site screening for the identification of potentially acceptable sites. This process was completed for purposes of the first repository before the enactment of the Act, and the identification of such sites was made after enactment in accordance with the provisions of section 116(a) of the Act. The screening process for the identification of potentially acceptable sites for the second and subsequent repositories shall be conducted in accordance with the requirements specified in §960.3–2–1 of this subpart. The nomination of any site as suitable for characterization shall follow the process specified in §960.3–2–2, and such nomination shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. The recommendation of sites as candidate sites for characterization shall be accomplished in accordance with the requirements specified in §960.3–2–3.


§ 960.3–2–1 Site screening for potentially acceptable sites.

To identify potentially acceptable sites for the development of other than the first repository, the process shall begin with site-screening activities that consider large land masses that contain rock formations of suitable depth, thickness, and lateral extent and have structural, hydrologic, and tectonic features favorable for waste containment and isolation. Within those large land masses, subsequent site-screening activities shall focus on

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§ 960.3–2–2 Nomination of sites as suitable for characterization.

From the sites identified as potentially acceptable, the Secretary shall nominate at least five sites determined suitable for site characterization for the selection of each repository site. For the second repository, at least three of the sites shall not have been nominated previously. Any site nominated as suitable for characterization for the first repository, but not recommended as a candidate site for characterization, may not be nominated as suitable for characterization for the second repository. The nomination of a site as suitable for characterization shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. Such nomination shall be based on evaluations in accordance with the guidelines of this part, and the bases and relevant details of those evaluations and of the decision processes involved therein shall be contained in the environmental assessment for the site in the manner specified in this subpart. The evidence required to support such evaluations and siting decisions is specified in §960.3–1–4–2.

§ 960.3–2–2–1 Evaluation of all potentially acceptable sites.

First, in considering sites for nomination, each of the potentially acceptable sites shall be evaluated on the basis of the disqualifying conditions specified.
in the technical guidelines of subparts C and D, in accordance with the application requirements set forth in appendix III of this part. This evaluation shall support a finding by the DOE that such sites is not disqualified.

§ 960.3–2–2–2 Selection of sites within geohydrologic settings.

Second, the siting provision requiring diversity of geohydrologic settings, as specified in §960.3–1–1, shall be applied to group all potentially acceptable sites according to their geohydrologic settings. Third, for those geohydrologic settings that contain more than one potentially acceptable site, the preferred site shall be selected on the basis of a comparative evaluation of all potentially acceptable sites in that setting. This evaluation shall consider the distinguishing characteristics displayed by the potentially acceptable sites within the setting and the related guidelines from subparts C and D. That is, the appropriate guidelines shall be selected primarily on the basis of the kinds of evidence among sites for which distinguishing characteristics can be identified. Such comparative evaluation shall be made on the basis of the qualifying conditions for those guidelines, considering, on balance, the favorable conditions and potentially adverse conditions identified at each site. Due consideration shall also be given to the siting provisions specifying the basis for site evaluations in §960.3–1–5, to the extent practicable, and diversity of rock types in §960.3–1–2, if the circumstances so apply. If less than five geohydrologic settings are available for consideration, the above process shall be used to select two or more preferred sites from those settings that contain more than one potentially acceptable site, as required to obtain the number of sites to be nominated as suitable for characterization. For purposes of the second and subsequent repositories, due consideration shall also be given to the siting provision for regionality as specified in §960.3–1–3. Fourth, each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for the development of a repository under the qualifying condition of each guideline specified in subparts C and D that does not require site characterization as a prerequisite for the application of such guideline. The guidelines considered appropriate to this evaluation have been selected on the basis of their exclusion under the definition of site characterization as specified in §960.2. Although the final application of these guidelines, in accordance with the provisions set forth in appendix III of this part, does not require geologic data from site-characterization activities, such application will require additional data beyond those specified in appendix IV of this part, which will be obtained concurrently with site characterization. Such guidelines include those specified in §§960.4–2–8–2 (Site Ownership and Control) of subpart C; §§960.5–1(a)(1) and 960.5–1(a)(2) of subpart D (preclosure system guidelines for radiological safety and environmental quality, socioeconomics, and transportation); and §§960.5–2–1 through 960.5–2–7 of subpart D (Population Density and Distribution, Site Ownership and Control, Meteorology, Offsite Installations and Operations, Environmental Quality, Socioeconomic Impacts, and Transportation). This evaluation shall consider on balance those favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for the development of a repository by considering the activities from the start of site characterization through decommissioning and shall support a finding by the DOE in accordance with the application requirements set forth in appendix III of this part. Fifth, each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for site characterization under the qualifying conditions of those guidelines specified in subparts C and D that require characterization (i.e., subsurface geologic, hydrologic, and geochemical data gathering). Such guidelines include those specified in §960.4–1(a) (postclosure system guideline); §§960.4–2–1 through 960.4–2–8–1 of subpart C (Geochemistry, Geochemistry, Rock Characteristics,
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Climatic Changes, Erosion, Dissolution, Tectonics, Human Interference, and Natural Resources; §960.5–1(a)(3) (preclosure system guideline for ease and cost of siting, construction, operation, and closure); and §960.5–2–8 through 960.5–2–11 of subpart D (Surface Characteristics, Rock Characteristics, Hydrology, and Tectonics). This evaluation shall consider on balance the favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for characterization and shall support a finding by the DOE in accordance with the application requirements set forth in appendix III of this part.

§ 960.3–2–2–3 Comparative evaluation of all sites proposed for nomination.

Sixth, for those potentially acceptable sites to be proposed for nomination, as determined by the process specified in §960.3–2–2–2, a reasonable comparative evaluation of each such site with all other such sites shall be made. For each site and for each guideline specified in subparts C and D, the DOE shall summarize the evaluations and findings specified under §960.3–2–2–1 and under the fourth and fifth provisions of §960.3–2–2. Each such summary shall allow comparisons to be made among sites on this basis of each guideline.

§ 960.3–2–2–4 The environmental assessment.

To document the process specified above, and in compliance with section 11203(1)(B) of the Act, an environmental assessment shall be prepared for each site proposed for nomination as suitable for characterization. Each such environmental assessment shall describe the decision process by which each site was proposed for nomination as described in the preceding six steps and shall contain or reference the evidence that supports such process according to the requirements of §960.3–1–4–2 and appendix IV of this part. As specified in the Act, each environmental assessment shall include an evaluation of the effects of the site-characterization activities at the site on public health and safety and the environment; a discussion of alternative activities related to site characterization that may be taken to avoid such impact; and an assessment of the regional and local impacts of locating a repository at the site. The draft environmental assessment for each site proposed for nomination as suitable for characterization shall be made available by the DOE for public comment after the Secretary has notified the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such impending availability.

§ 960.3–2–2–5 Formal site nomination.

After the final environmental assessments have been prepared, the Secretary shall nominate at least five sites that he determines suitable for site characterization for the selection of a repository site, and, in so doing, he shall cause to have published in the Federal Register a notice specifying the sites so nominated and announcing the availability of the final environmental assessments for such sites. This determination by the Secretary shall be based on the final environmental assessments for such sites, including, in particular, consideration of the available evidence, evaluations, and the resultant findings for the guidelines of subparts C and D so specified under the fourth and fifth provisions of §960.3–2–2. Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such nomination and the basis for such nomination.

§ 960.3–2–3 Recommendation of sites for characterization.

After the nomination of at least five sites as suitable for site characterization for the selection of the first repository, the Secretary shall recommend in writing to the President not less than three candidate sites for such characterization. The recommendation decision shall be based on the available geophysical, geologic, geochemical,
and hydrologic data; other information; associated evaluations and findings reported in the environmental assessments accompanying the nominations; and the considerations specified below, unless the Secretary certifies that such available data will not be adequate to satisfy applicable requirements of the Act in the absence of further preliminary borings or excavations. On the basis of the evidence and in accordance with the siting provision specifying the basis for site evaluations in §960.3–1–5, the sites nominated as suitable for characterization shall be considered as to their order of preference as candidate sites for characterization. Subsequently, the siting provisions specifying diversity of geohydrologic settings, diversity of rock types, and, after the first repository, consideration of regionality in §§960.3–1–1, 960.3–1–2, and 960.3–1–3, respectively, shall be considered to determine a final order of preference for the characterization of such sites. Considering this order of preference together with the available siting alternatives specified in the Act, the sites recommended as candidate sites for characterization shall offer, on balance, the most advantageous combination of characteristics and conditions for the successful development of repositories at such sites. The process for the recommendation of sites as candidate sites for characterization for the selection of any subsequent repository shall be the same as that specified above for the first repository.

§960.3–3 Consultation.

The DOE shall provide to designated officials of the affected States and to the governing bodies of any affected Indian tribe timely and complete information regarding determinations or plans made with respect to the siting, site characterization, design, development, construction, operation, closure, decommissioning, licensing, or regulation of a repository. Written responses to written requests for information from the designated officials of affected States or affected Indian tribes will be provided within 30 days after receipt of the written requests. In performing any study of an area for the purpose of determining the suitability of such area for the development of a repository, the DOE shall consult and cooperate with the Governor and the legislature of an affected State and the governing body of an affected Indian tribe in an effort to resolve concerns regarding public health and safety, environmental impacts, socioeconomic impacts, and technical aspects of the siting process. After notifying affected States and affected Indian tribes that potentially acceptable sites have been identified, or that a site has been approved for characterization, the DOE shall seek to enter into binding written agreements with such affected States or affected Indian tribes in accordance with the requirements of the Act. The DOE shall also consult, as appropriate, with other Federal agencies.

§960.3–4 Environmental impacts.

Environmental impacts shall be considered by the DOE throughout the site characterization, site selection, and repository development process. The DOE shall mitigate significant adverse environmental impacts, to the extent practicable, during site characterization and repository construction, operation, closure, and decommissioning.

Subpart C—Postclosure Guidelines

§960.4 Postclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance after closure. The postclosure guidelines are separated into a system guideline and eight technical guidelines. The system guideline establishes waste containment and isolation requirements that are based on NRC and EPA regulations. These requirements must be met by the repository system, which contains natural barriers and engineered barriers. The engineered barriers will be designed to complement the natural barriers, which provide the primary means for waste isolation.

§960.4–1 System guideline.

(a) Qualifying Condition. The geologic setting at the site shall allow for the physical separation of radioactive waste from the accessible environment
after closure in accordance with the requirements of 40 CFR part 191, subpart B, as implemented by the provisions of 10 CFR part 60. The geologic setting at the site will allow for the use of engineered barriers to ensure compliance with the requirements of 40 CFR part 191 and 10 CFR part 60 (see appendix I of this part).

§ 960.4–2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in five guidelines, disqualifying conditions on the characteristics, processes, and events that may influence the performance of a repository system after closure. The favorable conditions and the potentially adverse conditions under each guideline are not listed in any assumed order of importance. Potentially adverse conditions will be considered if they affect waste isolation within the controlled area even though such conditions may occur outside the controlled area. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying condition of the postclosure system guideline. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in subpart B.

§ 960.4–2–1 Geohydrology.

(a) Qualifying condition. The present and expected geohydrologic setting of a site shall be compatible with waste containment and isolation. The geohydrologic setting, considering the characteristics of and the processes operating within the geologic setting, shall permit compliance with (1) the requirements specified in §960.4–1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) Favorable conditions. (1) Site conditions such that the pre-waste-emplacement ground-water travel time along any path of likely radionuclide travel from the disturbed zone to the accessible environment would be more than 10,000 years.

(2) The nature and rates of hydrologic processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(3) Sites that have stratigraphic, structural, and hydrologic features such that the geohydrologic system can be readily characterized and modeled with reasonable certainty.

(4) For disposal in the saturated zone, at least one of the following pre-waste-emplacement conditions exists:

(i) A host rock and immediately surrounding geohydrologic units with low hydraulic conductivities.

(ii) A downward or predominantly horizontal hydraulic gradient in the host rock and in the immediately surrounding geohydrologic units.

(iii) A low hydraulic gradient in and between the host rock and the immediately surrounding geohydrologic units.

(iv) High effective porosity together with low hydraulic conductivity in rock units along paths of likely radionuclide travel between the host rock and the accessible environment.

(v) A climatic regime in which the average annual historical precipitation is a small fraction of the average annual potential evapotranspiration.

Note: The DOE will, in accordance with the general principles set forth in §960.1 of these regulations, revise the guidelines as
necessary, to ensure consistency with the final NRC regulations on the unsaturated zone, which were published as a proposed rule on February 16, 1984, in 49 FR 5934.

(c) Potentially adverse conditions. (1) Expected changes in geohydrologic conditions—such as changes in the hydraulic gradient, the hydraulic conductivity, the effective porosity, and the ground-water flux through the host rock and the surrounding geohydrologic units—sufficient to significantly increase the transport of radionuclides to the accessible environment as compared with pre-waste-emplacement conditions.

(2) The presence of ground-water sources, suitable for crop irrigation or human consumption without treatment, along ground-water flow paths from the host rock to the accessible environment.

(3) The presence in the geologic setting of stratigraphic or structural features—such as dikes, sills, faults, shear zones, folds, dissolution effects, or brine pockets—if their presence could significantly contribute to the difficulty of characterizing or modeling the geohydrologic system.

(d) Disqualifying condition. A site shall be disqualified if the pre-waste-emplacement ground-water travel time from the disturbed zone to the accessible environment is expected to be less than 1,000 years along any pathway of likely and significant radionuclide travel.

§ 960.4–2–2 Geochemistry.

(a) Qualifying condition. The present and expected geochemical characteristics of a site shall be compatible with waste containment and isolation. Considering the likely chemical interactions among radionuclides, the host rock, and the ground water, the characteristics of and the processes operating within the geologic setting shall permit compliance with (1) the requirements specified in §960.4–1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) Favorable conditions. (1) The nature and rates of the geochemical processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(2) Geochemical conditions that promote the precipitation, diffusion into the rock matrix, or sorption of radionuclides; inhibit the formation of particulates, colloids, inorganic complexes, or organic complexes that increase the mobility of radionuclides; or inhibit the transport of radionuclides by particulates, colloids, or complexes.

(3) Mineral assemblages that, when subjected to expected repository conditions, would remain unaltered or would alter to mineral assemblages with equal or increased capability to retard radionuclide transport.

(4) A combination of expected geochemical conditions and a volumetric flow rate of water in the host rock that would allow less than 0.001 percent per year of the total radionuclide inventory in the repository at 1,000 years to be dissolved.

(5) Any combination of geochemical and physical retardation processes that would decrease the predicted peak cumulative releases of radionuclides to the accessible environment by a factor of 10 as compared to those predicted on the basis of ground-water travel time without such retardation.

(c) Potentially adverse conditions. (1) Ground-water conditions in the host rock that could affect the solubility or the chemical reactivity of the engineered-barrier system to the extent that the expected repository performance could be compromised.

(2) Geochemical processes or conditions that could reduce the sorption of radionuclides or degrade the rock strength.

(3) Pre-waste-emplacement ground-water conditions in the host rock that are chemically oxidizing.

§ 960.4–2–3 Rock characteristics.

(a) Qualifying condition. The present and expected characteristics of the host rock and surrounding units shall be capable of accommodating the thermal, chemical, mechanical, and radiation stresses expected to be induced
§ 960.4–2–4 Climatic changes.

(a) Qualifying condition. The site shall be located where future climatic conditions will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in §960.4–1. In predicting the likely future climatic conditions at a site, the DOE will consider the global, regional, and site climatic patterns during the Quaternary Period, considering the geomorphic evidence of the climatic conditions in the geologic setting.

(b) Favorable conditions. (1) A surface-water system such that expected climatic cycles over the next 100,000 years would not adversely affect waste isolation.

(2) A geologic setting in which climatic changes have had little effect on the hydrologic system throughout the Quaternary Period.

(c) Potentially adverse conditions. (1) Evidence that the water table could rise sufficiently over the next 10,000 years to saturate the underground facility in a previously unsaturated host rock.

(2) Evidence that climatic changes over the next 10,000 years could cause perturbations in the hydraulic gradient, the hydraulic conductivity, the effective porosity, or the ground-water flux through the host rock and the surrounding geohydrologic units, sufficient to significantly increase the transport of radionuclides to the accessible environment.

§ 960.4–2–5 Erosion.

(a) Qualifying condition. The site shall allow the underground facility to be placed at a depth such that erosional processes acting upon the surface will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in §960.4–1. In predicting the likelihood of potentially disruptive erosional processes, the DOE will consider the climatic, tectonic, and geomorphic evidence of rates and patterns of erosion in the geologic setting during the Quaternary Period.

(b) Favorable conditions. (1) Site conditions that permit the emplacement of waste at a depth of at least 300 meters below the directly overlying ground surface.

(2) A geologic setting where the nature and rates of the erosional processes that have been operating during the Quaternary Period are predicted to have less than one chance in 10,000 over
the next 10,000 years of leading to releases of radionuclides to the accessible environment.

(3) Site conditions such that waste exhumation would not be expected to occur during the first one million years after repository closure.

(c) Potentially adverse conditions. (1) A geologic setting that shows evidence of extreme erosion during the Quaternary Period.

(2) A geologic setting where the nature and rates of geomorphic processes that have been operating during the Quaternary Period could, during the first 10,000 years after closure, adversely affect the ability of the geologic repository to isolate the waste.

(d) Disqualifying condition. The site shall be disqualified if site conditions do not allow all portions of the underground facility to be situated at least 200 meters below the directly overlying ground surface.

§ 960.4–2–6 Dissolution.

(a) Qualifying condition. The site shall be located such that any subsurface rock dissolution will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in §960.4–1. In predicting the likelihood of dissolution within the geologic setting at a site, the DOE will consider the evidence of dissolution within that setting during the Quaternary Period, including the locations and characteristics of dissolution fronts or other dissolution features, if identified.

(b) Favorable condition. No evidence that the host rock within the site was subject to significant dissolution during the Quaternary Period.

(c) Potentially adverse condition. Evidence of dissolution within the geologic setting—such as breccia pipes, dissolution cavities, significant volumetric reduction of the host rock or surrounding strata, or any structural collapse—such that a hydraulic interconnection leading to a loss of waste isolation could occur.

(d) Disqualifying condition. The site shall be disqualified if it is likely that, during the first 10,000 years after closure, active dissolution, as predicted on the basis of the geologic record, would result in a loss of waste isolation.

§ 960.4–2–7 Tectonics.

(a) Qualifying condition. The site shall be located in a geologic setting where future tectonic processes or events will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in §960.4–1. In predicting the likelihood of potentially disruptive tectonic processes or events, the DOE will consider the structural, stratigraphic, geophysical, and seismic evidence for the nature and rates of tectonic processes and events in the geologic setting during the Quaternary Period.

(b) Favorable condition. The nature and rates of igneous activity and tectonic processes (such as uplift, subsidence, faulting, or folding), if any, operating within the geologic setting during the Quaternary Period would, if continued into the future, have less than one chance in 10,000 over the first 10,000 years after closure of leading to releases of radionuclides to the accessible environment.

(c) Potentially adverse conditions. (1) Evidence of active folding, faulting, diapirism, uplift, subsidence, or other tectonic processes or igneous activity within the geologic setting during the Quaternary Period.

(2) Historical earthquakes within the geologic setting of such magnitude and intensity that, if they recurred, could affect waste containment or isolation.

(3) Indications, based on correlations of earthquakes with tectonic processes and features, that either the frequency of occurrence or the magnitude of earthquakes within the geologic setting may increase.

(4) More-frequent occurrences of earthquakes or earthquakes of higher magnitude than are representative of the region in which the geologic setting is located.

(5) Potential for natural phenomena such as landslides, subsidence, or volcanic activity of such magnitudes that they could create large-scale surface-water impoundments that could change the regional ground-water flow system.

(6) Potential for tectonic deformations—such as uplift, subsidence, folding, or faulting—that could adversely affect the regional ground-water flow system.
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(d) Disqualifying condition. A site shall be disqualified if, based on the geologic record during the Quaternary Period, the nature and rates of fault movement or other ground motion are expected to be such that a loss of waste isolation is likely to occur.

§ 960.4-2-8 Human interference.

The site shall be located such that activities by future generations at or near the site will not be likely to affect waste containment and isolation. In assessing the likelihood of such activities, the DOE will consider the estimated effectiveness of the permanent markers and records required by 10 CFR part 60, taking into account site-specific factors, as stated in §§ 960.4-2-8-1 and 960.4-2-8-2, that could compromise their continued effectiveness.

§ 960.4-2-8-1 Natural resources.

(a) Qualifying condition. This site shall be located such that—considering permanent markers and records and reasonable projections of value, scarcity, and technology—the natural resources, including ground water suitable for crop irrigation or human consumption without treatment, present at or near the site will not be likely to give rise to interference activities that would lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1.

(b) Favorable conditions. (1) No known natural resources that have or are projected to have in the foreseeable future a value great enough to be considered a commercially extractable resource.

(2) Ground water with 10,000 parts per million or more of total dissolved solids along any path of likely radionuclide travel from the host rock to the accessible environment.

(c) Potentially adverse conditions. (1) Indications that the site contains naturally occurring materials, whether or not actually identified in such form that (i) economic extraction is potentially feasible during the foreseeable future or (ii) such materials have a greater gross value, net value, or commercial potential than the average for other areas of similar size that are representative of, and located in, the geologic setting.

(2) Evidence of subsurface mining or extraction for resources within the site if it could affect waste containment or isolation.

(3) Evidence of drilling within the site for any purpose other than repository-site evaluation to a depth sufficient to affect waste containment and isolation.

(4) Evidence of a significant concentration of any naturally occurring material that is not widely available from other sources.

(5) Potential for foreseeable human activities—such as ground-water withdrawal, extensive irrigation, subsurface injection of fluids, underground pumped storage, military activities, or the construction of large-scale surface-water impoundments—that could adversely change portions of the ground-water flow system important to waste isolation.

(d) Disqualifying conditions. A site shall be disqualified if—

(1) Previous exploration, mining, or extraction activities for resources of commercial importance at the site have created significant pathways between the projected underground facility and the accessible environment; or

(2) Ongoing or likely future activities to recover presently valuable natural mineral resources outside the controlled area would be expected to lead to an inadvertent loss of waste isolation.

§ 960.4-2-8-2 Site ownership and control.

(a) Qualifying condition. The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR part 60, ownership, surface and subsurface rights, and control of access that are required in order that potential surface and subsurface activities as the site will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1.

(b) Favorable condition. Present ownership and control of land and all surface and subsurface rights by the DOE.

(c) Potentially adverse condition. Projected land-ownership conflicts that cannot be successfully resolved through voluntary purchase-sell agreements, nondisputed agency-to-agency agreement.
transfers of title, or Federal condemnation proceedings.

Subpart D—Preclosure Guidelines

§ 960.5 Preclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance before closure. The preclosure guidelines are separated into three system guidelines and eleven technical guidelines.

§ 960.5–1 System guidelines.

(a) Qualifying conditions—(1) Preclosure radiological safety. Any projected radiological exposures of the general public and any projected releases of radioactive materials to restricted and unrestricted areas during repository operation and closure shall meet the applicable safety requirements set forth in 10 CFR part 20, 10 CFR part 60, and 40 CFR 191, subpart A (see appendix II of this part).

(2) Environment, socioeconomics, and transportation. During repository siting, construction, operation, closure, and decommissioning the public and the environment shall be adequately protected from the hazards posed by the disposal of radioactive waste.

(3) Ease and cost of siting, construction, operation, and closure. Repository siting, construction, operation, and closure shall be demonstrated to be technically feasible on the basis of reasonably available technology, and the associated costs shall be demonstrated to be reasonable relative to other available and comparable siting options.

§ 960.5–2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in seven guidelines, disqualifying conditions for the characteristics, processes, and events that influence the suitability of a site relative to the preclosure system guidelines. These conditions are separated into three main groups: Preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure. The first group includes conditions on population density and distribution, site ownership and control, meteorology, and offsite installations and operations. The second group includes conditions related to environmental quality and socioeconomic impacts in areas potentially affected by a repository and to the transportation of waste to a repository site. The third group includes conditions on the surface characteristics of the site, the characteristics of the host rock and surrounding strata, hydrology, and tectonics. The individual technical guidelines within each group, as well as the favorable conditions and the potentially adverse conditions under each guideline, are not listed in any assumed order of importance. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying conditions of the preclosure system guidelines. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in subpart B.

Preclosure Radiological Safety

§ 960.5–2–1 Population density and distribution.

(a) Qualifying condition. The site shall be located such that, during repository operation and closure, (1) the expected average radiation dose to members of the public within any highly populated area will not be likely to exceed a small fraction of the limits allowable under the requirements specified in §960.5–1(a)(1), and (2) the expected radiation dose to any member of the public in an unrestricted area will not be likely to exceed the limit allowable under the requirements specified in §960.5–1(a)(1).

(b) Favorable conditions. (1) A low population density in the general region of the site.

(2) Remoteness of site from highly populated areas.

(c) Potentially adverse conditions. (1) High residential, seasonal, or daytime population density within the projected site boundaries.

(2) Proximity of the site to highly populated areas, or to areas having at least 1,000 individuals in an area 1 mile...
§ 960.5–2–2 Site ownership and control.

(a) Qualifying condition. The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR 60.121, ownership, surface and subsurface rights, and control of access that are required in order that surface and subsurface activities during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) Favorable condition. Present ownership and control of land and all surface and subsurface mineral and water rights by the DOE.

(c) Potentially adverse condition. Projected land-ownership conflicts that cannot be successfully resolved through voluntary purchase-sell agreements, nondisputed agency-to-agency transfers of title, or Federal condemnation proceedings.

§ 960.5–2–3 Meteorology.

(a) Qualifying condition. The site shall be located such that expected meteorological conditions during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) Favorable condition. Prevailing meteorological conditions such that any radioactive releases to the atmosphere during repository operation and closure would be effectively dispersed, thereby reducing significantly the likelihood of unacceptable exposure to any member of the public in the vicinity of the repository.

(c) Potentially adverse conditions. (1) Prevailing meteorological conditions such that radioactive emissions from repository operation of closure could be preferentially transported toward localities in the vicinity of the repository with higher population densities than are the average for the region.

(2) History of extreme weather phenomena—such as hurricanes, tornadoes, severe floods, or severe and frequent winter storms—that could significantly affect repository operation or closure.

§ 960.5–2–4 Offsite installations and operations.

(a) Qualifying condition. The site shall be located such that present projected effects from nearby industrial, transportation, and military installations and operations, including atomic energy defense activities, (1) will not significantly affect repository siting, construction, operation, closure, or decommissioning or can be accommodated by engineering measures and (2), when considered together with emissions from repository operation and closure, will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5–1(a)(1).

(b) Favorable condition. Absence of contributing radioactive releases from other nuclear installations and operations, including those subject to the requirements of 40 CFR part 190 or 40 CFR part 191, subpart A, with actual or projected releases near the maximum...
value permissible under those standards.

(d) Disqualifying condition. A site shall be disqualified if atomic energy defense activities in proximity to the site are expected to conflict irreconcilably with repository siting, construction, operation, closure, or decommissioning.

ENVIRONMENT, SOCIOECONOMICS, AND TRANSPORTATION

§ 960.5–2–5 Environmental quality.

(a) Qualifying condition. The site shall be located such that (1) the quality of the environment in the affected area during this and future generations will be adequately protected during repository siting, construction, operation, closure, and decommissioning, and projected environmental impacts in the affected area can be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements specified in § 960.5–1(a)(2) can be met.

(b) Favorable conditions. (1) Projected ability to meet, within time constraints, all Federal, State, and local procedural and substantive environmental requirements applicable to the site and the activities proposed to take place thereon.

(2) Potential significant adverse environmental impacts to present and future generations can be mitigated to an insignificant level through the application of reasonable measures, taking into account programmatic, technical, social, economic, and environmental factors.

(c) Potentially adverse conditions. (1) Projected major conflict with applicable Federal, State, or local environmental requirements.

(2) Projected significant adverse environmental impacts that cannot be avoided or mitigated.

(3) Proximity to, or projected significant adverse environmental impacts of the repository or its support facilities on, a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, or National Forest Land.

(4) Proximity to, and projected significant adverse environmental impacts of the repository or its support facilities on, a significant State or regional protected resource area, such as a State park, a wildlife area, or a historical area.

(5) Proximity to, and projected significant adverse environmental impacts of the repository and its support facilities on, a significant Native American resource, such as a major Indian religious site, or other sites of unique cultural interest.

(6) Presence of critical habitats for threatened or endangered species that may be compromised by the repository or its support facilities.

(d) Disqualifying conditions. Any of the following conditions shall disqualify a site:

(1) During repository siting, construction, operation, closure, or decommissioning the quality of the environment in the affected area could not be adequately protected or projected environmental impacts in the affected area could not be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors.

(2) Any part of the restricted area or repository support facilities would be located within the boundaries of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, or the National Wild and Scenic Rivers System.

(3) The presence of the restricted area or the repository support facilities would conflict irreconcilably with the previously designated resource-preservation use of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, or National Forest Lands, or any comparably significant State protected resource that was dedicated to resource preservation at the time of the enactment of the Act.

§ 960.5–2–6 Socioeconomic impacts.

(a) Qualifying condition. The site shall be located such that (1) any significant adverse social and/or economic impacts
induced in communities and surrounding regions by repository siting, construction, operation, closure, and decommissioning can be offset by reasonable mitigation or compensation, as determined by a process of analysis, planning, and consultation among the DOE, affected State and local government jurisdictions, and affected Indian tribes; and (2) the requirements specified in §960.5–1(a)(2) can be met.

(b) Favorable conditions. (1) Ability of an affected area to absorb the project-related population changes without significant disruptions of community services and without significant impacts on housing supply and demand.

(2) Availability of an adequate labor force in the affected area.

(3) Projected net increases in employment and business sales, improved community services, and increased government revenues in the affected area.

(4) No projected substantial disruption of primary sectors of the economy of the affected area.

(c) Potentially adverse conditions. (1) Potential for significant repository-related impacts on community services, housing supply and demand, and the finances of State and local government agencies in the affected area.

(2) Lack of an adequate labor force in the affected area.

(3) Need for repository-related purchase or acquisition of water rights. If such rights could have significant adverse impacts on the present or future development of the affected area.

(4) Potential for major disruptions of primary sectors of the economy of the affected area.

(d) Disqualifying condition. A site shall be disqualified if repository construction, operation, or closure would significantly degrade the quality, or significantly reduce the quantity, of water from major sources of offsite supplies presently suitable for human consumption or crop irrigation and such impacts cannot be compensated for, or mitigated by, reasonable measures.

§960.5–2–7 Transportation.

(a) Qualifying condition. The site shall be located such that (1) the access routes constructed from existing local highways and railroads to the site (i) will not conflict irreconcilably with the previously designated use of any resource listed in §960.5–2–5(d) (2) and (3); (ii) can be designed and constructed using reasonably available technology; (iii) will not require transportation system components to meet performance standards more stringent than those specified in the applicable DOT and NRC regulations, nor require the development of new packaging containment technology; (iv) will allow transportation operations to be conducted without causing an unacceptable risk to the public or unacceptable environmental impacts, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements of §960.5–1(a)(2) can be met.

(b) Favorable conditions. (1) Availability of access routes from local existing highways and railroads to the site which have any of the following characteristics:

(i) Such routes are relatively short and economical to construct as compared to access routes for other comparable siting options.

(ii) Federal condemnation is not required to acquire rights-of-way for the access routes.

(iii) Cuts, fills, tunnels, or bridges are not required.

(iv) Such routes are free of sharp curves or steep grades and are not likely to be affected by landslides or rock slides.

(v) Such routes bypass local cities and towns.

(2) Proximity to local highways and railroads that provide access to regional highways and railroads and are adequate to serve the repository without significant upgrading or reconstruction.

(3) Proximity to regional highways, mainline railroads, or inland waterways that provide access to the national transportation system.

(4) Availability of a regional railroad system with a minimum number of interchange points at which train crew and equipment changes would be required.

(5) Total projected life-cycle cost and risk for transportation of all wastes designated for the repository site
which are significantly lower than those for comparable siting options, considering locations of present and potential sources of waste, interim storage facilities, and other repositories.

(6) Availability of regional and local carriers—truck, rail, and water—which have the capability and are willing to handle waste shipments to the repository.

(7) Absence of legal impediment with regard to compliance with Federal regulations for the transportation of waste in or through the affected State and adjoining States.

(8) Plans, procedures, and capabilities for response to radioactive waste transportation accidents in the affected State that are completed or being developed.

(9) A regional meteorological history indicating that significant transportation disruptions would not be routine seasonal occurrences.

(c) Potentially adverse conditions.

(1) Access routes to existing local highways and railroads that are expensive to construct relative to comparable siting options.

(2) Terrain between the site and existing local highways and railroads such that steep grades, sharp switchbacks, rivers, lakes, landslides, rock slides, or potential sources of hazard to incoming waste shipments will be encountered along access routes to the site.

(3) Existing local highways and railroads that could require significant reconstruction or upgrading to provide adequate routes to the regional and national transportation system.

(4) Any local condition that could cause the transportation-related costs, environmental impacts, or risk to public health and safety from waste transportation operations to be significantly greater than those projected for other comparable siting options.

EASE AND COST OF SITING, CONSTRUCTION, OPERATION, AND CLOSURE

§ 960.5–2–9 Rock characteristics.

(a) Qualifying condition. The site shall be located such that (1) the thickness and lateral extent and the characteristics and composition of the host rock will be suitable for accommodation of the underground facility; (2) repository construction, operation, and closure will not cause undue hazard to personnel; and (3) the requirements specified in §960.5–1(a)(3) can be met.

(b) Favorable conditions. (1) A host rock that is sufficiently thick and laterally extensive to allow significant flexibility in selecting the depth, configuration, and location of the underground facility.

(2) A host rock with characteristics that would require minimal or no artificial support for underground openings to ensure safe repository construction, operation, and closure.

(c) Potentially adverse conditions. (1) A host rock that is suitable for repository construction, operation, and closure, but is so thin or laterally restricted that little flexibility is available for selecting the depth, configuration, or location of an underground facility.

(2) In situ characteristics and conditions that could require engineering measures beyond reasonably available technology in the construction of the shafts and underground facility.

(3) Geomechanical properties that could necessitate extensive maintenance of the underground openings during repository operation and closure.
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(4) Potential for such phenomena as thermally induced fracturing, the hydration and dehydration of mineral components, or other physical, chemical, or radiation-related phenomena that could lead to safety hazards or difficulty in retrieval during repository operation.

(5) Existing faults, shear zones, pressurized brine pockets, dissolution effects, or other stratigraphic or structural features that could compromise the safety of repository personnel because of water inflow or construction problems.

(d) Disqualifying condition. The site shall be disqualified if the rock characteristics are such that the activities associated with repository construction, operation, or closure are predicted to cause significant risk to the health and safety of personnel, taking into account mitigating measures that use reasonably available technology.

§ 960.5–2–10 Hydrology.

(a) Qualifying condition. The site shall be located such that the geohydrologic setting of the site will (1) be compatible with the activities required for repository construction, operation, and closure; (2) not compromise the intended functions of the shaft liners and seals; and (3) permit the requirements specified in §960.5–1(a)(3) to be met.

(b) Favorable conditions. (1) Absence of aquifers between the host rock and the land surface.

(2) Absence of surface-water systems that could potentially cause flooding of the repository.

(3) Availability of the water required for repository construction, operation, and closure.

(c) Potentially adverse condition. Ground-water conditions that could require complex engineering measures that are beyond reasonably available technology for repository construction, operation, and closure.

(d) Disqualifying condition. A site shall be disqualified if, based on expected ground-water conditions, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

§ 960.5–2–11 Tectonics.

(a) Qualifying Conditions. The site shall be located in a geologic setting in which any projected effects of expected tectonic phenomena or igneous activity on repository construction, operation, or closure will be such that the requirements specified in §960.5–1(a)(3) can be met.

(b) Favorable Condition. The nature and rates of faulting, if any, within the geologic setting are such that the magnitude and intensity of the associated seismicity are significantly less than those generally allowable for the construction and operation of nuclear facilities.

(c) Potentially Adverse Conditions. (1) Evidence of active faulting within the geologic setting.

(2) Historical earthquakes or past man-induced seismicity that, if either were to recur, could produce ground motion at the site in excess of reasonable design limits.

(3) Evidence, based on correlations of earthquakes with tectonic processes and features, (e.g., faults) within the geologic setting, that the magnitude of earthquakes at the site during repository construction, operation, and closure may be larger than predicted from historical seismicity.

(d) Disqualifying Condition. A site shall be disqualified if, based on the expected nature and rates of fault movement or other ground motion, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

APPENDIX I TO PART 960—NRC AND EPA REQUIREMENTS FOR POSTCLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR part 191, subpart B—Environmental Standards for Disposal, §191.13, “Containment Requirements”, specifies that for 10,000 years after disposal (a) releases of radioactive materials to the accessible environment that are estimated to have more than one chance in 100 of occurring over a 10,000 year period (“reasonably foreseeable releases”) shall be projected to be less than the quantities permitted by Table 2 of that regulation’s appendix; and (b) for “very unlikely releases” (i.e., those estimated to have between one chance in 100 and one chance in 10,000 of occurring over a 10,000
year period), the limits specified in Table 2 would be multiplied by 10. The basis for Table 2 is an upper limit on long term risks of 1,000 health effects over 10,000 years for a repository containing wastes generated from 100,000 metric tons of heavy metal of reactor fuel. For releases involving more than one radionuclide, the allowed release for each radionuclide is reduced to the fraction of its limit that insures that the overall limit on harm is not exceeded. Additionally, to provide confidence needed for compliance with the containment requirements specified above, §191.14, “Assurance Requirements”, specifies the disposal of radioactive waste in accordance with seven requirements, relating to prompt disposal of waste; selection and design of disposal systems to keep releases to the accessible environment as small as reasonably achievable; engineered and natural barriers; nonreliance on active institutional controls after closure; passive controls after closure; natural resource areas; and design of disposal systems to allow future recovery of wastes.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA. The implementation of 40 CFR parts 191, subpart A and 10 CFR 60.112. 10 CFR 60.113 establishes minimum conditions to be met for engineered components and ground-water flow; specifically: (1) Containment of radioactive waste within the waste packages will be substantially complete for a period to be determined by the NRC taking into account the factors specified in 10 CFR 60.113(b) provided that such period shall not be less than 300 years nor more than 1,000 years after permanent closure of the geologic repository; (2) the release rate of any radionuclide from the engineered barrier system following the containment period shall not exceed one part in 100,000 per year of the inventory of that radionuclide calculated to be present at 1,000 years following permanent closure, or such other fraction of the inventory as may be approved or specified by the NRC, provided that this requirement does not apply to any radionuclide which is released at a rate less than 0.1% of the calculated total release rate limit. The calculated total release rate limit shall be taken to be one part in 100,000 per year of the inventory of radioactive waste originally emplaced in the underground facility that remains after 1,000 years of radioactive decay; and (3) the geologic repository shall be located so that pre-waste-emplacement ground-water travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment shall be at least 1,000 years or such other travel time as may be approved or specified by the NRC.

The guidelines will be revised as necessary to ensure consistency with 10 CFR part 60.

APPENDIX II TO PART 960—NRC AND EPA REQUIREMENTS FOR PRECLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR part 191, subpart A—Environmental Standards for Management and Storage, Section 191.04, “Standards for Normal Operations”, specifies: (1) That operations should be conducted so as to reduce exposure to members of the public to the extent reasonably achievable, taking into account technical, social, and economic considerations; and (2) that, except for variances permitted for unusual operations under Section 191.04 as an upper limit, normal operations shall be conducted in such a manner as to provide reasonable assurance that the combined annual dose equivalent to any member of the public due to: (i) operations covered by 40 CFR part 190, (ii) planned discharges of radioactive material to the general environment from operations covered by this subpart, and (iii) direct radiation from these operations; shall not exceed 25 millirems to the whole body, 75 millirems to the thyroid, or 25 millirems to any other organ.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA. The implementation of 40 CFR part 191, subpart A and 10 CFR part 20 is required by 10 CFR 60.112. 10 CFR 60.113 also specifies requirements for waste retrieval, if necessary, including considerations of design, back-filling, and schedule. 10 CFR part 20 establishes (a) exposure limits for operating personnel and (b) permissible concentrations of radionuclides in uncontrolled areas for air and water. The latter are generally less restrictive than 40 CFR 191, subpart A, but may be limiting under certain conditions (i.e., if used as a maximum for short durations rather than annual averages).

The guidelines will be revised as necessary to ensure consistency with 10 CFR part 60.

APPENDIX III TO PART 960—APPLICATION OF THE SYSTEM AND TECHNICAL GUIDELINES DURING THE SITING PROCESS

1. This appendix presents a table that specifies how the guidelines of subparts C and D are to be applied at certain decision points of the siting process. The decision points, as referenced in the table, are defined as follows: “Potentially acceptable” means the decision point at which a site is identified as potentially acceptable.
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“Nomination and recommendation” means the decision point at which a site is nominated as suitable for characterization or recommended as a candidate site for characterization.

2. The findings resulting from the application of a disqualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 1 or 2. The numerals 1 and 2 signify the types of findings that are required and are defined as follows:

“1” means either of the following:

(a) The evidence does not support a finding that the site is disqualified.

(b) The evidence supports a finding that the site is disqualified.

“2” means either of the following:

(a) The evidence supports a finding that the site is not disqualified on the basis of that evidence and is not likely to be disqualified.

(b) The evidence supports a finding that the site is disqualified or is likely to be disqualified.

3. The findings resulting from the application of a qualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 3 or 4. The numerals 3 and 4 signify the types of findings that are required and are defined as follows:

“3” means either of the following:

(a) The evidence does not support a finding that the site is not likely to meet the qualifying condition.

(b) The evidence supports a finding that the site is not likely to meet the qualifying condition, and therefore the site is disqualified.

4. If performance assessments are used to substantiate any of the above findings, those assessments shall include estimates of the effects of uncertainties in data and modeling.

5. For both the disqualifying and qualifying conditions of any guideline, a higher finding (e.g., a “2” finding rather than “1”) shall be made if there is sufficient evidence to support such a finding.

<table>
<thead>
<tr>
<th>Section 960</th>
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<tr>
<td>5–2–6(b)</td>
<td>do</td>
<td>Disqualifying</td>
<td>1</td>
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</table>
APPENDIX IV TO PART 960—TYPES OF INFORMATION FOR THE NOMINATION OF SITES AS SUITABLE FOR CHARACTERIZATION

The types of information specified below are those that the DOE expects will be included in the evidence used for evaluations and applications of the guidelines of subparts C and D at the time of nomination of a site as suitable for characterization. The types of information listed under each guideline are considered to be the most significant for the evaluation of that guideline. However, the types of information listed under any particular guideline will be used, as necessary, for the evaluation of any other guideline. As stated in §960.3–1–4–2, the DOE will use technically conservative assumptions or extrapolations of regional data, where necessary, to supplement this information. The information specified below will be supplemented with conceptual models, as appropriate, and analyses of uncertainties in the data.

Before site-characterization studies and related nongeologic data gathering activities, the evidence is not expected to provide precise information, but, rather, to provide a reasonable basis for assessing the merit or shortcomings of the site against the guidelines of subparts C and D. Consequently, the types of information described below should be interpreted so as to accommodate differences among sites and differences in the information acquired before detailed studies.

The specific information required for the guideline applications set forth in appendix III of this part is expected to differ from site to site because of site-specific factors, both with regard to favorable and potentially adverse conditions and with regard to the sources and reliability of the information. The types of information specified in this appendix will be used except where the findings set forth in appendix III of this part can be arrived at by reasonable alternative means or the information is not required for the particular site.

Section 960.4–2–1 Geohydrology.

Description of the geohydrologic setting of the site, in context with its geologic setting, in order to estimate the pre-waste-emplacement ground-water flow conditions. The types of information to support this description should include—

• Location and estimated hydraulic properties of aquifers, confining units, and aquitards.
• Potential areas and modes of recharge and discharge for aquifers.
• Regional potentiometric surfaces of aquifers.
• Likely flow paths from the repository to locations in the expected accessible environment, as based on regional data.
• Preliminary estimates of ground-water travel times along the likely flow paths from the repository to locations in the expected accessible environment.
• Current use of principal aquifers and State or local management plans for such use.

Section 960.4–2–2 Geochemistry.

Description of the geochemical and hydrochemical conditions of the host rock, of the surrounding geohydrologic units, and along likely ground-water paths to locations in the expected accessible environment, in order to estimate the potential for the migration of radionuclides. The types of information to support this description should include—

• Petrology of the rocks.
• Mineralogy of the rocks and general characteristics of fracture fillings.
• Geochemical and mechanical stability of the minerals under expected repository conditions.
• General characteristics of the ground-water chemistry (e.g., reducing/oxidizing conditions and the principal ions that may affect the waste package or radionuclide behavior).
• Geochronal properties of minerals as related to radionuclide transport.

Section 960.4–2–3 Rock characteristics.

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to estimate the capability of the host rock and surrounding rock units to accommodate the thermal, mechanical, chemical, and radiation stresses expected to be induced by repository construction, operation, and closure and by expected interactions among the waste, host rock, groundwater, and engineered components of the repository system. The types of information to support this description should include—

• Approximate geology and stratigraphy of the site, including the depth, thickness, and lateral extent of the host rock and surrounding rock units.
• Approximate structural framework of the rock units and any major discontinuities identified from core samples.
• Approximate thermal, mechanical, and thermomechanical properties of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.
• Estimates of the magnitude and direction of in situ stress and of temperature in the host rock and surrounding rock units.

Section 960.4–2–4 Climatic changes.

Description of the climatic conditions of the site region, in context with global and regional patterns of climatic changes during the Quaternary Period, in order to project likely future changes in climate such that potential impacts on the repository can be estimated. The types of information to support this description should include—

• Expected climatic conditions and cycles, based on extrapolation of climates during the Quaternary Period.
• Geomorphology of the site region and evidence of changes due to climatic changes.
• Estimated effects of expected climatic cycles on the surface-water and the groundwater systems.

Section 960.4–2–5 Erosion.

Description of the structure, stratigraphy, and geomorphology of the site, in context with the geologic setting, in order to estimate the depth of waste emplacement and the likelihood for erosional processes to uncover the waste in less than one million years. The types of information to support this description should include—

• Depth, thickness, and lateral extent of the host rock and the overlying rock units.
• Lithology of the stratigraphic units above the host rock.

• Nature and rates of geomorphic processes during the Quaternary Period.

Section 960.4–2–6 Dissolution.

Description of the stratigraphy, structure, hydrology, and geochemistry of the site, in context with the geologic setting, in order to project the tectonic stability of the site over the next 10,000 years and to identify tectonic features and processes that could reasonably be expected to have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

• The stratigraphy of the site, including rock units largely comprised of water-soluble minerals.
• The approximate extent and configuration of features indicative of dissolution within the geologic setting.

Section 960.4–2–7 Tectonics.

Description of the tectonic setting of the site, in context with its geologic setting, in order to project the tectonic stability of the site over the next 10,000 years and to identify tectonic features and processes that could reasonably be expected to have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

• The tectonic history and framework of the geologic setting and the site.
• Quaternary faults in the geologic setting, including their length, displacement, and any information regarding the age of latest movement.
• Active tectonic processes, such as uplift, diapirism, tilting, subsidence, faulting, and volcanism.
• Estimate of the geothermal gradient.
• Estimate of the regional in situ stress field.
• The historical seismicity of the geologic setting.

Section 960.4–2–8 Human interference.

Section 960.4–2–8–1 Natural resources.

Description of the mineral and energy resources of the site, in order to project whether past or future exploration and recovery could have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

• Known occurrences of energy and mineral resources, including ground water.
• Estimates of the present and projected value of these resources compared with resources contained in other areas of similar size in the geologic setting.
• Past and present drilling and mining operations in the vicinity of the site.

Section 960.4–2–8–2 Site ownership and control.

Description of the ownership of land for the geologic-repository operations area and the controlled area, in order to evaluate sustainable use of land for mining operations and to allow for the establishment of a schedule for the closure and post-closure maintenance of the geologic repository facilities.
whether the DOE can obtain ownership of, and control access to, the site. The types of information to support this description should include—

- Present land ownership.

Section 960.5-2-1 Population density and distribution.

Description of the population density and distribution of the site region, in order to identify highly populated areas and the nearest 1 mile by 1 mile area having a population greater than 1,000 persons. The types of information to support this description should include—

- The most-recent U.S. census, including population distribution, and density.

Section 960.5-2-2 Site ownership and control.

Description of current ownership of land, including surface and subsurface mineral and water rights, in order to evaluate whether the DOE can obtain control of land within the projected restricted area. The types of information to support this description should include—

- Present land ownership.

Section 960.5-2-3 Meteorology.

The meteorological setting, as determined from the closest recording station, in order to project meteorological conditions during repository operation and closure and their potential effects on the transport of airborne emissions. The types of information to support this description should include—

- Wind and atmospheric-dispersion characteristics.
- Precipitation characteristics.
- Extreme weather phenomena.

Section 960.5-2-4 Offsite installations and operations.

Description of offsite installations and operations in the vicinity of the site in order to estimate their projected effects on repository construction, operation, or closure. The types of information to support this description should include—

- Location and nature of nearby industrial, transportation, and military installations and operations, including atomic energy defense activities.

Section 960.5-2-5 Environmental quality.

Description of environmental conditions in order to estimate potential impacts on public health and welfare and on environmental quality. The types of information to support this description should include—

- Applicable Federal, State, and local procedural and substantive environmental requirements.
- Existing air quality and trends.
- Existing surface-water and ground-water quality and quantity.
- Existing land resources and uses.
- Existing terrestrial and aquatic vegetation and wildlife.
- Location of any identified critical habitats for threatened or endangered species.
- Existing aesthetic characteristics.
- Location of components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Land.
- Location of significant State or regional protected resource areas, such as State parks, wildlife areas, or historical areas.
- Location of significant Native American resources such as major Indian religious sites, or other sites of unique cultural interest.

Section 960.5-2-6 Socioeconomic impacts.

Description of the socioeconomic conditions of the site, including population density and distribution, economics, community services and facilities, social conditions, and fiscal and government structure, in order to estimate the impacts that might result from site characterization and from the development of a repository at that site. The types of information to support this description should include—

- Population composition, density, and distribution.
- Economic base and economic activity, including major sectors of local economy.
- Employment distribution and trends by economic sector.
- Resource usage.
- Community services and infrastructure, including trends in use and current capacity utilization.
- Housing supply and demand.
- Life style and indicators of the quality of life.
- Existing social problems.
- Sources of, and trends in, local government expenditures and revenues.

Section 960.5-2-7 Transportation.

Description of the transportation facilities in the vicinity of the site in order to evaluate existing or required access routes or improvements. The types of information to support this description should include—

- Estimates of the overall cost and risk of transporting waste to the site.
- Description of the road and rail network between the site and the nearest Interstate highways and major rail lines; also, description of the waterway system, if any.
- Analyses of the adequacy of the existing regional transportation network to handle waste shipments; the movement of supplies for repository construction, operation, and closure; removal of nonradioactive waste
from the site; and the transportation of the labor force.

- Improvements anticipated to be required in the transportation network and their feasibility, cost, and environmental impacts.
- Compatibility of the required transportation network improvements with the local and regional transportation and land-use plans.
- Analysis of weather impacts on transportation.
- Analysis of emergency response requirements and capabilities related to transportation.

Section 960.5-2-8 Surface characteristics.

Description of the surface characteristics of the site, in order to evaluate whether repository construction, operation, and closure are feasible on the basis of site characteristics that influence those activities. The types of information to support this description should include—

- Topography of the site.
- Existing and planned surface bodies of water.
- Definition of areas of landslides and other potentially unstable slopes, poorly drained material, or materials of low bearing strength or of high liquefaction potential.

Section 960.5-2-9 Rock characteristics.

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to project the capability of the host rock and the surrounding rock units to provide the space required for the underground facility and safe underground openings during repository construction, operation, and closure. The types of information to support this description should include—

- Depth, thickness, and lateral extent of the host rock.
- Stratigraphic and structural features within the host rock and adjacent rock units.
- Thermal, mechanical, and thermomechanical properties and constructibility characteristics of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.
- Fluid inclusions and gas content in the host rock.
- Estimates of the magnitude and direction of in situ stress and of temperature in the host rock.

Section 960.5-2-10 Hydrology.

Description of the hydrology of the site, in context with its geologic setting, in order to project compatibility with repository construction, operation, and closure. The types of information to support this description should include—

- Surface-water systems, including recharge and runoff characteristics, and potential for flooding of the repository.
- Nature and location of aquifers, confining units, and aquitards.
- Potentiometric surfaces of aquifers.
- Hydraulic properties of geohydrologic units.

Section 960.5-2-11 Tectonics.

Description of the tectonic setting of the site, in context with the regional setting, in order to estimate any expected effects of tectonic activity on repository construction, operation, or closure. The types of information to support this description should include—

- Quaternary faults.
- Active tectonic processes.
- Preliminary estimates of expected ground motion caused by the maximum potential earthquake within the geologic setting.

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

Subpart A—General

Sec. 961.1 Purpose.
961.2 Applicability.
961.3 Definitions.
961.4 Deviations.
961.5 Federal agencies.

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

961.11 Text of the contract.


SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

Subpart A—General

§ 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy...
Act of 1982 (Pub. L. 97–425). Under the contract set forth in §961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE’s radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

§961.2 Applicability.
This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste. In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

§961.3 Definitions.
For purposes of this part—


**Contract** means the agreement set forth in §961.11 of this part and any duly executed amendment or modification thereto.

**Generator** means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

**Owner** means any person who has title to spent nuclear fuel or high-level radioactive waste.

**Purchaser** means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

**Secretary** means the Secretary of Energy of his designee.
Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in §961.11, Text of the contract, of this part.

§961.4 Deviations.
Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

§961.5 Federal agencies.
Federal agencies or departments requiring DOE’s disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract.
Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high-level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

THIS CONTRACT, entered into this day of 19 , by and between the UNITED STATES OF AMERICA (hereinafter referred to as the “Government”), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereinafter referred to as “DOE”) and , (hereinafter referred to as the “Purchaser”), a corporation organized and existing under the laws of the State of [add as applicable: “acting on behalf of itself and [ [ ]”].

Witnesseth that:

Whereas, DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and


Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term assigned three-month period means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser’s assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser’s nuclear power reactor and for establishing fees due and payable to DOE.

2. The term cask means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term civilian nuclear power reactor means a civilian nuclear power plant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term Commission means the United States Nuclear Regulatory Commission.

5. The term contract means this agreement and any duly executed amendment or modification thereto.

6. The term Contracting Officer means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term delivery means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the Purchaser’s civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term disposal means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term DOE means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term DOE facility means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or
Department of Energy

§ 961.11

high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term full cost recovery, means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). As used herein, the term cost includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term high-level radioactive waste (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

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. For purposes of this provision, the following definition shall apply:

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.

c. The term Owner’s Energy Adjustment Factor (OEAF) means the sum of the individual owner’s adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term Owner’s Share of the plant (OS) means the owner’s fraction of metered electricity sales, the owner’s fraction of plant ownership, or the sponsor company’s fixed entitlement percentage of the plant’s output. This definition includes joint owners of generating companies or participants in a generation and transmission cooperative.

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 disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;

(2) Energy used by the company;

(3) Transmission losses;

(4) Distribution losses; and

(5) 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; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the “Annual Electric Utility Report,” Energy Information Administration (EIA) Form EIA-861.

h. The term Total Electricity Available for Disposition to Ultimate Consumers means the reporting year’s 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 minus the electricity sold for resale by the utility.

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 for resale by the utility relative to the total of electricity sales.

k. The term National Average Adjustment Factor (NAF) means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA-830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.
Instructions to annex A of appendix G, NWPA–830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser’s site* means the location of Purchaser’s civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the Federal Register prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel (SNF)* means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

**ARTICLE II—SCOPE**

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1988 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

**ARTICLE III—TERM**

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser’s site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

**ARTICLE IV—RESPONSIBILITIES OF THE PARTIES**

A. Purchaser’s Responsibilities

1. Discharge Information.

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser’s firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies reinserted or removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core.

2. Preparation for Transportation.

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities conducted by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser’s responsibilities hereunder. DOE may designate a representative to observe the preparatory activities conducted by the Purchaser at the Purchaser’s site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.
(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser’s site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser’s site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:
   (a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;
   (b) Training for Purchaser’s personnel in cask handling and loading, as may be necessary;
   (c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and
   (d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for the disposal of SNF and/or HLW for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE’s notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule.
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within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE’s notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; provided, however, that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; provided, however, that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser’s approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

A. General Requirements

1. Criteria.

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix B, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix B.

2. Procedures.

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of any changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE’s obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. Acceptance Priority Ranking.

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. Verification of SNF and/or HLW.

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as evidenced in writing, of the material at the Purchaser’s site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: “This is to certify that the above-named materials are properly described, classified, packaged, marked and...”
labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation.”

3. Improperly described SNF and/or HLW.

(a) Prior to Acceptance—If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser’s site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) After Acceptance—If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII—TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser’s site as provided for in Article VI hereof. DOE shall be solely responsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

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) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e., spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

<table>
<thead>
<tr>
<th>Nuclear spent fuel burnup range</th>
<th>Dollars per kilogram</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 5,000 MWDT/MTU</td>
<td>$80.00</td>
</tr>
<tr>
<td>5,000 to 10,000 MWDT/MTU</td>
<td>$142.00</td>
</tr>
<tr>
<td>10,000 to 20,000 MWDT/MTU</td>
<td>$162.00</td>
</tr>
<tr>
<td>Over 20,000 MWDT/MTU</td>
<td>$184.00</td>
</tr>
</tbody>
</table>

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of uranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

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 ____.) The assigned 3-month period, for purposes of payment and reporting of electricity generated and sold shall begin

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) Option 1—The Purchaser’s financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser’s financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) Option 2—The Purchaser’s financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) Option 3—The Purchaser’s financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. Method of Payment:

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D-208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

\[
\text{Interest} = \text{Unpaid balance due to DOE} \times \text{Quarterly Treasury rate plus six percent (6%)} \times \text{Number of months late including month of payment (fractions rounded up to whole months) ÷ 12}
\]

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on unpaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.
ARTICLE IX—DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damage caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delays by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser’s obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled “DISPUTES.”

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in the Federal Register) shall be in writing and shall be sent to the following address:

To DOE:

To the Purchaser:

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; provided, however, that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based on Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation of DOE to
§ 961.11

10 CFR Ch. III (1–1–02 Edition)

The rights and duties of the Purchaser may be assignable with transfer of title to the contract as the parties may deem to be necessary or proper to reflect their respective interests; provided, however, that any such amendment shall be consistent with the DOE final rule published in the Federal Register on April 18, 1983 entitled, “Standard Contract for Disposal or SNF and/or HLW”. as the same may be amended from time to time.

 ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer’s decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser’s knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge of the Purchaser’s plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser’s affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must decide the claim within sixty (60) days. For Purchaser claims in excess of $50,000, the Contracting Officer must render a decision within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This “Dispute” clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; provided, however, that nothing in this contract shall be construed as making final the decision of any administrative, official, representative, or board on a question of law.

 ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

 ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

 ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

 ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws.
and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

**ARTICLE XXI—RIGHTS IN TECHNICAL DATA**

**A. Definitions.**

1. **Technical data** means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. **Proprietary data** means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:
   (a) Are not generally known or available from other sources without obligation concerning their confidentiality;
   (b) Have not been made available by the owner to others without obligation concerning its confidentiality; and
   (c) Are not already available to the Government without obligation concerning their confidentiality.

3. **Contract data** means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. **Unlimited rights** means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

**B. Allocation of Rights.**

1. The Government shall have:
   (a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;
   (b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;
   (c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

   **LIMITED RIGHTS LEGEND**

   This “proprietary data,” furnished under “Contract No.” with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the “proprietary data” may not be transferred outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:
   (a) This “proprietary data” may be disclosed for evaluation purposes under the restriction that the “proprietary data” be retained in confidence and not be further disclosed;
   (b) This “proprietary data” may be disclosed to contractors participating in the Government’s program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the “proprietary data” be retained in confidence and not be further disclosed;
   (c) This “proprietary data” may be used by the Government or others on its behalf for emergency work under the restriction that the “proprietary data” be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

**ARTICLE XXII—ENTIRE CONTRACT**

A. This contract, which consists of Articles I through XXII and appendices A through G,
annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

C. Appendices

A. Nuclear Power Reactor(s) or Other Facilities Covered
B. Discharge Information (Ten Year; Annual)
C. Delivery Commitment Schedule
D. Final Delivery Schedule
E. General Specifications
F. Detailed Description of Purchaser’s Fuel
G. Standard Remittance Advice For Payment of Fees

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

United States of America
United States Department of Energy

By: (Contracting Officer)

Witnesses as to Execution on Behalf of Purchaser

(Purchaser’s Company Name)

Title:

1. (Name), certify that I am the (Title) of the corporation named as Purchaser herein; that (Name) who signed this document on behalf of the Purchaser was then (Title) of said corporation; that said document was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

APPENDIX A

Nuclear Power Reactor(s) or Other Facilities Covered

Purchaser
Contract Number/Date __________ / ______
Reactor/Facility Name __________________________
Location:
Street __________________________
City __________________________
County/State __________________________
Zip Code __________________________

Reactor Type:
BWR □
PWR □
Other (Identify) __________________________

Capacity (MWE) __________________________

Net Revenue

Date of Commencement of Operation
(actual or estimated)

NRC License #: __________

By Purchaser:
Signature __________________________
Title __________________________
Date __________

APPENDIX B

Ten Year Discharge Forecast

To be used for DOE planning purposes only and does not represent a firm commitment by Purchaser.

Purchaser
Contract Number/Date __________ / ______
Reactor/Facility Name __________________________
Location:
Street __________________________
City __________________________
County/State __________________________
Zip Code __________________________

Type: BWR □
PWR □
Other (Identify) __________________________

Metric tons:
Initial __________________________
Discharged __________________________

Number of assemblies discharged (per cycle) __________________________

1yr 1 2 3 4 5 6 7 8 9 10 10yr total

Discharge date—mo/yr (or refueling shutdown date) __________________________

Metric tons:
Initial __________________________
Discharged __________________________

Number of assemblies discharged (per cycle) __________________________

By Purchaser:
Signature __________________________
Title __________________________

In Witness Whereof, I have hereunto affixed my hand and the seal of said corporation this ___ day of ___, 1983
(Corporate Seal)
(Signature)
APPENDIX B (ENCLOSURE 1)

Actual Discharges

Purchaser

Contract Number/Date

Reactor/Facility Name

Location:

Street

City

County/State

Zip Code

Type:

BWR □
PWR □
Other (Identify)

Refueling Shutdown Date

Metric Tons Uranium (Initial/Discharged);

Initial

Discharged

Number of Assemblies Discharged:

Any false, fictitious or fraudulent state-

ment may be punishable by fine or imprison-

ment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature

Title

Date

APPENDIX C

Delivery Commitment Schedule

This delivery commitment schedule shall

be submitted by Purchaser to DOE as speci-

fied in Article V.B. of this contract.

Purchaser

Contract Number/Date

Reactor/Facility Name

Location:

Street

City

County/State

Zip Code

Type(s) cask(s) required:

No. Assemblies per cask

Shipping Lot Number

Shipping Mode:

(Assigned by DOE)

Truck □

Rail □

Barge □

DOE Assigned Delivery Commitment Date

Range of Discharge Date(s) (Earliest to Lat-
est)

Mo    Day____ Yr____ to Mo    Day____ Yr____

Metric Tons Uranium:

(Initial)

(Discharged)

Number of Assemblies:

BWR

PWR

Other

Unless otherwise agreed to in writing by

DOE, the Purchaser shall furnish herewith to

DOE suitable proof of ownership of the SNF

and/or HLW, to be delivered hereunder. The

Purchaser shall notify DOE in writing at the

earliest practicable date of any change in

said ownership.

Any false, fictitious or fraudulent state-

ment may be punishable by fine or imprison-

ment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature

Title

Date

Approved by DOE:

Technical Representative

Title

Date

Contracting Officer

Date

APPENDIX D

Final Delivery Schedule

(To be submitted to DOE by Purchaser for

each designated Purchaser Delivery site not

later than twelve (12) months prior to esti-
mated date of first delivery)

Purchaser

Contract Number/Date

Reactor/Facility Name

Location:

Street

City

County/State

Zip Code

Type(s) cask(s) required:

No. Assemblies per cask

Shipping Lot Number

Shipping Mode:

(Assigned by DOE)

Truck □

Rail □

Barge □

Metric Tons Uranium:

(Initial)

(Discharged)

Range of Discharge Date(s) (Earliest to Lat-
est)

(From approved commitment schedule)

Mo    Day____ Yr____ to Mo    Day____ Yr____

Number of Assemblies:

BWR

PWR

Other

Purchaser’s Delivery First Estimate

Mo    Day____ Yr____ last Mo    Day____ Yr____

Mo____

Unless otherwise agreed to in writing by

DOE, the Purchaser shall furnish herewith to

DOE suitable proof of ownership of the SNF

and/or HLW to be delivered hereunder. The

Purchaser shall notify DOE in writing at the

earliest practicable date of any change in

said ownership.

To confirm acceptability of delivery
date(s):

Purchaser Contact

Phone

Title

DOE Contact
§ 961.11

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

A. Fuel Category Identification

1. Categories—Purchaser shall use reasonable efforts, utilizing technology equivalent to and consistent with the commercial practice, to properly classify Spent Nuclear Fuel (SNF) prior to delivery to DOE, as follows:
   a. Standard Fuel means SNF that meets all the General Specifications therefor set forth in paragraph B below.
   b. Nonstandard Fuel means SNF that does not meet one or more of the General Specifications set forth in subparagraphs 1 through 5 of paragraph B below, and which is classified as Nonstandard Fuel Classes NS through NS–5, pursuant to paragraph B below.
   c. Failed Fuel means SNF that meets the specifications set forth in subparagraphs 1 through 3 of paragraph B below, and which is classified as Failed Fuel Class F–1 through F–3 pursuant to subparagraph 6 of paragraph B below.
   d. Fuel may have “Failed Fuel” and/or several “Nonstandard Fuel” classifications

B. Fuel Description and Subclassification—General Specifications

1. Maximum Nominal Physical Dimensions.

<table>
<thead>
<tr>
<th></th>
<th>Boiling water reactor (BWR)</th>
<th>Pressurized water reactor (PWR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Length</td>
<td>14 feet, 11 inches</td>
<td>14 feet, 10 inches</td>
</tr>
<tr>
<td>Active Fuel Length</td>
<td>12 feet, 6 inches</td>
<td>12 feet, 0 inches</td>
</tr>
<tr>
<td>Cross Section 1</td>
<td>6 inches x 6 inches</td>
<td>9 inches x 9 inches</td>
</tr>
</tbody>
</table>

2. Nonfuel Components. Nonfuel components including, but not limited to, control spacers, burnable poison rod assemblies, control rod elements, thimble plugs, fission chambers, and primary and secondary neutron sources, that are contained within the fuel assembly, or BWR channels that are an integral part of the fuel assembly, which do not require special handling, may be included as part of the spent nuclear fuel delivered for disposal pursuant to this contract.

3. Cooling. The minimum cooling time for fuel is five (5) years.

4. Non-LWR Fuel. Fuel from other than LWR power facilities shall be classified as Nonstandard Fuel—Class NS–5. Such fuel may be unique and require special handling, storage, and disposal facilities.

5. Consolidated Fuel Rods. Fuel which has been disassembled and stored with the fuel rods in a consolidated manner shall be classified as Nonstandard Fuel Class NS–5.

   a. Visual Inspection. Assemblies shall be visually inspected for evidence of structural deformity or damage to cladding or spacers which may require special handling. Assemblies which [i] are structurally deformed or have damaged cladding to the extent that special handling may be required or [ii] for any reason cannot be handled with normal fuel handling equipment shall be classified as Failed Fuel—Class F–1.
   b. Previously Encapsulated Assemblies. Assemblies encapsulated by Purchaser prior to classification hereunder shall be classified as Failed Fuel—Class F–3. Purchaser shall advise DOE of the reason for the prior encapsulation of assemblies in sufficient detail so that DOE may plan for appropriate subsequent handling.
   c. Regulatory Requirements. Spent fuel assemblies shall be packaged and placed in casks so that all applicable regulatory requirements are met.

C. Summary of Fuel Classifications

1. Standard Fuel:
   a. Class S–1: PWR
   b. Class S–2: BWR

2. Nonstandard Fuel:
   a. Class NS–1: Physical Dimensions
   b. Class NS–2: Non Fuel Components
   c. Class NS–3: Short Cooled
   d. Class NS–4: Non-LWR
   e. Class NS–5: Consolidated Fuel Rods.

3. Failed Fuel:
   a. Class F–1: Visual Failure or Damage
   b. Class F–2: Radioactive “Leakage”
   c. Class F–3: Encapsulated

D. High-Level Radioactive Waste

The DOE shall accept high-level radioactive waste. Detailed acceptance criteria and general specifications for such waste will
Department of Energy

be issued by the DOE no later than the date on which DOE submits its license application to the Nuclear Regulatory Commission for the first disposal facility.

APPENDIX F

Detailed Description of Purchaser’s Fuel

This information shall be provided by Purchaser for each distinct fuel type within a Shipping Lot not later than sixty (60) days prior to the schedule transportation date.

Purchaser
Contract Number/Date ______________/____________________________
Reactor/Facility Name ________________________________

I. Drawings included in generic dossier:

1. Fuel Assembly DWG# ______________
2. Upper & Lower end fittings DWG# ______________

Dossier Number: ______________

# Assemblies Described:

____ BWR
____ PWR
____ Other

II. Design Material Descriptions.

Fuel Element:

1. Element type __________ (rod, plate, etc.)
2. Total length ________(in.)
3. Active length ________(in.)
4. Cladding material ________(Zr, s.s., etc.)

Assembly Description:

1. Number of Elements ______
2. Overall dimensions (length ______ (cross section) ______ (in.)
3. Overall weight ______

III. Describe any distortions, cladding damage or other damage to the spent fuel, or nonfuel components within this Shipping Lot which will require special handling procedures. (Attach additional pages if needed.)

IV. Assembly Number ______
Shipping Lot # ______

<table>
<thead>
<tr>
<th>Irradiation history cycle No.</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Startup date (mo/day/yr)</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
<tr>
<td>2. Shutdown date (mo/day/yr)</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
<tr>
<td>3. Cumulative fuel exposure</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
<tr>
<td>(mwd/mtu)</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
<tr>
<td>4. Avg. reactor power (mwh)</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
<tr>
<td>5. Total heat output/assembly in watts, using an approved calculational method:</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
<td>___</td>
</tr>
</tbody>
</table>

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature ________________________________
Title ________________________________
Date ________________________________
## Appendix G - Standard Remittance Advice for Payment of Fees

This form is to be used in lieu of the remittance advice currently used by the Department of Energy. It is intended to reduce the possibility of errors and to provide a more concise, informative, and comprehensive explanation of the fees, costs, and credits that will be charged against the payment. The format of this form is designed to be user-friendly and to facilitate easier processing by the contractor or vendor.

### Identifying Information

<table>
<thead>
<tr>
<th>1.0 Identifying Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Name: __________________</td>
</tr>
<tr>
<td>(b) Address: ________________</td>
</tr>
<tr>
<td>(c) City, State &amp; Zip Code: __</td>
</tr>
</tbody>
</table>

### Contact Person

<table>
<thead>
<tr>
<th>2.0 Contact Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Name: ________</td>
</tr>
<tr>
<td>(b) Telephone (Include Area Code): ______</td>
</tr>
</tbody>
</table>

### Spent Nuclear Fuel (SNF) Fee

<table>
<thead>
<tr>
<th>2.0 Spent Nuclear Fuel (SNF) Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Number of Reactors Covered: __</td>
</tr>
<tr>
<td>(b) Total Purchaser Obligation as of April 7, 1983: $__</td>
</tr>
</tbody>
</table>

### Date of First Payment

<table>
<thead>
<tr>
<th>2.3 Date of First Payment:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month: __ Day: __ Year: __</td>
</tr>
</tbody>
</table>

### Ten-Year Treasury Note Rate

<table>
<thead>
<tr>
<th>2.4 Ten-Year Treasury Note Rate as of the Date of First Payment:</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
</tr>
</tbody>
</table>

### Unpaid Balance Prior to This Payment

<table>
<thead>
<tr>
<th>2.5 Unpaid Balance Prior to This Payment:</th>
</tr>
</thead>
<tbody>
<tr>
<td>$__</td>
</tr>
</tbody>
</table>

### Fee for Electricity Generated and Sold (Mills per Kilowatt Hour, MWh)

<table>
<thead>
<tr>
<th>3.0 Fee for Electricity Generated and Sold (Mills per Kilowatt Hour, MWh)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Number of Reactors Covered: __</td>
</tr>
<tr>
<td>(b) Total Electricity Generated and Sold (Megawatt hours) (Sum of Line 4.2 from all Annex A3): __</td>
</tr>
<tr>
<td>(c) Current Fee Rate (MWh): __</td>
</tr>
</tbody>
</table>

### Underpayment/Late Payment (As notified by DOE)

<table>
<thead>
<tr>
<th>4.0 Underpayment/Late Payment (As notified by DOE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Payment</td>
</tr>
<tr>
<td>-----------------</td>
</tr>
<tr>
<td>4.1 SNF Underpayment</td>
</tr>
<tr>
<td>4.2 Electricity Generation Late Payment</td>
</tr>
<tr>
<td>4.3 TOTAL UNDERPAYMENT</td>
</tr>
<tr>
<td>4.4 SNF Late Payment</td>
</tr>
<tr>
<td>4.5 Electricity Generation Late Payment</td>
</tr>
<tr>
<td>4.6 TOTAL LATE PAYMENT</td>
</tr>
</tbody>
</table>

### Other Credits Claimed (Attach Explanation)

<table>
<thead>
<tr>
<th>5.0 Other Credits Claimed (Attach Explanation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enter the Total Amount Claimed for All Credits: $__</td>
</tr>
</tbody>
</table>

### Total Remittance

<table>
<thead>
<tr>
<th>6.0 Total Remittance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Total Spent Nuclear Fuel Fee Transmitted (from 2.2b)</td>
</tr>
<tr>
<td>(b) Total Fee for Electricity Generated and Sold (from 2.4)</td>
</tr>
<tr>
<td>(c) Total Underpayment (from 4.1b)</td>
</tr>
<tr>
<td>(d) Total Late Payment (from 4.5b)</td>
</tr>
<tr>
<td>(e) Total Credits (from 5.6)</td>
</tr>
<tr>
<td>(f) TOTAL REMITTANCE: (Sum of 6.1 through 6.4 minus 5.5)</td>
</tr>
</tbody>
</table>

### 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 to any department or agency of the United States any false, inaccurate, or fraudulent statements as to any matter within its jurisdiction.

[Caption: Data SA, DOE/SA.]
APPENDIX G - STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

General Information
1. Purpose:
   Standard Remittance Advice (SRA) form is designed to serve as the source document for entries into the Department's accounting records to transact data from transactions concerning payment of fees to the Nuclear Waste Fund.

2. Who Shall Submit:
   This form shall be submitted by Purchasers who signed the Standard Contract for Spent Spent Nuclear Fuel and High Level Radioactive Waste. Submit Div. 2, 3 and 3 to DOE, Office of the Controller, Special Accounts and Payroll Division and wire Copy 4.

3. Where to Submit:
   Purchasers shall forward completed SRA to:
   U.S. Department of Energy
   Office of the Controller
   Special Accounts and Payroll Division (C-216 OTA)
   Box 595
   Germantown, MD 20875-5990
   Request for further information, additional forms, and instructions may be directed in writing to the address above or by telephone to (301) 565-4014. For electrically generated or on or after 4.73 this form shall be paid to the Purchaser shall, and must be released by DOE not later than the date of the last business day of the month following the end of each completed fiscal quarter. Payment is to be made by electronic wire transfer only.

4. Sanctions:
   The timely submission of RA by a Purchaser is mandatory. Failure to do so may result in late penalty fees as provide in Article VIII C of the Contract for Spent Nuclear Fuel and/or High Level Radioactive Waste.

5. Provisions Regarding the Confidentiality of Information:
   The information contained in these forms may be of information which is exempt from disclosure to the public under the exemptions for trade secrets and commercial or financial commercial information specified in the Freedom of Information Act of 1966 (5 U.S.C. 552(b)(4)) or is protected from public release by 18 U.S.C. 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 believe the information contained in it is a trade secret or other proprietary information, whether such information is subject to receive as confidential information by its competitors 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 1914.11 of DOE's FSA regulations, DOE will determine whether any information submitted shall be withheld from public disclosure.

   If DOE receives a response and does not receive a response, 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 written notice requirement need not be submitted once the DPA 4000 is submitted in:
   a. views concerning information items identified as privileged or confidential have not changed and
   b. written solicitation form; respondents views in this regard was previously submitted.

   In accordance with the creed of the DOE and other applicable laws, 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 Date of agreement, the date on which the payment is made, and the fiscal year to which the payment is applicable. Add the fiscal year of the payment to the period of the form.
1.3 Standard Contract identification number as assigned by DOE;
1.4 Fiscal period covered by this advice and date of this payment. Any period different from the assigned income period should be explained in a separate attachment.

Section 2.0 Spent Nuclear Fuel (SNF) Fees
2.1 Enter the number of dollars for which the Purchaser had paid fuel as of midnight between June 30 of each year and the number of Annex B fees for which the Purchaser had paid.
2.2 Enter the number of dollars for which the Purchaser had paid fuel as of midnight between July 1 of each year and the number of Annex B fees for which the Purchaser had paid.
2.3 Enter any non-fuel amount paid, if any, in the space provided.
2.4 Enter any amount of interest paid for the period indicated, if any, in the space provided.
2.5 Enter any amount of late payment fees, if any, in the space provided.
2.6 Enter any amount of payment due on the date indicated, if any, in the space provided.

Section 3.0 Fee for Electric Generation and Total (SRAF):
3.1 Enter the number of dollars for which the Purchaser is responsible for the period indicated, if any, in the space provided.
3.2 Enter the total Federal amount paid during the period indicated, if any, in the space provided.
3.3 Enter any amount of interest paid for the period indicated, if any, in the space provided.
3.4 Enter the total amount of money paid for the period indicated, if any, in the space provided.

Section 4.0 Unemployment and other payments (as directed by DOE)
4.1 Enter any amount of money paid, if any, in the space provided.

Section 5.0 Other Credits/Claimed
5.1 Enter any amount of money paid, if any, in the space provided.

Section 6.0 Total Amount
6.1 Total amount paid shall be the sum of all amounts paid to date.

Section 7.0 Certification:
7.1 The person who signs this agreement is the individual who is responsible for the accuracy of the data. The signature of the "Certification" block must be signed by the person certifying the accuracy of the data.
§ 961.11  
10 CFR Ch. III (1–1–02 Edition) 

ANNEX A TO APPENDIX G

Standard Remittance Advice for Payment of Fees

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

<table>
<thead>
<tr>
<th>1.1 Purchaser Information:</th>
<th>1.3 Station Name:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.11 Name:</td>
<td></td>
</tr>
<tr>
<td>1.12 Address:</td>
<td></td>
</tr>
<tr>
<td>1.13 Attention:</td>
<td></td>
</tr>
<tr>
<td>1.14 City:</td>
<td></td>
</tr>
<tr>
<td>1.15 State:</td>
<td></td>
</tr>
<tr>
<td>1.16 Zip:</td>
<td></td>
</tr>
<tr>
<td>1.17 Utility ID Number:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1.2 Contact Person:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.21 Name:</td>
</tr>
<tr>
<td>1.22 Title:</td>
</tr>
<tr>
<td>1.23 Phone No.:</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1.4 Standard Contract Identification Number:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>1.5 Period Covered (MM/DD/YY):</th>
</tr>
</thead>
<tbody>
<tr>
<td>From: / / / To: / / /</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1.52 Date of This Submission:</th>
</tr>
</thead>
</table>

Section 2. Net Electricity Generated Calculation

<table>
<thead>
<tr>
<th>Item</th>
<th>Unit 1</th>
<th>Unit 2</th>
<th>Unit 3</th>
<th>Station Total*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 Unit ID Code:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.2 Gross Thermal Energy Generated (MWh):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.3 Gross Electricity Generated (MWh):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service** (MWh):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service** (MWh):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.6 Net Electricity Generated (MWh):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Item 2.3 minus Item 2.4):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.7 Footnote (if any):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*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 or shall report estimated unit use and shall submit in a footnote how the unit data were estimated.

Section 3. Total Energy Adjustment Factor Calculation

<table>
<thead>
<tr>
<th>3.1 Weighted Energy Adjustment Factor Calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Nuclear Station Owner(s)</td>
</tr>
<tr>
<td>----------------------------------</td>
</tr>
<tr>
<td>1.</td>
</tr>
<tr>
<td>2.</td>
</tr>
<tr>
<td>3.</td>
</tr>
<tr>
<td>4.</td>
</tr>
<tr>
<td>5.</td>
</tr>
<tr>
<td>6.</td>
</tr>
<tr>
<td>7.</td>
</tr>
<tr>
<td>8.</td>
</tr>
<tr>
<td>9.</td>
</tr>
<tr>
<td>10.</td>
</tr>
<tr>
<td>11.</td>
</tr>
<tr>
<td>12.</td>
</tr>
</tbody>
</table>

Section 4. Fee Calculation for Electricity Generated and Sold

<table>
<thead>
<tr>
<th>Item</th>
<th>Unit 1</th>
<th>Unit 2</th>
<th>Unit 3</th>
<th>Station Total*</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1 Total Energy Adjustment Factor (Enter value from 3.2 above):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.2 Electricity Generated and Sold (Items in 4.1 times items in 2.6):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current Fee Rate (Dollars):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transfer Station Total to line 3.4 of Appendix G:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*OS: Distribution, Wind, DOE Contractors, Other, DOE BLM, FPL, DOE MA, Conditional Utility Costs, 

604
Section 1. Identification Information; (Self-explanatory)

Section 2. Net Electricity Generated Calculation

2.1 Unit ID Code: Enter the Reactor Unit Identification Code (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 Electric Generation (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 labeled "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 in service and producing electricity. A utility unable to measure 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 exceeds nuclear station generation, the utility shall treat all resulting negative values as zero for calculation purposes.

B. A utility shall have multiple units at one station:

- 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 unless the utility has been metered separately for the units that comprise a common electrical bus(es) and the station has metered service on its own (see item 2.5, any electricity use by the nuclear portion of the station during days in which all nuclear units at the station were out of service is unused).

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

D. Utility may deduct small quantities of unremitted non-nuclear electricity generation included in "Gross Electric Generation" provided it is identified and explained in item 2.7.

E. Utility may deduct nuclear electricity generation which is not sold and does not use the bus(es), provided they identify and explain the deduction in item 2.7 and that the deduction is not double counted.

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 case, the utility shall report the consumption of electricity by the nuclear portion of the station during days in which all nuclear units are out of service. 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 and 2.5 from item 2.3.

2.7 Footnotes (if any): Utilities that are unable to meter individual unit use shall explain how the unit data were estimated.
## ANNEX B TO APPENDIX G

**Standard Remittance of Advice (RA) for Payment of Fees**

This Annex should be completed only for SNF burned before midnight between April 6/7, 1983.

### I. Identification

A. Purchaser: [Blank]

<table>
<thead>
<tr>
<th>Burnup 1 (MWDT/MTU)</th>
<th>0–5,000</th>
<th>5,000–10,000</th>
<th>10,000–20,000</th>
<th>20,000 up</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Burnup 1 (MWDT/MTU)</td>
<td>0–5,000</td>
<td>5,000–10,000</td>
<td>10,000–20,000</td>
<td>20,000 up</td>
</tr>
<tr>
<td>2. Initial loading (KgU)</td>
<td>0–5,000</td>
<td>5,000–10,000</td>
<td>10,000–20,000</td>
<td>20,000 up</td>
</tr>
<tr>
<td>3. Fee rate ($/KgU)</td>
<td>80.00</td>
<td>142.00</td>
<td>162.00</td>
<td>184.00</td>
</tr>
<tr>
<td>4. Fee ($)</td>
<td>0–5,000</td>
<td>5,000–10,000</td>
<td>10,000–20,000</td>
<td>20,000 up</td>
</tr>
<tr>
<td>5. Total fee (4)</td>
<td>0–5,000</td>
<td>5,000–10,000</td>
<td>10,000–20,000</td>
<td>20,000 up</td>
</tr>
</tbody>
</table>

### B. Nuclear fuel in the reactor core as of midnight of 6/7 April 1983.

<table>
<thead>
<tr>
<th>Assembly identification</th>
<th>Initial loading (KgU)</th>
<th>Burnup 1 as of midnight 6/7 April 1983 (MWDT/MTU)</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>0–5,000</td>
<td>5,000–10,000</td>
<td>80.00</td>
</tr>
<tr>
<td>2.</td>
<td>5,000–10,000</td>
<td>10,000–20,000</td>
<td>142.00</td>
</tr>
<tr>
<td>3.</td>
<td>10,000–20,000</td>
<td>20,000 up</td>
<td>162.00</td>
</tr>
<tr>
<td>4.</td>
<td>20,000 up</td>
<td></td>
<td>184.00</td>
</tr>
</tbody>
</table>

1. Please provide (as an attachment) a clear reference to the methodology used to derive the burnup figures (computer codes, etc.) and a clear reference to all data used in the derivation of those figures.

C. Total fee.

(Approved by the Office of Management and Budget under control number 1091–0260)


### PART 962—BYPRODUCT MATERIAL

Sec.
962.1 Scope.
962.2 Purpose.
962.3 Byproduct material.


**SOURCE:** 52 FR 15940, May 1, 1987, unless otherwise noted.

§ 962.1 Scope.

This part applies only to radioactive waste substances which are owned or produced by the Department of Energy at facilities owned or operated by or for the Department of Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.). This part does not apply to substances which are not owned or produced by the Department of Energy.

§ 962.2 Purpose.

The purpose of this part is to clarify the meaning of the term “byproduct material” under section 11e(1) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(1)) for use only in determining the Department of Energy’s obligations under the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.) with regard to radioactive waste substances owned or produced by the Department of Energy pursuant to the exercise of its responsibilities under the Atomic Energy Act of 1954. This part does not affect materials defined as byproduct material under section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).
§ 962.3 Byproduct material.

(a) For purposes of this part, the term byproduct material means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(b) For purposes of determining the applicability of the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.) to any radioactive waste substance owned or produced by the Department of Energy pursuant to the exercise of its atomic energy research, development, testing and production responsibilities under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), the words "any radioactive material," as used in paragraph (a) of this section, refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under the Resource Conservation and Recovery Act.

PART 963—YUCCA MOUNTAIN SITE SUITABILITY GUIDELINES

Subpart A—General Provisions

963.1 Purpose.
963.2 Definitions.

Subpart B—Site Suitability Determination, Methods, and Criteria

963.10 Scope.
963.11 Suitability determination.
963.12 Preclosure suitability determination.
963.13 Preclosure suitability evaluation method.
963.14 Preclosure suitability criteria.
963.15 Postclosure suitability determination.
963.16 Postclosure suitability evaluation method.
963.17 Postclosure suitability criteria.


SOURCE: 66 FR 57336, Nov. 14, 2001, unless otherwise noted.

Subpart A—General Provisions

§ 963.1 Purpose.

(a) The purpose of this part is to establish DOE methods and criteria for determining the suitability of the Yucca Mountain site for the location of a geologic repository. DOE will use these methods and criteria in analyzing the data from the site characterization activities required under section 113 of the Nuclear Waste Policy Act.

(b) This part does not address other information that must be considered and submitted to the President, and made available to the public, by the Secretary under section 114 of the Nuclear Waste Policy Act if the Yucca Mountain site is recommended for development as a geologic repository.

§ 963.2 Definitions.

For purposes of this part:

Applicable radiation protection standard means (1) For the preclosure period, the preclosure numerical radiation dose limits in 10 CFR 63.111(a) and (b) and 63.204; and

(2) For the postclosure period, the postclosure numerical radiation dose limits in 10 CFR 63.311 and 63.321 and radionuclide concentration limits in 10 CFR 63.331.

Barrier means any material, structure or feature that prevents or substantially reduces the rate of movement of water or radionuclides from the Yucca Mountain repository to the accessible environment, or prevents the release or substantially reduces the release rate of radionuclides from the waste. For example, a barrier may be a geologic feature, an engineered structure, a canister, a waste form with physical and chemical characteristics that significantly decrease the mobility of radionuclides, or a material placed over and around the waste, provided that the material substantially delays movement of water or radionuclides.

Cladding is the metallic outer sheath of a fuel rod element; it is generally made of a corrosion resistant zirconium alloy or stainless steel, and is intended to isolate the fuel from the external environment.

Closure means the final closing of the remaining open operational areas of the underground facility and boreholes after termination of waste emplacement, culminating in the sealing of
§ 963.2

shafts and ramps, except those openings that may be designed for ventilation or monitoring.

*Colloid* means any fine-grained material in suspension, or any such material that can be easily suspended.

*Criteria* means the characterizing traits relevant to assessing the performance of a geologic repository, as defined by this section, at the Yucca Mountain site.

*Design* means a description of the engineered structures, systems, components and equipment of a geologic repository at Yucca Mountain that includes the engineered barrier system.

*Design bases* means that information that identifies the specific functions to be performed by a structure, system, or component of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design. These values may be constraints derived from generally accepted “state-of-the-art” practices for achieving functional goals or requirements derived from analysis (based on calculation or experiments) of the effects of a postulated event under which a structure, system, or component must meet its functional goals. The values for controlling parameters for external events include:

(1) Estimates of severe natural events to be used for deriving design bases that will be based on consideration of historical data on the associated parameters, physical data, or analysis of upper limits of the physical processes involved; and

(2) Estimates of severe external human-induced events to be used for deriving design bases, that will be based on analysis of human activity in the region, taking into account the site characteristics and the risks associated with the event.

*DOE* means the U.S. Department of Energy, or its duly authorized representatives.

*Engineered barrier system* means the waste packages, including engineered components and systems other than the waste package (e.g., drip shields), and the underground facility.

*Event sequence* means a series of actions and/or occurrences within the natural and engineered components of a geologic repository operations area that could potentially lead to exposure of individuals to radiation. An event sequence includes one or more initiating events and associated combinations of repository system component failures, including those produced by the action or inaction of operating personnel. Those event sequences that are expected to occur one or more times before permanent closure of the geologic repository operations area are referred to as Category 1 event sequences. Other event sequences that have at least one chance in 10,000 of occurring before permanent closure are referred to as Category 2 event sequences.

*Geologic repository* means a system that is intended to be used for, or may be used for, the disposal of radioactive wastes in excavated geologic media. A geologic repository includes the engineered barrier system and the portion of the geologic setting that provides isolation of the radioactive waste.

*Geologic repository operations area* means a high-level radioactive waste facility that is part of a geologic repository, including both surface and subsurface areas, where waste handling activities are conducted.

*Geologic setting* means geologic, hydrologic, and geochemical system of the region in which a geologic repository is or may be located.

*High-level radioactive waste* means

(1) The highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentration; and

(2) Other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

*Human intrusion* means breaching of any portion of the Yucca Mountain disposal system within the repository footprint by any human activity.

*Infiltration* means the flow of a fluid into a solid substance through pores or small openings; specifically, the movement of water into soil and fractured or porous rock.
Initiating event means a natural or human induced event that causes an event sequence.

Near-field means the region where the adjacent natural geohydrologic system has been significantly impacted by the excavation of the repository and the emplacement of the waste.

NRC means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

Perched water means ground water of limited lateral extent separated from an underlying body of ground water by an unsaturated zone.

Preclosure means the period of time before and during closure of the geologic repository.

Preclosure safety evaluation means a preliminary assessment of the adequacy of repository support facilities to prevent or mitigate the effects of postulated initiating events and event sequences and their consequences (including fire, radiation, criticality, and chemical hazards), and the site, structures, systems, components, equipment, and operator actions that would be relied on for safety.

Postclosure means the period of time after the closure of the geologic repository.

Radioactive waste or waste means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in the geologic repository.

Reasonably maximally exposed individual means the hypothetical person meeting the criteria specified at 10 CFR 63.312.

Reference biosphere means the description of the environment, inhabited by the reasonably maximally exposed individual. The reference biosphere comprises the set of specific biotic and abiotic characteristics of the environment, including, but not limited to, climate, topography, soils, flora, fauna, and human activities.

Seepage means the inflow of ground water moving in fractures or pore spaces of permeable rock to an open space in the rock such as an excavated drift.

Sensitivity study means an analytic or numerical technique for examining the effects on model outcomes, such as radionuclide releases, of varying specified parameters, such as the infiltration rate due to precipitation.

Site characterization means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

Surface facilities means all permanent facilities within the restricted area constructed in support of site characterization activities and repository construction, operation, and closure activities, including surface structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

System performance means the complete behavior of a geologic repository system at Yucca Mountain in response to the features, events, and processes that may affect it.

Total system performance assessment means a probabilistic analysis that is used to:

1. Identify the features, events and processes (except human intrusion) that might affect the Yucca Mountain disposal system and their probabilities of occurring during 10,000 years after disposal;

2. Examine the effects of those features, events, processes, and sequences of events and processes (except human intrusion) on the performance of the Yucca Mountain disposal system; and

3. Estimate the dose incurred by the reasonably maximally exposed individual, including associated uncertainties, as a result of releases caused by all significant features, events, processes, and sequences of events and processes, weighted by their probability of occurrence.

Underground facility means the underground structure, backfill materials, if any, and openings that penetrate the underground structure (e.g., ramps,
§ 963.10 Scope.

(a) The scope of this subpart includes the following for both the preclosure and postclosure periods:

1. The bases for the suitability determination for the Yucca Mountain site as a location for a geologic repository;

2. The suitability evaluation methods for applying the site suitability criteria to a geologic repository at the Yucca Mountain site; and

3. The site suitability criteria that DOE will apply in accordance with section 113(b)(1)(A)(iv) of the NWPA.

(b) DOE will seek NRC concurrence on any future revisions to this subpart.

§ 963.11 Suitability determination.

DOE will evaluate whether the Yucca Mountain site is suitable for the location of a geologic repository on the basis of the preclosure and postclosure determinations described in §§963.12 and 963.15. If DOE’s evaluation of the Yucca Mountain site for the location of a geologic repository under §§963.12 and 963.15 shows that the geologic repository is likely to meet the applicable radiation protection standards for the preclosure and postclosure periods, then DOE may determine that the site is a suitable location for the development of such a repository.

§ 963.12 Preclosure suitability determination.

DOE will apply the method and criteria described in §§963.13 and 963.14 to evaluate the suitability of the Yucca Mountain site for the preclosure period. If DOE finds that the results of the preclosure safety evaluation conducted under §963.13 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the preclosure period.

§ 963.13 Preclosure suitability evaluation method.

(a) DOE will evaluate preclosure suitability using a preclosure safety evaluation method. DOE will evaluate the performance of the geologic repository at the Yucca Mountain site using the method described in paragraph (b) of this section and the criteria in §963.14. DOE will consider the performance of the system in terms of the criteria to evaluate whether the geologic repository is likely to comply with the applicable radiation protection standard.

(b) The preclosure safety evaluation method, using preliminary engineering specifications, will assess the adequacy of the repository facilities to perform their intended functions and prevent or mitigate the effects of postulated Category 1 and 2 event sequences. The preclosure safety evaluation will consider:

1. A preliminary description of the site characteristics, the surface facilities and the underground operating facilities;

2. A preliminary description of the design bases for the operating facilities and a preliminary description of any associated limits on operation;

3. A preliminary description of potential hazards, event sequences, and their consequences; and

4. A preliminary description of the structures, systems, components, equipment, and operator actions intended to mitigate or prevent accidents.
§ 963.14 Preclosure suitability criteria.

DOE will evaluate preclosure suitability using the following criteria:

(a) Ability to contain radioactive material and to limit releases of radioactive materials;

(b) Ability to implement control and emergency systems to limit exposure to radiation;

(c) Ability to maintain a system and components that perform their intended safety functions; and

(d) Ability to preserve the option to retrieve wastes during the preclosure period.

§ 963.15 Postclosure suitability determination.

DOE will apply the method and criteria described in §§963.16 and 963.17 to evaluate the suitability of the Yucca Mountain site for the postclosure period. If DOE finds that the results of the total system performance assessments conducted under §963.16 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the postclosure period.

§ 963.16 Postclosure suitability evaluation method.

(a) DOE will evaluate postclosure suitability using the total system performance assessment method. DOE will conduct a total system performance assessment to evaluate the ability of the Yucca Mountain disposal system to limit radiological doses in the case where there is no human intrusion as specified by 10 CFR 63.322. DOE will model the performance of the Yucca Mountain disposal system using the method described in paragraph (b) of this section and the criteria in §963.17. If required by applicable NRC regulations regarding a human intrusion standard, §63.321, DOE will consider the performance of the system in terms of the criteria to evaluate whether the Yucca Mountain disposal system is likely to comply with the applicable radiation protection standard.

(b) In conducting a total system performance assessment under this section, DOE will:

(1) Include data related to the suitability criteria in §963.17;

(2) Account for uncertainties and variabilities in parameter values and provide the technical basis for parameter ranges, probability distributions, and bounding values;

(3) Consider alternative models of features and processes that are consistent with available data and current scientific understanding, and evaluate the effects that alternative models would have on the estimated performance of the Yucca Mountain disposal system;

(4) Consider only events that have at least one chance in 10,000 of occurring over 10,000 years;

(5) Provide the technical basis for either inclusion or exclusion of specific features, events, and processes of the geologic setting, including appropriate details as to magnitude and timing regarding any exclusions that would significantly change the dose to the reasonably maximally exposed individual;

(6) Provide the technical basis for either inclusion or exclusion of degradation, deterioration, or alteration processes of engineered barriers, including those processes that would adversely affect natural barriers, (such as degradation of concrete liners affecting the pH of ground water or precipitation...
§ 963.17 Postclosure suitability criteria.

(a) DOE will evaluate the postclosure suitability of a geologic repository at the Yucca Mountain site through suitability criteria that reflect both the processes and the models used to simulate those processes that are important to the total system performance of the geologic repository. The applicable criteria are:

(1) Site characteristics, which include:
   (i) Geologic properties of the site—for example, stratigraphy, rock type and physical properties, and structural characteristics;
   (ii) Hydrologic properties of the site—for example, porosity, permeability, moisture content, saturation, and potentiometric characteristics;
   (iii) Geophysical properties of the site—for example, densities, velocities and water contents, as measured or deduced from geophysical logs; and
   (iv) Geochemical properties of the site—for example, precipitation, dissolution characteristics, and sorption properties of mineral and rock surfaces.

(2) Unsaturated zone flow characteristics, which include:
   (i) Climate—for example, precipitation and postulated future climatic conditions;
   (ii) Infiltration—for example, precipitation entering the mountain in excess of water returned to the atmosphere by evaporation and plant transpiration;
   (iii) Unsaturated zone flux—for example, water movement through the pore spaces, or flowing along fractures or through perched water zones above the repository;
   (iv) Seepage—for example, water dripping into the underground repository openings from the surrounding rock.

(3) Near field environment characteristics, which include:
   (i) Thermal hydrology—for example, effects of heat from the waste on water flow through the site, and the temperature and humidity at the engineered barriers
   (ii) Near field geochemical environment—for example, the chemical reactions and products resulting from water contacting the waste and the engineered barrier materials.

(4) Engineered barrier system degradation characteristics, which include:
   (i) Engineered barrier system component performance—for example, drip shields, backfill, coatings, or chemical modifications, and
   (ii) Waste package degradation—for example, the corrosion of the waste package materials within the near-field environment.

(5) Waste form degradation characteristics, which include:
   (i) Cladding degradation—for example, corrosion or break-down of the cladding on the spent fuel pellets;
   (ii) Waste form dissolution—for example, the ability of individual radionuclides to dissolve in water penetrating breached waste packages.
(6) Engineered barrier system degradation, flow, and transport characteristics, which include:
(i) Colloid formation and stability—for example, the formation of colloidal particles and the ability of radionuclides to adhere to these particles as they may migrate through the remaining barriers; and
(ii) Engineered barrier transport—for example, the movement of radionuclides dissolved in water or adhering to colloidal particles to be transported through the remaining engineered barriers and in the underlying unsaturated zone.
(7) Unsaturated zone flow and transport characteristics, which include:
(i) Unsaturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the unsaturated zone underlying the repository, including retardation mechanisms such as sorption on rock or mineral surfaces;
(ii) Thermal hydrology—for example, effects of heat from the waste on water flow through the site.
(8) Saturated zone flow and transport characteristics, which include:
(i) Saturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the saturated zone underlying and beyond the repository, including retardation mechanisms such as sorption on rock or mineral surfaces; and
(ii) Dilution—for example, diffusion of radionuclides into pore spaces, dispersion of radionuclides along flow paths, and mixing with non-contaminated ground water.
(9) Biosphere characteristics, which include:
(i) Reference biosphere and reasonably maximally exposed individual—for example, biosphere water pathways, location and behavior of reasonably maximally exposed individual; and
(ii) Biosphere transport and uptake—for example, the consumption of ground or surface waters through direct extraction or agriculture, including mixing with non-contaminated waters and exposure to contaminated agricultural products.
(b) DOE will evaluate the postclosure suitability of the Yucca Mountain disposal system using criteria that consider disruptive processes and events important to the total system performance of the geologic repository. The applicable criteria related to disruptive processes and events include:
(1) Volcanism—for example, the probability and potential consequences of a volcanic eruption intersecting the repository;
(2) Seismic events—for example, the probability and potential consequences of an earthquake on the underground facilities or hydrologic system; and
(3) Nuclear criticality—for example, the probability and potential consequences of a self-sustaining nuclear reaction as a result of chemical or physical processes affecting the waste either in or after release from breached waste packages.
## CHAPTER X—DEPARTMENT OF ENERGY  
(GENERAL PROVISIONS)

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PART 1000—TRANSFER OF PROCEEDINGS TO THE SECRETARY OF ENERGY AND THE FEDERAL ENERGY REGULATORY COMMISSION

§ 1000.1 Transfer of proceedings.

(a) Scope. This part establishes the transfer of proceedings pending with regard to those functions of various agencies which have been consolidated in the Department of Energy and identifies those proceedings which are transferred into the jurisdiction of the Secretary and those which are transferred into the jurisdiction of the Federal Energy Regulatory Commission.

(b) Proceedings transferred to the Secretary. The following proceedings are transferred to the Secretary:

1. All Notices of Proposed Rule-making, pending and outstanding, which have been proposed by the Department of Energy and the Department of Energy;
2. All Notices of Inquiry which have been issued by the Department of Energy;
3. All Requests for Interpretations which have been filed pursuant to 10 CFR part 205, subpart F, and on which no interpretation has been issued, with the Office of General Counsel of the Department of Energy;
4. All Applications for Exception Relief which have been filed pursuant to 10 CFR part 205, subpart D, and on which no final decision and order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;
5. All petitions for special redress, relief or other extraordinary assistance which have been filed pursuant to 10 CFR part 205, subpart R, and on which no order has been issued, with the Office of Private Grievances and Redress of the Department of Energy;
6. All appeals from Remedial Orders, Exception Decisions and Orders, Interpretations issued by the Office of General Counsel, and other agency orders which have been filed pursuant to 10 CFR part 205, subpart H, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Department of Energy;
7. All applications for modification or rescission of any DOE order or interpretation which have been filed pursuant to 10 CFR part 205, subpart J, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Federal Energy Administration;
8. All applications for temporary stays and stays which have been filed pursuant to 10 CFR part 205, subpart I, and on which no order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;
9. All applications which have been filed with the Office of Regulatory Programs of the Department of Energy and on which no final order has been issued;
10. All investigations which have been instituted and have not been resolved by the Office of Compliance of the Department of Energy;
11. All Notices of Probable Violation which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;
12. All Notices of Proposed Disallowance which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;
13. All Prohibition Orders which have been issued pursuant to 10 CFR part 303 and as to which no Notice of Effectiveness has been issued;
14. From the Department of the Interior:
(i) The tentative power rate adjustments for the Central Valley Project, California, proposed on September 12, 1977 (42 FR 46619, September 16, 1977). (12) All Notices of Proposed Disallowance which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;
15. From the Interstate Commerce Commission:
(i) Ex Parte No. 308 (Sub-No. 1)—Investigation of Common Carrier Pipelines.
16. From the Federal Power Commission:
(i) Cases:
(A) Northwest Pipeline Corporation, Docket No. CP75–340.
(C) St. Lawrence Gas Company, Docket No. G–17500.
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(D) U.S.D.I. Bonneville Power Administration, Docket No. E-9563.
(F) U.S.D.I. Southeastern Power Administration, Docket No. E-6957.
(G) Tenneco InterAmerica, Inc., Docket No. CP77-561.

(ii) Applications:
(C) Arizona Public Service Co., Docket No. IT-3331. (ERA Docket No. IE-78-3).

(G) Bonneville Power Administration, Docket No. IT-5959. (ERA Docket No. PP-10).

(H) EPR—Oregon (Geothermal Steam Leases).
(I) EPR—Utah (Geothermal Steam Leases).
(J) EPR—Idaho (Geothermal Steam Leases).
(K) EPR—Oregon (Geothermal Steam Leases).

(1) New Form Nos:
151, Docket No. RM76-19.
153, Docket No. RM76-27.
154, Docket No. RM76-33.
156, Docket No. RM76-32.
157, Docket No. RM76-21.
158, Docket No. RM76-31.
159, Docket No. RM76-23.
162, Docket No. RM76-34.
163, Docket No. RM76-30.
164, Docket No. RM76-25.

(C) Procedures for the Filing of Federal Rate Schedules Docket No. RM77-9.
(iv) Project withdrawals and power site revocations:
(A) Project 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).
(B) Project Nos. 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).
(C) Project Nos. 220 and 691—(Wyoming)—Cliff Gold Mining Co. (Applicant for P-691) The Colowyo Gold Mining Co. (Applicant for P-220).
(D) Project No. 1203—(Wyoming)—F. D. Foster (Applicant).
(E) Project No. 1241—(Wyoming)—F. B. Hommel (Applicant).
(F) Project No. 947—(Oregon)—H. L. Vorse (Applicant).
(G) Project No. 907—(Colorado)—S. B. Collins (Applicant).
(H) Project No. 941—(Colorado)—Marian Mining Company (Applicant).
(I) Project Nos. 347 and 418—(Colorado)—Jones Brothers (Applicant for P-347) Frank Gay et al. (Applicant for P-418).
(J) Project Nos. 373, 521, 937, 1024, 1415, 1546, 1547, and 1025—( )—U.S. Forest (Applicant).
(K) Project No. 163—(Colorado)—James F. Meyser and Edward E. Drach (Applicants).
(L) Project Nos. 385, 445, 506, 519, 1220, 1296, 1418, 1519, 1576, 1615, 1616, 1618, 1678, 1682, and 1750—(Colorado)—U.S. Forest Service (Applicant).
(M) DA-117—(Alaska)—Bureau of Land Management (Applicant).
(N) Project No. 114—(Alaska)—Elizabeth H. Graff et al. (Applicant).
(O) DA-222—(Washington)—Bureau of Land Management (Applicant).
(Q) DA-601—(Idaho)—Bureau of Land Management (Applicant).
(S) DA-616—(Idaho)—U.S. Forest Service (Applicant).
(T) DA-1—(South Carolina)—U.S. Forest Service (Applicant).
(U) DA-1116—(California)—U.S. Geological Survey (Applicant).
There are hereby transferred to the jurisdiction of the Federal Energy Regulatory Commission the following proceedings:

(1) From the Interstate Commerce Commission:
   (i) Ex Parte No. 308—Valuation of Common Carrier Pipelines.
   (ii) I&S 9164—Trans Alaska Pipeline System—Rate Filings (including I&S 9164 (Sub-No. 1), NOR 36611, NOR 36611 (Sub-No. 1), NOR 36611 (Sub-No. 2), NOR 36611 (Sub-No. 3), NOR 36611 (Sub-No. 4)).
   (iii) I&S 9089—General Increase, December 1975, Williams Pipeline Company.
   (iv) I&S 9128—Anhydrous Ammonia, Gulf Central Pipeline Company.
   (v) NOR 35533 (Sub-No. 3)—Petroleum Products, Southwest & Midwest Williams Pipeline.
   (vi) NOR 35794—Northville Dock Pipeline Corp. et al.
   (vii) NOR 35895—Inexco Oil Company v. Belle Fourche Pipeline Co. et al.
   (viii) NOR 36217—Department of Defense v. Interstate Storage & Pipeline Corp.
   (ix) NOR 36423—Petroleum Products Southwest to Midwest Points.
   (x) NOR 36520—Williams Pipeline Company—Petroleum Products Midwest.
   (xi) NOR 36553—Kerr-McGee Refining Corporation v. Texoma Pipeline Co.
   (xii) Suspension Docket 67124—Williams Pipe Line Co.—General Increase.

(2) To remain with the Commission until forwarding to the Secretary:
   The following proceedings will continue in effect under the jurisdiction of the Commission until the timely filing of all briefs on and opposing exceptions to the initial decision of the presiding Administrative Law Judge, at which time the Commission shall forward the record of the proceeding to the Secretary for decision on those matters within his jurisdiction:

   (ii) Tenneco Atlantic Pipeline Co., et al., Docket No. CP 77–100, et al.
   (iii) DistriGas of Massachusetts Corp., et al., Docket No. CP 77–196, et al.
   (vi) Pacific Indonesia LNG Co., et al., Docket No. CP 74–160, et al., (except as provided in paragraph (c)(3) of this section).

(3) The Amendment to Application of Western LNG Terminal Associates, filed on November 11, 1977, in Pacific Indonesia LNG Co., et al., FPC Docket No. CP74–160, et al., ERA Docket No. 77–001–LNG, is transferred to the jurisdiction of the Commission until timely filing of all briefs on and opposing exceptions to the initial decision of the presiding Administrative Law Judge on that Amendment, at which time the Commission shall forward a copy of the record of that proceeding to the Secretary of Energy for decision on those matters within his jurisdiction. (If the Commission waives the preparation of an initial decision, the Commission will forward a copy of the record after completion of the hearing, or after the timely filing of any briefs submitted to the Commission, whichever occurs later.)

(d) Residual clause. All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) pending with regard to any function of the Department of Energy, the Department of Energy, Department of the Interior, the Department of Commerce, the Department of Housing and Urban Development, the Department of Navy, and the Naval Reactor and Military Applications Programs which is transferred to the Department of Energy (DOE) by the DOE Organization Act, will be conducted by the Secretary. All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) before the Federal Power Commission or Interstate Commerce Commission will be conducted by the
PART 1002—OFFICIAL SEAL AND DISTINGUISHING FLAG

Subpart A—General

Sec.

1002.1 Purpose.
1002.2 Definitions.
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Subpart B—Official Seal

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1002.21 Description of distinguishing flag.
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1002.31 Unauthorized uses of the seal and flag.

AUTHORITY: 42 U.S.C. 7264.
SOURCE: 43 FR 20782, May 15, 1978, unless otherwise noted.

Subpart A—General

§ 1002.1 Purpose.

The purpose of this part is to describe the official seal and distinguishing flag of the Department of Energy, and to prescribe rules for their custody and use.

§ 1002.2 Definitions.

For purposes of this part—

(a) DOE means all organizational units of the Department of Energy.

(b) Embossing seal means a display of the form and content of the official seal made on a die so that the seal can be embossed on paper or other medium.

(c) Official seal means the original(s) of the seal showing the exact form, content, and colors thereof.

(d) Replica means a copy of the official seal displaying the identical form, content, and colors thereof.

(e) Reproduction means a copy of the official seal displaying the form and content thereof, reproduced in only one color.

(f) Secretary means the Secretary of DOE.

§ 1002.3 Custody of official seal and distinguishing flags.

The Secretary or his designee shall:

(a) Have custody of:

(1) The official seal and prototypes thereof, and masters, molds, dies, and all other means of producing replicas, reproductions, and embossing seals; and

(2) Production, inventory and loan records relating to items specified in paragraph (a)(1) of this section; and

(b) Have custody of distinguishing flags, and be responsible for production, inventory, and loan records therefor.

Subpart B—Official Seal

§ 1002.11 Description of official seal.

The Department of Energy hereby prescribes as its official seal, of which judicial notice shall be taken pursuant to section 654 of the Department of Energy Organization Act of 1977, 42 U.S.C. 7264, the imprint illustrated below and described as follows:

(a)(1) The official seal includes a green shield bisected by a gold-colored lightning bolt, on which is emblazoned a gold-colored symbolic sun, atom, oil derrick, windmill, and dynamo. It is
crested by the white head of an eagle, atop a white rope. Both appear on a blue field surrounded by concentric circles in which the name of the agency, in gold, appears on a green background. Detailing is in black. 

(2) The colors used in the configuration are dark green, dark blue, gold, black, and white. 

(3) The eagle represents the care in planning and the purposefulness of efforts required to respond to the Nation’s increasing demands for energy. The sun, atom, oil derrick, windmill, and dynamo serve as representative technologies whose enhanced development can help meet these demands. The rope represents the cohesiveness in the development of the technologies and their link to our future capabilities. The lightning bolt represents the power of the natural forces from which energy is derived and the Nation’s challenge in harnessing the forces. 

(4) The color scheme is derived from nature, symbolizing both the source of energy and the support of man’s existence. The blue field represents air and water, green represents mineral resources and the earth itself, and gold represents the creation of energy in the release of natural forces. By invoking this symbolism, the color scheme represents the Nation’s commitment to meet its energy needs in a manner consistent with the preservation of the natural environment.

§ 1002.12 Use of replicas, reproductions, and embossing seals.

(a) The Secretary and his designees are authorized to affix replicas, reproductions, and embossing seals to appropriate documents, certifications, and other material for all purposes as authorized by this section. 

(b) Replicas may be used only for: 
(1) Display in or adjacent to DOE facilities, in Department auditoriums, presentation rooms, hearing rooms, lobbies, and public document rooms. 
(2) Offices of senior officials. 
(3) Official DOE distinguishing flags, adopted and utilized pursuant to subpart C. 
(4) Official awards, certificates, medals, and plaques. 

(5) Motion picture film, video tape and other audiovisual media prepared by or for DOE and attributed thereto. 

(6) Official prestige publications which represent the achievements or mission of DOE. 

(7) Non-DOE facilities in connection with events and displays sponsored by DOE, and public appearances of the Secretary or other designated senior DOE Officials. 

(8) For other such purposes as determined by the Director of the Office of Administrative Services. 

(c) Reproductions may be used only on: 
(1) DOE letterhead stationery. 
(2) Official DOE identification cards and security credentials. 
(3) Business cards for DOE employees. 
(4) Official DOE signs. 
(5) Official publications or graphics issued by and attributed to DOE, or joint statements of DOE with one or more Federal agencies, State or local governments, or foreign governments. 
(6) Official awards, certificates, and medals. 

(7) Motion picture film, video tape, and other audiovisual media prepared by or for DOE and attributed thereto. 

(8) For other such purposes as determined by the Director of the Office of Administrative Services. 

(d) Embossing seals may be used only on: 
(1) DOE legal documents, including interagency or intergovernmental agreements, agreements with States, foreign patent applications, and similar documents. 

(2) For other such purposes as determined by the General Counsel or the Director of Administration. 

(e) Any person who uses the official seal, replicas, reproductions, or embossing seals in a manner inconsistent with this part shall be subject to the provisions of 18 U.S.C. 1017, providing penalties for the wrongful use of an official seal, and to other provisions of law as applicable. 

(f) The official seal is being registered with the World Intellectual Property Organization through the U.S. Patent and Trademark Office.
§ 1002.21 Description of distinguishing flag.

(a) The base or field of the flag shall be white, and a replica of the official seal shall appear on both sides thereof.

(b) (1) The indoor flag shall be of rayon banner, measure 4' 4" on hoist by 5' 6" on the fly, exclusive of heading and hems, and be fringed on three edges with yellow rayon fringe, 2 1/2" wide.

(2) The outdoor flag shall be of heavy weight nylon, and measure either 3' on the hoist by 5' on the fly or 5' on the hoist by 8' on the fly, exclusive of heading and hems.

(c) Each flag shall be manufactured in accordance with U.S. Department of Defense Military Specification Mil-F-2692. The official seal shall be screen printed on both sides, and on each side, the lettering shall read from left to right. Headings shall be Type II in accordance with the Institute of Heraldry Drawing No. 5-1-45E.

§ 1002.22 Use of distinguishing flag.

(a) DOE distinguishing flags may be used only:

(1) In the offices of the Secretarial officers, Chairman of the Federal Energy Regulatory Commission, and heads of field locations designated below:

- Power Administrations.
- Regional Offices.
- Operations Offices.
- Certain Field Offices and other locations as designated by the Director of Administration.

(2) At official DOE ceremonies.

(3) In Department auditoriums, official presentation rooms, hearing rooms, lobbies, public document rooms, and in non-DOE facilities in connection with events or displays sponsored by DOE, and public appearances of DOE officials.

(4) On or in front of DOE installation buildings.

(5) Other such purposes as determined by the Director of Administration.

§ 1002.31 Unauthorized uses of the seal and flag.

The official seal and distinguishing flag shall not be used except as authorized by the Director of Administration in connection with:

(a) Contractor-operated facilities.

(b) Souvenir or novelty items.

(c) Toys or commercial gifts or premiums.

(d) Letterhead design, except on official Departmental stationery.

(e) Matchbook covers, calendars, and similar items.

(f) Civilian clothing or equipment.

(g) Any article which may disparage the seal or flag or reflect unfavorably upon DOE.

(h) Any manner which implies Departmental endorsement of commercial products or services, or of the user's policies or activities.
§ 1003.2 Definitions.

(a) As used in this part:

Action means an order issued, or a rulemaking undertaken, by the DOE.
Aggrieved, with respect to a person, means adversely affected by an action of the DOE.
Conference means an informal meeting between the Office of Hearings and Appeals and any person aggrieved by an action of the DOE.

Director means the Director of the Office of Hearings and Appeals or duly authorized delegate.

DOE means the Department of Energy, created by the Department of Energy Organization Act (42 U.S.C. 7101 et seq.).

Duly authorized representative means a person who has been designated to appear before the Office of Hearings and Appeals in connection with a proceeding on behalf of a person interested in or aggrieved by an action of the DOE. Such appearance may consist of the submission of a written document, a personal appearance, verbal communication, or any other participation in the proceeding.

Exception means the waiver or modification of the requirements of a rule,
regulation or other DOE action having the effect of a rule as defined by 5 U.S.C. 551(4) under a specific set of facts, pursuant to subpart B of this part.

Federal legal holiday means the first day of January, the third Monday of January, the third Monday of February, the last Monday of May, the fourth day of July, the first Monday of September, the second Monday of October, the eleventh day of November, the fourth Thursday of November, the twenty-fifth day of December, or any other calendar day designated as a holiday by federal statute or Executive order.

OHA means the Office of Hearings and Appeals of the Department of Energy.

Order means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of DOE in a matter other than rulemaking but including licensing. This definition does not include internal DOE orders and directives issued by the Secretary of Energy or delegate in the management and administration of departmental elements and functions.

Person means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

Proceeding means the process and activity, and any part thereof, instituted by the OHA, either on its own initiative or in response to an application, complaint, petition or request submitted by a person, that may lead to an action by the OHA.

SRO means a special report order issued pursuant to §1003.8(b) of this part.

(b) Throughout this part the use of a word or term in the singular shall include the plural, and the use of the male gender shall include the female gender.

§ 1003.3 Appearance before the OHA.

(a) A person may make an appearance, including personal appearances in the discretion of the OHA, and participate in any proceeding described in this part on his own behalf or by a duly authorized representative. Any application, appeal, petition, or request filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. Falsification of such certification will subject such person to the sanctions stated in 18 U.S.C. 1001.

(b) Suspension and disqualification. The OHA may deny, temporarily or permanently, the privilege of participating in proceedings, including oral presentation, to any individual who is found by the OHA—

(1) To have made false or misleading statements, either verbally or in writing;

(2) To have filed false or materially altered documents, affidavits or other writings;

(3) To lack the specific authority to represent the person seeking an OHA action; or

(4) To have engaged in or to be engaged in contumacious conduct that substantially disrupts a proceeding.

§ 1003.4 Filing of documents.

(a) Any document filed with the OHA must be addressed as required by §1003.11, and should conform to the requirements contained in §1003.9. All documents and exhibits submitted become part of an OHA file and will not be returned.

(b) A document submitted in connection with any proceeding transmitted by first class United States mail and properly addressed is considered to be filed upon mailing.

(c) Hand-delivered documents to be filed with the OHA shall be submitted to 950 L'Enfant Plaza, SW., Washington, DC, during normal business hours.

(d) Documents hand delivered or received electronically after regular business hours are deemed filed on the next regular business day.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§ 1003.5 Computation of time.

(a) Days. (1) Except as provided in paragraph (b) of this section, in computing any period of time prescribed or
allowed by these regulations or by an order of the OHA, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a federal legal holiday.

(2) Saturdays, Sundays and federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less.

(b) Hours. If the period of time prescribed in an order issued by the OHA is stated in hours rather than days, the period of time shall begin to run upon actual notice of such order, whether by verbal or written communication, to the person directly affected, and shall run without interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended or rescinded. When a written order is transmitted by verbal communication, the written order shall be served as soon thereafter as is feasible.

(c) Additional time after service by mail. Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice or other document and the order, notice or other document is served solely by mail, 3 days shall be added to the prescribed period.

§1003.6 Extension of time.

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the OHA upon good cause shown.

§1003.7 Service.

(a) All documents required to be served under this part shall be served personally or by first class United States mail, except as otherwise provided.

(b) Service upon a person’s duly authorized representative shall constitute service upon that person.

(c) Official United States Postal Service receipts from certified mailing shall constitute evidence of service.

§1003.8 Subpoenas, special report orders, oaths, witnesses.

(a) In accordance with the provisions of this section and as otherwise authorized by law, the Director may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and request witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(b) The Director may issue a Special Report Order requiring any person subject to the jurisdiction of the OHA to file a special report providing information relating to the OHA proceeding, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required.

(c) The Director, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(d) Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may file a request for review of the subpoena or SRO with the Director. The Director then shall provide notice of receipt to the person requesting review, may extend the time prescribed for compliance with the subpoena or SRO, and may negotiate and approve the terms of satisfactory compliance.

(e) If the subpoena or SRO is not modified or rescinded within 10 days of the date of the Director’s notice of receipt:

(1) The subpoena or SRO shall be effective as issued; and

(2) The person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the Director’s notice of receipt, unless otherwise notified in writing by the Director.
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(f) There is no administrative appeal of a subpoena or SRO.

(g) A subpoena or SRO shall be served upon a person named in the document by delivering a copy of the document to the person named.

(h) Delivery of a copy of a subpoena or SRO to a natural person may be made by:

(1) Handing it to the person;
(2) Leaving it at the person’s office with the person in charge of the office;
(3) Leaving it at the person’s dwelling or usual place of abode with a person of suitable age and discretion who resides there;
(4) Mailing it to the person by certified mail, at his last known address; or
(5) Any method that provides the person with actual notice prior to the return date of the document.

(i) Delivery of a copy of a subpoena or SRO to a person who is not a natural person may be made by:

(1) Handing it to a registered agent of the person;
(2) Handing it to any officer, director, or agent in charge of any office of such person;
(3) Mailing it to the last known address of any registered agent, officer, director, or agent in charge of any office of the person by certified mail; or
(4) Any method that provides any registered agent, officer, director, or agent in charge of any office of the person with actual notice of the document prior to the return date of the document.

(j) A witness subpoenaed by the OHA may be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(k) If in the course of a proceeding a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage may be paid by the OHA if the person shows:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and
(2) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage.

(l) If any person upon whom a subpoena or SRO is served pursuant to this section refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the appropriate United States District Court to enforce the subpoena or SRO.

(m) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that:

(1) A diligent search has been made for each document responsive to the subpoena; and
(2) To the best of his knowledge, information, and belief each document responsive to the subpoena is being produced.

(n) Any information furnished in response to an SRO shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom it was directed or his authorized agent who actually provides the information that:

(1) A diligent effort has been made to provide all information required by the SRO; and
(2) All information furnished is true, complete, and correct.

(o) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO. If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (m) or (n) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of
the person whose privilege is being asserted.

(p) If testimony is taken pursuant to a subpoena, the Director shall determine whether the testimony shall be recorded and the means by which the testimony is recorded.

(q) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees. However, the Director may deny the request for good cause. Upon proper identification, any witness or his attorney has the right to inspect the official transcript of the witness’ own testimony.

(r) The Director may sequester any person subpoenaed to furnish documents or give testimony. Unless permitted by the Director, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(s) A witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(1) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(2) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(t) The Director shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. OHA may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

§ 1003.9 General filing requirements.

(a) Purpose and scope. The provisions of this section shall apply to all documents required or permitted to be filed with the OHA. One copy of each document must be filed with the original, except as provided in paragraph (f) of this section. A telefax filing of a document will be accepted only if immediately followed by the filing by mail or hand-delivery of the original document.

(b) Signing. Any document that is required to be signed, shall be signed by the person filing the document. Any document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. (A false certification is unlawful under the provisions of 18 U.S.C. 1001.) The signature by the person or duly authorized representative constitutes a certificate by the signer that the signer has read the document and that to the best of the signer’s knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact, warranted under existing law, and submitted in good faith and not for any improper purpose such as to harass or to cause unnecessary delay. If a document is signed in violation of this section, OHA may impose the sanctions specified in section 1003.3 and other sanctions determined to be appropriate.

(c) Labeling. An application, petition, or other request for action by the OHA should be clearly labeled according to the nature of the action involved both on the document and on the outside of the envelope in which the document is transmitted.

(d) Obligation to supply information. A person who files an application, petition, appeal or other request for action is under a continuing obligation during the proceeding to provide the OHA with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, appeal or request for action that is subsequently filed by that person with any DOE office.

(e) The same or related matters. A person who files an application, petition, appeal or other request for action by the OHA shall state whether, to the best knowledge of that person, the same or related issue, act or transaction has been or presently is being considered or investigated by any other
§ 1003.10 **DOE office, other federal agency, department or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with any proceeding described in this part. In addition, the person shall state whether contact has been made by the person or one acting on his behalf with any person who is employed by the DOE with regard to the same issue, act or transaction or a related issue, act or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact.**

(f) **Request for confidential treatment.**

(1) If any person filing a document with the OHA claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if such person requests the OHA not to disclose such information, such person shall file together with the document two copies of the document from which has been deleted the information for which such person wishes to claim confidential treatment. The person shall indicate in the original document that it is confidential or contains confidential information and must file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception codified at 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If the person filing a document does not submit two copies of the document from which the confidential information deleted, the OHA may assume that there is no objection to public disclosure of the document in its entirety.

(2) The OHA retains the right to make its own determination with regard to any claim of confidentiality, under criteria specified in 10 CFR 1004.11. Notice of the decision by the OHA to deny such claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

(g) Each application, petition or request for OHA action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding.

§ 1003.10 **Effective date of orders.**

Any order issued by the OHA under this part is effective as against all persons having actual or constructive notice thereof upon issuance, in accordance with its terms, unless and until it is stayed, modified, suspended, or rescinded. An order is deemed to be issued on the date, as specified in the order, on which it is signed by the Director of the OHA or his designee, unless the order provides otherwise.

§ 1003.11 **Address for filing documents.**

All applications, requests, petitions, appeals, written communications and other documents to be submitted to or filed with the OHA, as provided in this part or otherwise, shall be addressed to the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0107. The OHA has facilities for the receipt of transmissions via FAX, at FAX Number (202) 426–1415.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§ 1003.12 **Ratification of prior directives, orders and actions.**

All orders and other directives issued, all proceedings initiated, and all other actions taken in accordance with 10 CFR part 205 prior to the effective date of this part, are hereby confirmed and ratified, and shall remain in full force and effect as if issued under this part, unless or until they are altered, amended, modified or rescinded in accordance with the provisions of this part.
§ 1003.13 Public reference room.

A public reference room shall be maintained at the OHA, 950 L’Enfant Plaza, S.W., Washington, DC. In this room, the following information shall be made available for public inspection and copying, during normal business hours:

(a) A list of all persons who have applied for an exception, or filed an appeal or petition, and a digest of each application;

(b) Each Decision and Order, with confidential information deleted, issued in response to an application for an exception, petition or other request, or at the conclusion of an appeal; and

(c) Any other information in the possession of OHA which is required by statute to be made available for public inspection and copying, and any other information that the OHA determines should be made available to the public.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

§ 1003.14 Notice of proceedings.

At regular intervals, the OHA shall publish on its Internet World Wide Web site, a digest of the applications, appeals, petitions and other requests filed, and a summary of the Decisions and Orders issued by the OHA, pursuant to proceedings conducted under this part. The OHA’s web site is located at http://www.oha.doe.gov.

[60 FR 15006, Mar. 21, 1995, as amended at 63 FR 58289, Oct. 30, 1998]

Subpart B—Exceptions

§ 1003.20 Purpose and scope.

(a) This subpart establishes the procedures for applying for an exception or exemption, as provided for in section 504 (42 U.S.C. 7194) of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), from a rule, regulation or DOE action having the effect of a rule as defined by 5 U.S.C. 551(4), based on an assertion of serious hardship, gross inequity or unfair distribution of burdens, and for consideration of such application by the OHA. The procedures contained in this subpart may be incorporated by reference in another DOE rule or regulation which invokes the adjudicatory authority of the Office of Hearings and Appeals. The procedures may also be made applicable to proceedings undertaken at the direction of an appropriate DOE official if incorporated by reference in the delegation.

(b) The filing of an application for an exception shall not constitute grounds for noncompliance with the requirements from which an exception is sought, unless a stay has been issued in accordance with subpart D of this part.

[60 FR 15006, Mar. 21, 1995, as amended at 61 FR 35114, July 5, 1996]

§ 1003.21 What to file.

A person seeking relief under this subpart shall file an “Application for Exception,” which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing. The general filing requirements stated in §1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.22 Where to file.

All applications for exception shall be filed with the OHA at the address provided in §1003.11.

§ 1003.23 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provision of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:
(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the Federal Register.

(c) The OHA shall serve notice on any other person readily identified by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

d) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§1003.24 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested OHA action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the particular action sought therein.

d) The application shall specify the exact nature and extent of the relief requested.

§1003.25 OHA evaluation.

(a)(1) OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may consider any other source of information. The OHA on its own initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application. The OHA may issue appropriate orders as warranted in the proceeding.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by §1003.23, the OHA may dismiss the application without prejudice.

(b)(1) The OHA shall consider an application for an exception only when it determines that a more appropriate proceeding is not provided by DOE regulations.

§1003.24 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested OHA action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application.
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(2) An application for an exception may be granted to alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens.

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

§ 1003.26 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the OHA shall issue an order granting or denying the application, in whole or in part.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the order. The Decision and Order shall provide that any person aggrieved thereby may file an appeal in accordance with §1003.27.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

§ 1003.27 Appeal of exception order.

(a) Except as provided in paragraph (b) of this section, any person aggrieved by an order issued by the OHA under this subpart may file an appeal with the OHA in accordance with subpart C of this part. Any appeal filed under this paragraph must be filed within 30 days of service, or constructive service under §1003.14, of the order from which the appeal is taken.

(b) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to §504 of the Department of Energy Organization Act (42 U.S.C. 7194) may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission’s regulations.

Subpart C—Appeals

§ 1003.30 Purpose and scope.

This subpart establishes the procedures for the filing of an administrative appeal of a DOE order and for the consideration of the appeal by the Office of Hearings and Appeals. Unless a program rule or regulation or a DOE delegation of authority provides otherwise, a person aggrieved by a DOE order appealable under this subpart has not exhausted his or her administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued. A person filing an appeal must also file an “Application for Stay” under subpart D of this part if the grant of a stay is necessary under Section 10(c) of the Administrative Procedure Act (5 U.S.C. 704) to preclude judicial review pending final action on the appeal.

§ 1003.31 Who may file.

Any person may file an appeal under this subpart who is so authorized by §1003.27, a program rule or regulation, or a DOE delegation of authority.

§ 1003.32 What to file.

A person filing under this subpart shall file an “Appeal of Order” which should be clearly labeled as such both on the appeal and on the outside of the envelope in which the appeal is transmitted, and shall be in writing. The general filing requirements stated in §1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.33 Where to file.

The appeal shall be filed with the OHA at the address provided in §1003.11.

§ 1003.34 Notice.

(a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to each person who is reasonably ascertainable by the appellant as a person who would be aggrieved by the OHA action sought, including those who participated in the process that led to the issuance of the order from which the appeal has been taken. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the OHA within 10
§ 1003.35 Contents.

(a) The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the appeal. If the appeal includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order from which the appeal has been taken. For purposes of this subpart, the term “significantly changed circumstances” shall mean—

(1) The discovery of material facts that were not known or could not have been known at the time of the process that led to the issuance of the order from which the appeal has been taken;

(2) The discovery of a law, rule, regulation, order or decision on an appeal or any exception that was in effect at the time of the process that led to the issuance of the order from which the appeal has been taken, and which, if such had been made known to DOE, would have been relevant and would have substantially altered the outcome; or

(3) A substantial change in the facts or circumstances upon which an outstanding and continuing order affecting the appellant was issued, which change has occurred during the interval between issuance of the order and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant.

(b) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether he requests or intends to request that there be a conference or hearing regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

§ 1003.36 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept...
submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the appeal with leave to refile within a specified time. If the failure to supply additional information is repeated or willful, the OHA may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by §1003.34, the OHA may dismiss the appeal without prejudice.

(b) The OHA may issue an order summarily denying the appeal if—

(1) It is not filed in a timely manner, unless good cause is shown; or

(2) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the DOE action was erroneous in fact or in law, or that it was arbitrary or capricious.

§1003.37 Decision and Order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the OHA shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. The Decision and Order shall state that it is a final order of the DOE of which the appellant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the appellant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart D—Stays

§1003.40 Purpose and scope.

(a) This subpart establishes the procedures for applying for a stay. It also specifies the nature of the relief which may be effectuated through the approval of a stay.

(b) An application for a stay will be considered if it is incident to a submission over which OHA has jurisdiction. An application for stay may also be considered if the stay is requested pending judicial review of an order issued by the OHA.

(c) All applicable DOE rules, regulations, orders, and generally applicable requirements shall be complied with unless and until an application for a stay is granted.

§1003.41 What to file.

A person filing under this subpart shall file an “Application for Stay” which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted. The application shall be in writing. The general filing requirements stated in §1003.9 shall be complied with in addition to the requirements stated in this subpart.

§1003.42 Where to file.

An Application for Stay shall be filed with the OHA at the address provided in §1003.11.

§1003.43 Notice.

(a) An applicant for stay shall notify each person readily identifiable as one who will be directly aggrieved by the OHA action sought that it has filed an Application for Stay. The applicant shall serve the application on each identified person and shall notify each such person that the OHA will receive and endeavor to consider, subject to
§ 1003.44 Contents.  
(a) An Application for Stay shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include, but not be limited to, all information that relates to satisfaction of the criteria in § 1003.45(b).

(b) The application shall include a description of the proceeding incident to which the stay is being sought. This description shall contain a discussion of all DOE actions relevant to the proceeding.

(c) The applicant shall state whether he requests that a conference or hearing be convened regarding the application, as provided in subpart F of this part.

§ 1003.45 OHA evaluation.
(a)(1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may order the submission of additional information, and may solicit and accept submissions from third persons relevant to an application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may also consider any other source of information, and may conduct hearings or conferences either in response to requests by parties in the proceeding or on its own initiative.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice.

(3) The OHA shall process applications for stay as expeditiously as possible. When administratively feasible, the OHA shall grant or deny an Application for Stay within 10 business days after receipt of the application.

(4) Notwithstanding any other provision of the DOE regulations, the OHA may make a decision on any Application for Stay prior to the receipt of written comments.

(b) The criteria to be considered and weighed by the OHA in determining whether a stay should be granted are:

(1) Whether a showing has been made that an irreparable injury will result in the event that the stay is denied;

(2) Whether a showing has been made that a denial of the stay will result in a more immediate hardship or inequity to the applicant than a grant of the stay would cause to other persons affected by the proceeding;

(3) Whether a showing has been made that it would be desirable for public policy reasons to grant immediate relief pending a decision by OHA on the merits;

(4) Whether a showing has been made that it is impossible for the applicant
§ 1003.53 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, from which confidential information has been deleted in accordance with §1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought, including persons who participated in the process that led to the issuance of the order for which the modification or rescission is sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the OHA within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of all persons to whom a copy of the application was sent.

(b) If an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA with respect to
§ 1003.54 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable), a complete statement of the business or other reasons that justify the act or transaction, a description of the acts or transactions that would be affected by the requested action, and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to the OHA upon its request. A copy of the order of which modification or rescission is sought shall be included with the application.

(b) The application shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The application shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances, as defined in §1003.55(b)(2), upon which the application is based. The applicant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order for which modification or rescission is sought.

(d) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeal and exceptions relied upon to support the action sought therein.

§ 1003.55 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application for modification or rescission provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application for modification or rescission, the OHA may convene a conference, on its own initiative, if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by §1003.53, the OHA may dismiss the application without prejudice.

(b)(1) An application for modification or rescission of an order shall be processed only if—

(i) The application demonstrates that it is based on significantly changed circumstances; and

(ii) The period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(b)(2) For purposes of this subpart, the term "significantly changed circumstances" shall mean—

(i) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) The discovery of a law, rule, regulation, order or decision on appeal or exception that was in effect at the time
of the proceeding upon which the application is based and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

§ 1003.56 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the OHA shall issue a Decision and Order granting or denying the application.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. When appropriate, the Decision and Order shall state that it is a final order of which the applicant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart F—Conferences and Hearings

§ 1003.60 Purpose and scope.

This subpart establishes the procedures for requesting and conducting an OHA conference or hearing. Such proceedings shall be convened in the discretion of the OHA, consistent with OHA requirements.

§ 1003.61 Conferences.

(a) The OHA in its discretion may direct that a conference be convened, on its own initiative or upon request by a person, when it appears that such conference will materially advance the proceeding. The determination as to who may attend a conference convened under this subpart shall be in the discretion of the OHA, but a conference will usually not be open to the public.

(b) A conference may be requested in connection with any proceeding of the OHA by any person who would be aggrieved by that proceeding. The request may be made in writing or verbally, but must include a specific showing as to why such conference will materially advance the proceeding. The request shall be addressed to the OHA, as provided in §1003.11.

(c) A conference may only be convened after actual notice of the time, place and nature of the conference is provided to the person who requested the conference.

(d) When a conference is convened in accordance with this section, each person may present views as to the issues involved. Documentary evidence may be presented at the conference, but will be treated as if submitted in the regular course of the proceeding. A transcript of the conference will not usually be prepared. However, the OHA in its discretion may have a verbatim transcript prepared.

(e) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the OHA in its discretion determines that such would be advisable.

§ 1003.62 Hearings.

(a) The OHA in its discretion may direct that a hearing be convened on its own initiative or upon request by a person, when it appears that such hearing will materially advance the proceeding. All hearings convened pursuant to this subpart shall be conducted by the Director of the OHA or his designee. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of OHA. Hearings will be open to the public, but may be closed at the discretion of OHA if the reason is put in the record.

(b) A hearing may be requested by an applicant, appellant, or any other person who would be aggrieved by the OHA action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed
to the OHA at the address provided in §1003.11.

(c) A hearing may be convened only after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action involved. The notice shall include, as appropriate:

(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(d) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceeding. A transcript of the hearing will be prepared.

(e) If material factual issues remain in dispute after an application or appeal has been filed, the Director of the OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding. A motion may be summarily denied for lack of sufficient specificity, because an evidentiary hearing would place an undue burden on another person or the DOE, or because an evidentiary hearing would cause undue delay.

(f) A Motion for Evidentiary Hearing must be served on any person from whom information is sought and on parties to the underlying administrative action. Any person who wishes to respond to a Motion for Evidentiary Hearing must do so within ten days of service.

(g) In reaching a decision with respect to a request for a hearing or motion filed under this subpart, the OHA shall consider all relevant information in the record. If an order is issued granting a hearing or evidentiary hearing, in whole or in part, the order shall specify the parties, any limitations on the participation of a party, and the issues to be considered. An order of the OHA issued under this section is an interlocutory order which is subject to further administrative review or appeal only upon issuance of a final Decision and Order in the proceeding concerned.

(h) At any evidentiary hearing, the parties shall have the opportunity to present material evidence that directly relates to a particular issue set forth for hearing. The Presiding Officer may administer oaths or affirmations, rule on objections to the presentation of evidence, receive relevant material, require the advance submission of documents offered as evidence, dispose of procedural requests, determine the format of the hearing, modify any order granting a Motion for Evidentiary Hearing, direct that written motions, documents or briefs be filed with respect to issues raised during the course of the hearing, ask questions of witnesses, issue subpoenas, direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential) and otherwise regulate the conduct of the hearing.

Subpart G—Private Grievances and Redress

§ 1003.70 Purpose and scope.

The OHA shall receive and consider petitions that seek special redress relief or other extraordinary assistance as provided for in the Federal Energy Administration Act of 1974, Section 21 (15 U.S.C. 780), apart from or in addition to the other proceedings described in this part. This subpart may also apply if cross referenced in another DOE rule or regulation, or in a DOE delegation of authority. Petitions under this subpart shall include those seeking special assistance based on an assertion that DOE is not complying with its rules, regulations, or orders.

§ 1003.71 Who may file.

Any person may file a petition under this subpart who is adversely affected by any DOE rule, regulation or order.
subject to 15 U.S.C. 780 or who is so authorized by a program rule or regulation or a DOE delegation of authority.

§ 1003.72 What to file.

The person seeking relief under this subpart shall file a “Petition for Special Redress or Other Relief,” which shall be clearly labeled as such both on the petition and on the outside of the envelope in which it is transmitted, and shall be in writing. The general filing requirements stated in §1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.73 Where to file.

A petition shall be filed with the OHA at the address provided in §1003.11.

§ 1003.74 Notice.

(a) The person filing the petition, except a petition that asserts that the DOE is not complying with agency rules, regulations, or orders, shall send by United States mail a copy of the petition and any subsequent amendments or other documents relating to the petition, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to each person who is reasonably ascertainable by the petitioner as a person who would be aggrieved by the OHA action sought. The copy of the petition shall be accompanied by a statement that the person may submit comments regarding the petition to the OHA within 10 days. The copy filed with the OHA shall include certification that the requirements of this paragraph have been complied with and shall include the names and addresses of each person to whom a copy of the petition was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the petitioner determines that compliance with paragraph (a) of this section would be impracticable, the petitioner shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the petition a description of the persons or class or classes of persons to whom notice was not sent.

(3) The OHA may require the petitioner to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the Federal Register.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the petition will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA regarding a petition filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with §1003.9(f), to the petitioner. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

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The petition shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the petition and to the OHA action sought. Such facts shall include, but not be limited to, the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction, if applicable; a description of the act or transaction, if applicable; a description of the acts or transactions that would be affected by the requested action; a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the petition, and an explanation of how the petitioner is aggrieved by DOE’s position. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the petition shall be submitted to the OHA upon its request.

§ 1003.76 OHA evaluation of request.

(a)(1) The OHA may initiate an investigation of any statement in a petition
§ 1003.77 Decision and Order.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition.

(b) The Decision and Order denying or granting the petition shall include a written statement setting forth the relevant facts and legal basis for the Decision and Order. Such Decision and Order shall state that it is a final order of the DOE of which the petitioner may seek judicial review.

PART 1004—FREEDOM OF INFORMATION

1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) that implement 5 U.S.C. 552, Pub. L. 89–487, as amended by Pub. L. 93–502, 88 Stat. 1561, by Pub. L. 94–409, 90 Stat. 1241, and by Pub. L. 99–570, 100 Stat. 3207–49. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of the DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of the DOE may find it helpful to consult with a DOE Freedom of Information Officer before invoking the formal procedures set out below. To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

1004.2 Definitions.

As used in this part:

(a) Appeal Authority means the Office of Hearings and Appeals.

(b) Authorizing or Denying Official means that DOE officer as identified by the Directorate of Administration by separate directive, having custody of or...
responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Officer as defined below and officials who report directly to either the Office of the Secretary or a Secretarial Officer as also defined below. In the Field Offices, the term refers to the head of a field location identified in §1004.2(h) and the heads of field offices to which they provide administrative support and have delegated this authority.

(c) 'Commercial use' request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.

(d) Department or Department of Energy (DOE) means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub L. 95–91. This specifically excludes the FERC.

(e) Direct costs means those expenditures which the DOE actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(f) Duplication refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of, but are not limited to, paper copy, microform, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk). The copy provided must be in a form that can be reasonably used by requesters.

(g) Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) Freedom of Information Officer means the person designated to administer the Freedom of Information Act at the following DOE offices:

1. Alaska Power Administration, P.O. Box 020050, Juneau, AK 99802-0050.
2. Albuquerque Operations Office, P.O. Box 5400, Albuquerque, NM 87115.
3. Bartlesville Project Office, P.O. Box 1398, Bartlesville, OK 74005.
4. Bonneville Power Administration, P.O. Box 3621–AL, Portland, OR 97208–3621.
5. Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439.
8. Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26507.
10. Oak Ridge Operations Office, P.O. Box E, Oak Ridge, TN 37831.
11. Pittsburgh Energy Technology Center, P.O. Box 10940, Pittsburgh, PA 15236–0940.
12. Richland Operations Office, P.O. Box 530, Richland, WA 99352.
15. Southeastern Power Administration, Samuel Elbert Building, Elberton, GA 30635.
16. Southwestern Power Administration, ATTN: SWPA–120, P.O. Box 1619, Tulsa, OK 74101.
17. Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East, New Orleans, LA 70123.
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(18) Western Area Power Administration, P.O. Box 3402, Golden, CO 80401.

(i) General Counsel means the General Counsel provided for in section 202(b) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters.

(j) Headquarters means all DOE facilities functioning within the Washington metropolitan area.

(k) Non-commercial scientific institution refers to an institution that is not operated on a “commercial” basis as that term is referenced in §1004.2(c), and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(l) Office means any administrative or operating unit of the DOE, including those in field offices.

(m) Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive.

Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

(n) Review refers to the process of examining documents located in response to a commercial use request (see §1004.2(c)) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(o) Search includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The DOE will search for material in the most efficient and least expensive manner in order to minimize cost for both DOE and the requester.

For example, DOE will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. “Search” will be distinguished, moreover, from “review” of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(p) Secretarial Officer means the General Counsel; Assistant Secretary, Management and Administration; Assistant Secretary for Congressional, Intergovernmental, and Public Affairs; Assistant Secretary for International Affairs and Energy Emergencies; Assistant Secretary for Nuclear Energy; Assistant Secretary for Fossil Energy; Assistant Secretary, Conservation and Renewable Energy; Assistant Secretary for Defense Programs; Assistant Secretary for Environment, Safety, and Health; Administrator, Economic Regulatory Administration; Administrator, Energy Information Administration; Director of Energy Research; Director of Civilian Radioactive Waste Management; Director of Minority Economic Impact, and the Inspector General.

(q) Statute specifically providing for setting the level of fees for particular types of records, at 5 U.S.C. 552(a)(4)(A)(vi), means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to
set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

§ 1004.3 Public reading facilities and policy on contractor records.

(a) The DOE Headquarters will maintain, in the public reading facilities, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. The principal public reading facility will be located at the Freedom of Information Office, 1000 Independence Avenue, SW, Washington, DC. A complete listing of other facilities is available from the Freedom of Information Officer at DOE Headquarters.

(b) Each of the designated field offices will maintain in public reading facilities certain materials maintained in the Headquarters facility and other materials associated with the particular field offices.

(c) Each of these public reading facilities will maintain and make available for public inspection and copying current indices of the materials at that facility which are required to be indexed by 5 U.S.C. 552(a)(2) or other applicable statutes.

(d) [Reserved]

(e) Contractor Records. (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)(2).

(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in §1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

(3) The policies stated in this paragraph:

(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

(4) For purposes of §1004.3(e)(2), "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.


§ 1004.4 Elements of a request.

(a) Addressed to the Freedom of Information Officer. A request for a record of the DOE which is not available in a public reading facility, as described in §1004.3, shall be addressed to the appropriate Headquarters or field Freedom of Information Officer, Department of Energy, at a location listed in §1004.2(h) of this part, and both the envelope and the letter shall be clearly marked "Freedom of Information Request." Except as provided in §1004.4(e), a request will be considered to be received by the DOE for purposes of 5 U.S.C. 552(a)(6) upon actual receipt by the Freedom of Information Officer.
Requests delivered after regular business hours of the Freedom of Information Office are considered received on the next regular business day.

(b) Request must be in writing and for reasonably described records. A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to the submission of a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should identify that office.

(c) Categorical requests. (1) Must meet reasonably described records requirement. A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The Freedom of Information Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) Assistance in reformulating a non-conforming request. If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

(d) Nonexistent records. (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(3) If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified.

(e) Assurance of willingness to pay fees. A request shall include (1) an assurance to pay whatever fees will be assessed in accordance with §1004.9, (2) an assurance to pay those fees not exceeding some specified dollar amount, or (3) a request for a waiver or reduction of fees. No request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees anticipated to be associated with the processing of the request or a specific request of a waiver or reduction of fees.

(f) Requests for records or information of other agencies. Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(1) Where a document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester, unless the originator agrees to direct release by DOE.

(2) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official
will coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, will cite the other agency Denying Official as well as the appropriate DOE Denying Official if a denial by DOE is also involved.

§ 1004.5 Processing requests for records.

(a) Freedom of Information Officers will be responsible for processing requests for records submitted pursuant to this part. Upon receiving such a request, the Freedom of Information Officer will, except as provided in paragraph (c) of this section, ascertain which Authorizing Official has responsibility for, custody of, or concern with the records requested. The Freedom of Information Officer will review the request, consulting with the Authorizing Official where appropriate, to determine its compliance with §1004.4. Where a request complies with §1004.4, the Freedom of Information Officer will acknowledge receipt of the request to the requester and forward the request to the Authorizing Official for action.

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official will prepare a written response (1) granting the request, (2) denying the request, (3) granting/denying it in part, (4) replying with a response stating that the request has been referred to another agency under §1004.4(f) or §1004.6(e), (5) informing the requester that responsive records cannot be located or do not exist.

(c) Where a request involves records which are in the custody of or are the concern of more than one Authorizing Official, the Freedom of Information Officer will identify all concerned Authorizing Officials, send copies of the request to them and forward the request for action to the Authorizing Official that can reasonably be expected to have custody of most of the requested records. This Authorizing Official will prepare a DOE response to the requester consistent with paragraph (b) of this section, which will identify any other Authorizing Official, having responsibility for the denial of records.

(d) Time for processing requests. (1) Action pursuant to paragraph (b) of this section will be taken within 10 working days of receipt of a request for DOE records ("receipt" is defined in §1004.4(a)), except that, if unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official may take an extension not to exceed 10 working days.

(2) For purposes of this section and §1004.8(d), the term “unusual circumstances” may include but is not limited to the following:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;

(ii) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are responsive to a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Department having substantial subject matter interest therein.

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.

(4) If no determination has been made at the end of the 10-day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the responsible Authorizing Official will nevertheless continue to process the request. If the DOE is unable to provide a response within the statutory
§ 1004.6 Requests for classified records.

(a) All requests for classified records and Unclassified Controlled Nuclear Information will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 12356 or any successor thereto, may be automatically considered a Freedom of Information Act request.

(c) Concurrence of the Director of Classification is required on all responses involving requests for classified records. The Director of Classification will be informed of the request by either the Freedom of Information Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification and the Authorizing Official for the classified portion of such records in accordance with §§1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of §1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

§ 1004.7 Responses by authorizing officials: Form and content.

(a) Form of grant. Records requested pursuant to §1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the Freedom of Information Act, and where the applicable fees are $15 or less or where it has been determined that the payment of applicable fees should be waived. Where the applicable fees exceed $15, the records may be made available before all charges are paid.

(b) Form of denial. A reply denying a request for a record will be in writing. It will be signed by the Denying Official pursuant to §1004.5 (b) or (c) and will include:

(1) Reason for denial. A statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

(2) Persons responsible for denial. A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) Segregation of nonexempt material. A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.
(4) Adequacy of search. Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.

(5) Administrative appeal. A statement that the determination to deny documents made within the statutory time period, may be appealed within 30 calendar days to the Office of Hearings and Appeals.

§ 1004.8 Appeal of initial denials.

(a) Appeal to Office of Hearings and Appeals. When the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with §1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with §1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) Elements of appeal. The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585 and both the envelope and letter must be clearly marked “Freedom of Information Appeal.” The appeal must contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, must be submitted with the appeal.

(c) Receipt of appeal. An appeal will be considered to be received for purposes of §5 U.S.C. 552(a)(6) upon receipt by the appeal authority. Documents delivered after regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day.

(d) Action within 20 working days. (1) The appeal authority will act upon the appeal within 20 working days of its receipt, except that if unusual circumstances (as defined in §1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the appeal authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the appeal authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the appeal authority and will clearly specify the total time agreed upon for the appeal decision.

(e) Form of action on appeal. The appeal authority’s action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requestor resides or has a principal place of business, the district in which the records are situated, or in the District
of Columbia. Documents determined by
the appeal authority to be documents
subject to release will be made prompt-
ly available to the requester upon pay-
ment of any applicable fees.

(f) Classified records and records cov-
ered by section 148 of the Atomic Energy
Act. The Secretary of Energy or his
designee will make the final deter-
mination concerning appeals involving
the denial of requests for classified in-
formation or the denial of requests for
information falling within the scope of
section 148 of the Atomic Energy Act of

§ 1004.9 Fees for providing records.

(a) Fees to be charged. The DOE will
charge fees that recoup the full allow-
able direct costs incurred. The DOE
will use the most efficient and least
costly methods to comply with re-
quests for documents made under the
FOIA. The DOE may contract with pri-
vate sector services to locate, repro-
duce and disseminate records in re-
sponse to FOIA requests when that is
the most efficient and least costly
method. When doing so, however, the
DOE will ensure that the ultimate cost
to the requester is no greater than it
would be if the DOE itself had per-
formed these tasks. In no case will the
DOE contract out responsibilities
which the FOIA provides that only the
agency may discharge, such as deter-
mining the applicability of an exemp-
tion, or determining whether to waive
or reduce fees. Where the DOE can
identify documents that are responsive
to a request and are maintained for
public distribution by other agencies
such as the National Technical Infor-
mation Service and the Government
Printing Office, the Freedom of Infor-
mation Officer will inform requesters
of the procedures to obtain records
from those sources.

(1) Manual searches for records. When-
ever feasible, the DOE will charge for
manual searches for records at the sal-
ary rate(s) (i.e. basic pay plus 16 per-
cent) of the employee(s) making the
search.

(2) Computer searches for records. The
DOE will charge at the actual direct
cost of providing the service. This will
include the cost of operating the cen-
tral processing unit (CPU) for that por-
tion of operating time that is directly
attributable to searching for records
responsive to a FOIA request and oper-
ator/programmer salary.

(3) Review of records. The DOE will
charge requesters who are seeking doc-
uments for commercial use for time
spent reviewing records to determine
whether they are exempt from manda-
tory disclosure. Charges will be as-
essed only for the initial review (i.e.,
the review undertaken the first time
the DOE analyzes the applicability of a
specific exemption to a particular
record or portion of a record. The DOE
will not charge for review at the ad-
ministrative appeal level of an exempt-
tion already applied. However, records
or portions of records withheld in full
under an exemption which is subse-
quently determined not to apply may
be reviewed again to determine the ap-
plicability of other exemptions not pre-
viously considered. The costs for such a
subsequent review would be properly
assessable.

(4) Duplication of records. The DOE
will make a per-page charge for paper
copy reproduction of documents. At
present, the charge for paper to paper
copies will be five cents per page and
the charge for microform to paper cop-
ies will be ten cents per page. For com-
puter generated copies, such as tapes
or printouts, the DOE will charge the
actual cost, including operator time,
for production of the tape or printout.
For other methods of reproduction or
duplication, we will charge the actual
costs of producing the docu-
ment(s).

(5) Other charges. It shall be noted
that complying with requests for spe-
cial services such as those listed below
is entirely at the discretion of this
agency. Neither the FOIA nor its fee
structure cover these kinds of services.
The DOE will recover the full direct
costs of providing services such as
those enumerated below to the extent
that we elect to provide them:

(i) Certifying that records are true
copies;

(ii) Sending records by special meth-
ods such as express mail, etc.

(6) Restrictions on assessing fees. With
the exception of requesters seeking
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Waiving or reducing fees. The DOE will furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the Freedom of Information Officer should address the following two criteria:

(i) That disclosure of the Information “is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.” Factors to be considered in applying this criteria include but are not limited to:

(A) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government”;

(B) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the

documents for a commercial use, section (a)(4)(A)(iv) of the Freedom of Information Act, as amended, DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only 10 minutes of search time and only five pages of reproduction. If this cost is equal to or less than $15.00, the amount DOE incurs to process a fee collection, no charges would be assessed. For purposes of these restrictions on assessment of fees, the word “pages” refers to paper copies of a standard agency size which will be normally be “8½x11” or “11x14.” Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer print-out, however, might meet the terms of the restriction. Similarly, the term “search time” is based on a manual search. To apply this term to searches made by computer, the DOE will determine the hourly cost of operating the central processing unit and the operator’s hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the computer operator conducting the search, DOE will begin assessing charges for computer search.

(7) Notification of charges. If the DOE determines or estimates that the fees to be assessed under this section may amount to more than $25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency. In cases where a requester has been notified that actual or estimated fees may amount to more than $25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to a requester pursuant to this paragraph will offer him the opportunity to confer with DOE personnel in order to reformulate his request to meet his needs at a lower cost.
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subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

(ii) If Disclosure of the Information “Is Not Primarily in the Commercial Interest of the Requester.” Factors to be considered in applying this criteria include but are not limited to:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

(b) Fees to be charged—categories of requesters. There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Freedom of Information Officer will make determinations regarding categories of requesters as defined at §1004.2. The Headquarters Freedom of Information Officer will assist field Freedom of Information Officers in categorizing requesters, and will resolve conflicting categorizations. The FOIA prescribes specific levels of fees for each of these categories:

(1) Commercial use requesters. When the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. The DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(2) Educational and non-commercial scientific institution requesters. The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) Requesters who are representatives of the news media. The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in §1004.2(m), and his or her request must not be made for a commercial use. With respect to this class of requesters, a request for records supporting the news dissemination function of the requester will not be considered to be a request for a commercial use.

(4) All other requesters. The DOE will charge requesters who do not fall into any of the above categories fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests from individuals for records about themselves filed in DOE systems of records will continue to be processed under the fee provisions of the Privacy Act of 1974.

(5) Charging interest—notice and rate. Interest will be charged those requesters who fail to pay fees. The DOE will begin to assess interest charges on the amount billed on the 31st day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) Charges for unsuccessful search. The DOE will assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be exempt from disclosure. If the DOE estimates that search charges are likely
to exceed $25, it will notify the requestor of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

(7) Aggregating requests. A requester may not file multiple requests each seeking portions of a document or documents, solely to avoid payment of fees. When the DOE reasonably believes that a requester or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the DOE will aggregate any such requests and charge the appropriate fees. The DOE may consider the time period in which the requests have been made in its determination to aggregate the related requests. In no case will DOE aggregate multiple requests on unrelated subjects from one requester.

(8) Advance payments. Requesters are not required to make an advance payment (i.e., payment before action is commenced or continued on a request) unless:

(i) The DOE estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00. In such cases, the DOE will notify the requester of the likely cost and obtain a satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of the full amount before we begin to process a new request or a pending request from that requester.

(ii) A requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing). The DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a new request or a pending request from that requester.

When the DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after the DOE has received fee payments described above.

(c) Effect of the Debt Collection Act of 1982 (Pub. L. 97–365). The DOE will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and the use of collection agencies, where appropriate, to encourage payment of fees.

§ 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with §1004.1 of these regulations to matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.) are covered by this exemption;
§ 1004.11 Handling information of a private business, foreign government, or an international organization.

(a) Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter’s views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter’s views at the time of the submission of the document to which the views relate, or at any other time.

(b) When the DOE may determine, in the course of responding to a Freedom of Information request, not to release information submitted to the DOE (as described in paragraph (a) of this section, and contained in a requested document) without seeking any or further submitter’s views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter’s views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE will make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by the DOE that a claim of exemption made pursuant to this paragraph is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is
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Deemed to be given when mailed to the submitter at the submitter's last known address.

(d) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, the DOE will consider such submitter's views and will not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE will make its own determination with regard to any claim that information be exempted from disclosure. Notice of the DOE's determination to deny a claim of exemption made pursuant to this paragraph will be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by the DOE that a claim of exemption is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) Criteria for determining the applicability of 5 U.S.C. 552(b)(4). Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When the DOE, in the course of responding to a Freedom of Information request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with §1004.1, the DOE will notify the submitter of the intended discretionary release no less than seven (7) days prior to intended public disclosure of the information in question.

(h) As used in this section, the term submitter's views means, with regard to a document submitted to the DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation shall specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section. In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.
§ 1004.12 Computation of time.
Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays, and legal holidays are excepted.

PART 1005—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF ENERGY PROGRAMS AND ACTIVITIES

Sec.
1005.1 What is the purpose of these regulations?
(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.
(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 1005.2 What definitions apply to these regulations?
Department means the U.S. Department of Energy.
Secretary means the Secretary of the U.S. Department of Energy or an official or employee of the Department acting for the Secretary under a delegation of authority.
State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 1005.3 What programs and activities of the Department are subject to these regulations?
(a) The Secretary publishes in the Federal Register a list of the Department’s program and activities that are subject to the order and these regulations.
(b) Unless otherwise stated in the Federal Register listing identified in
Department of Energy

§ 1005.7

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

§ 1005.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 1005.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the Federal Register in accordance with §1005.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department’s programs and activities selected for that process.

(c) A state may notify the Administrator of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state’s process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

§ 1005.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of
§ 1005.8 How does the Secretary provide states an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) Except in unusual circumstances, the Secretary gives state processes or directly affected state, areawide, regional and local officials and entities—

(1) At least 30 days from the date established by the Secretary to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Secretary to comment on proposed direct Federal development or Federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

§ 1005.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedures in §1005.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under §1005.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of §1005.10 of this part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §1005.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§ 1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting
period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 1005.11 What are the Secretary’s obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department’s program or activity;

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department’s program or activity;

(4) Responding pursuant to §1005.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in §1005.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§ 1005.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) Simplify means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) Consolidate means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) Substitute means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

§ 1005.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

PART 1008—RECORDS MAINTAINED ON INDIVIDUALS (PRIVACY ACT)

Subpart A—General Provisions

Sec. 1008.1 Purpose and scope.
1008.2 Definitions.
1008.3 Employee standards of conduct with regard to privacy.
1008.4 Procedures for identifying the individual making a request for access to or amendment of records.
1008.5 Effect of the Freedom of Information Act (FOIA).

Subpart B—Requests for Access or Amendment

1008.6 Procedures for Privacy Act requests.
1008.7 Processing of requests.
1008.8 Action in response to a request for access: disclosure of requested information to subject individuals.
1008.9 Action in response to a request for access: initial denial of access.
1008.10 Action in response to a request for correction or amendment of records.
1008.11 Appeals of denials of requests pursuant to §1008.8.
1008.12 Exemptions.
1008.13 Fees.
1008.14 Requests under false pretenses.
1008.15 Civil remedies.

Subpart C—Disclosure to Third Parties

1008.16 Prohibition against disclosure.
1008.17 Conditions of disclosure.
1008.18 Accounting for disclosures.
1008.19 Criminal penalties—improper disclosure.
Subpart D—Maintenance and Establishment of Systems of Records

§ 1008.20 Content of systems of records.
§ 1008.21 Collection of information by DOE about an individual for a system of records.
§ 1008.22 Use and collection of social security numbers.
§ 1008.23 Public notice of systems of records.
§ 1008.24 Criminal penalties—failure to publish a system notice.

SOURCE: 45 FR 61577, Sept. 16, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 1008.1 Purpose and scope.

(a) This part establishes the procedures to implement the Privacy Act of 1974 (Pub. L. 93–579, 5 U.S.C. 552a) within the Department of Energy.

(b) This part applies to all systems of records, as defined in §1008.2(m), maintained by DOE.

(c) This part applies to all divisions within the DOE, and to the personnel records of the Federal Energy Regulatory Commission (FERC), which are maintained by DOE on behalf of FERC. These regulations also apply to DOE contractors and their employees to the extent required by 5 U.S.C. 552a(m).

§ 1008.2 Definitions.

(a) Department or Department of Energy (DOE) means all organizational entities which are a part of the executive department created by title II of the Department of Energy Organization Act, Public Law 95–91, except the Federal Energy Regulatory Commission (FERC).

(b) Director, Office of Hearings and Appeals means the Director or his delegate.

(c) DOE locations means each of the following DOE components:

(1) Alaska Power Administration, P.O. Box 50, Juneau, AK 99801.
(2) Albuquerque Operations Office, P.O. Box 5400, Albuquerque, NM 87115.

NOTE: This office has cognizance over the following area offices: Amarillo, Dayton, Kansas City, Los Alamos, Pinellas, Rocky Flats and Savannah.

(3) Bartlesville Energy Technology Center, P.O. Box 1398, Bartlesville, OK 74003.
(4) Bonneville Power Administration, P.O. Box 3621, Portland, OR 97268.
(5) Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439.

NOTE: This office has cognizance over the Batavia and Brookhaven area offices and the New Brunswick laboratory.

(6) Grand Forks Energy Technology Center, P.O. Box 8213, University Station, Grand Forks, ND 58201.
(7) Grand Junction Office, P.O. Box 2567, Grand Junction, CO 81502.
(8) Headquarters, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.
(10) Laramie Energy Technology Center, P.O. Box 3365, University Station, Laramie, WY 82070.
(11) Morgantown Energy Technology Center, P.O. Box 980, Morgantown, WV 26505.
(12) Nevada Operations Office, P.O. Box 14100, Las Vegas, NV 89114.
(13) Oak Ridge Operations Office, P.O. Box E, Oak Ridge, TN 37830.
(14) Oak Ridge Technical Information Center, P.O. Box 62, Oak Ridge, TN 37830.
(15) Pittsburgh Energy Technology Center, 4800 Forbes Avenue, Pittsburgh, PA 15213.
(16) Region I, Analex Building, Room 700, 150 Causeway Street, Boston, MA 02114.
(17) Region II, 26 Federal Plaza, Room 3206, New York, NY 10007.
(18) Region III, 1421 Cherry Street, 10th Floor, Philadelphia, PA 19102.
(19) Region IV, 1255 Peachtree Street, NE., 8th Floor, Atlanta, GA 30309.
(20) Region V, 175 West Jackson Boulevard, Room A–333, Chicago, IL 60604.
(21) Region VI, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, TX 75235.
(22) Region VII, Twelve Grand Building, 1150 Grand Avenue, Kansas City, MO 64106.
(23) Region VIII, P.O. Box 2847—Belmar Branch, 1075 South Yukon Street, Lakewood, CO 80225.
(24) Region IX, 111 Pine Street, Third Floor, San Francisco, CA 94111.
(26) Richland Operations Office, P.O. Box 550, Richland, WA 99352.
(27) San Francisco Operations Office, 1333 Broadway, Wells Fargo Building, Oakland, CA 94612.
(28) Savannah River Operations Office, P.O. Box “A,” Aiken, SC 29801.
(29) Southeastern Power Administration, Elberton, GA 30635.
Employee standards of conduct with regard to privacy.

(a) The Headquarters DOE Privacy Act Officer shall assure that DOE personnel are advised of the provisions of the Privacy Act, including the criminal penalties and civil liabilities provided therein, (subsections (g) and (i) of the Act), and that DOE personnel are made aware of their responsibilities: to protect the security of personal information to assure its accuracy, relevance, timeliness and completeness; to avoid unauthorized disclosure; and to insure that no system of records concerning individuals, no matter how insignificant or specialized, is maintained without public notice.

(b) DOE personnel shall:

(1) Collect or maintain no information of a personal nature about individuals unless relevant and necessary to achieve a purpose or carry out a responsibility of the DOE as required by statute or by Executive Order. See subsection (e)(1) of the Act and §1008.18(a).

(2) Collect information, wherever possible, directly from the individual to whom it pertains. See subsection (e)(2) of the Act and §1008.19(a).

(3) Inform individuals from whom information is collected of the authority for collection, the principal purposes for which the information will be used, the routine uses that will be made of the information, and the effects of not furnishing the information. See subsection (e)(3) of the Act and §1008.19(b).

(4) Collect, maintain, use or disseminate no information concerning an individual’s rights guaranteed by the First Amendment, unless:

(i) The individual has volunteered such; or
§ 1008.4 Procedures for identifying the individual making a request for access to or amendment of records.

(a) When a request for information about or for access to or correction of a record pertaining to an individual and contained in a system of records has been made pursuant to §1008.6, valid identification of the individual making the request shall be required before information will be given, access granted or a correction considered, to insure that information is given, corrected, or records disclosed or corrected only at the request of the proper person.

(b) Subject to paragraphs (c) and (d) of this section, an individual making a request may establish his identity by:

(1) Including with his request, if submitted by mail, a photocopy of two identifying documents bearing his name and signature, one of which shall bear his current home or business address and date of birth; or

(2) Appearing at the appropriate DOE location during the regular business hours and presenting either of the following:

(i) One identifying document bearing the individual’s photograph and signature, such as a driver’s license or passport; or

(ii) Two identifying documents bearing the individual’s name and signature, one of which shall bear the individual’s current home or business address and date of birth; or

(3) Providing such other proof of identity as the Privacy Act Officer deems satisfactory in the circumstances of a particular request.

(c) If the Privacy Act Officer or the appropriate System Manager determines that the information in a record is so sensitive that unauthorized access could cause harm or embarrassment to the individual whose record is involved, or if the individual making the request is unable to produce satisfactory evidence of identity under paragraph (b) or (d) of this section, the individual making the request may be required to submit a notarized statement attesting to his identity and his understanding of the criminal penalties provided under section 1001 of title 18 of the United States Code for making false statements to a Government agency and under subsection (i)(3) of the Act for obtaining records under false pretenses. Copies of these statutory provisions and forms of such notarized statements may be obtained upon request from the Privacy Act Officer, Headquarters, Department of Energy, Washington, DC.

(d) When an individual acting as the parent of a minor or the legal guardian of the person to whom a record pertains makes a request pursuant to §1008.6 of this part:
(1) Such an individual shall establish his personal identity in the same manner required in either paragraph (b) or (c) of this section.

(2) In addition, such an individual shall establish his identity in the representative capacity of parent or legal guardian. In the case of the parent of a minor, the proof of identity shall be a certified or authenticated copy of the minor’s birth certificate. In the case of the legal guardian of a person who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, the proof of identity shall be a certified or authenticated copy of the order from a court of competent jurisdiction.

(3) A parent or legal guardian may act only for a living individual, not for a decedent. Requests for the records of decedents will be handled under the Freedom of Information Act (5 U.S.C. 552).

§ 1008.5 Effect of the Freedom of Information Act (FOIA).

(a) DOE shall not rely on any exemption contained in the Freedom of Information Act (5 U.S.C. 552) to withhold from the individual to whom it pertains, any record which is otherwise accessible to such individual under this part.

(b) DOE shall rely on subsection (b) of the Privacy Act to withhold information from a person other than the person to whom the record pertains only when the information is also exempt from disclosure under the FOIA.

(c) Where a request for access to records is submitted pursuant to both the FOIA and the Privacy Act, the DOE shall, to the maximum extent possible, process the request under the provisions of this part, including the time limits of this part.

Subpart B—Requests for Access or Amendment

§ 1008.6 Procedures for Privacy Act requests.

(a) Any individual may—

(1) Ask the DOE whether a system of records maintained by the DOE contains records about him or her;

(2) Request access to information pertaining to him or her that is maintained in a DOE system of records;

(3) Request that information about him or her in a DOE system of records be amended or corrected. Requests for correction or amendment may include inquiries concerning:

(i) Whether such information is relevant or necessary to accomplish a purpose that DOE is required to accomplish by statute or Executive Order; or

(ii) If the information is to be used by the DOE in making a determination about the individual, whether the information is as accurate, relevant, timely, or complete as is reasonably necessary to assure fairness in the determination.

(b) Requests submitted pursuant to this section shall:

(1) Be in writing and signed by the individual making the request;

(2) State that the request is a “Privacy Act Access” or “Privacy Act Amendment” request;

(3) Include the identification information required by §1008.4;

(4) Specify, if possible, the title and identifying number of the system of records as listed in DOE’s published notices of system of records;

(5) Provide if possible any additional information to aid DOE in responding to the request, for example, a description of the records sought;

(6) Indicate, as appropriate, the time, place, and form of access sought.

(c) Any request not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the appropriate Privacy Act Officer. An improperly addressed request will not be deemed to have been received for purposes of measuring time periods pursuant to §§1008.7 and 1008.10 until actual receipt by the appropriate Privacy Act Officer. The individual making the request shall be notified that the request was improperly addressed and the date when the request was received by the Privacy Act Officer.

(d) Assistance in preparing an access request pursuant to this section may be obtained from any DOE Privacy Act Officer at the locations listed at §1008.2(e).
§ 1008.7

(e) An individual shall not be required to state a reason or otherwise justify his request for information or access to a record pertaining to him/her that is contained in a system of records.

§ 1008.7 Processing of requests.

(a) Receipt of a request made in accordance with §1008.6 shall be promptly acknowledged by the Privacy Act Officer.

(b) Each request shall be acted upon promptly. Every effort will be made to respond within ten working days of the date of receipt by the System Manager or designee. If a response cannot be made within ten working days, the appropriate Privacy Act Officer shall send an interim response providing information on the status of the request, including an estimate of the time within which action is expected to be taken on the request and asking for any further information as may be necessary to respond to the request. Action will be completed as soon as possible, but not later than 20 working days after receipt of the original specific inquiry. In unusual circumstances and for good cause, the appropriate Privacy Act Officer may decide that action cannot be completed within the initial 20 working days. In such case, the appropriate Privacy Act Officer will advise the individual of the reason for the delay and the date (not to exceed an additional 20 working days) by which action can be expected to be completed.

(c) The term unusual circumstances as used in this section includes situations where a search for requested records from inactive storage is necessary; cases where a voluminous amount of data is involved; instances where information on other individuals must be separated or expunged from the particular record; and cases where consultation with other agencies which have substantial interest in the response to the request is necessary.

(d) Upon receiving a request, the Privacy Act Officer shall ascertain which System Manager or Managers of the DOE have primary responsibility for, custody of, or concern with the system or systems of records subject to the request and shall forward the request to such System Manager or Managers.

§ 1008.8 Action in response to a request for access: disclosure of requested information to subject individuals.

(a) Consistent with the recommendation of the System Manager and the concurrence of the appropriate General Counsel, the Privacy Act Officer shall provide to the requesting individual the information about or access to a record or information pertaining to the individual contained in a system of records, unless the request is being denied in accordance with §1008.9 of this part. The Privacy Act Officer shall notify the individual of such determination and provide the following information:

(1) Whether there is information or a record pertaining to him that is contained in a system of records;

(2) The methods of access as set forth in paragraph (b) of this section;

(3) The place at which the record or information may be inspected;

(4) The earliest date on which the record or information may be inspected and the period of time that the record is open for inspection.

If the request is being denied in accordance with §1008.9 of this part, the Privacy Act Officer shall notify the individual of the denial indicating the specific basis for the determination and provide the following information:

(1) The specific basis for the denial;

(2) A statement informing the individual that he or she has no right of access to the requested information or record;

(3) The individual’s right to request a correction or amendment of the record, and the procedures governing such request; and

(4) The right of the individual to file a complaint, and the procedures governing such complaint.
or information will remain available for inspection. In no event shall the earliest date be later than thirty calendar days from the date of notification.

(5) An indication that copies of the records are enclosed, or the estimated date by which a copy of the record could be mailed and the estimate of fees that would be charged to provide other than the first copy of the record, pursuant to §1008.13.

(6) The fact that the individual, if he wishes, may be accompanied by another person during the in-person review of the record or information, provided that the individual shall first furnish to the Privacy Act Officer a written statement authorizing disclosure of that individual’s record in the accompanying person’s presence; and

(7) Any additional requirements that must be satisfied in order to provide information about or to grant access to the requested record or information.

(b) The following methods of access to records or information pertaining to an individual and contained in a system of records may be available to that individual depending on the circumstances of a particular request:

(1) A copy of the record may be enclosed with the initial response in accordance with paragraph (a) of this section;

(2) Inspection in person may be arranged during the regular business hours of the DOE in the office specified by the Privacy Act Officer;

(3) Transfer of records to a Federal facility more convenient to the individual may be arranged, but only if the Privacy Act Officer determines that a suitable facility is available, that the individual’s access can be properly supervised at that facility, and that transmittal of the records or information to that facility will not unduly interfere with operations of the DOE or involve unreasonable costs, in terms of money or manpower; and

(4) The requested number of copies in addition to the initial copy may be mailed at the request of the individual, subject to payment of the fees prescribed in §1008.13.

(c) If the Privacy Act Officer believes, based upon a recommendation of the System Manager and the agency’s medical officer, that disclosure of medical and/or psychological information directly to an individual could have an adverse effect upon that individual, the individual may be asked:

(1) To designate in writing a physician or mental health professional to whom he would like the records to be disclosed; or

(2) To submit a signed statement by his physician or a mental health professional indicating that, in his view, disclosure of the requested records or information directly to the individual will not have an adverse effect upon the individual. If the individual refuses to designate a physician or mental health professional, or to submit a signed statement from his physician or mental health professional as provided in paragraphs (c) (1) and (2) of this section, the request will be considered denied, and the appeal rights provided in §1008.11 will be available to the individual.

(d) The Privacy Act Officer shall supply such other information and assistance at the time of an individual’s review of his record as is necessary to make the record intelligible to the individual.

(e) The DOE will, as required by subsection (d)(1), assure an individual’s right “to review his or her record and have a copy made of all or any portion thereof in a form comprehensible to him.” However, original records will be made available to individuals only under the supervision of the Privacy Act Officer or his designee. Individuals will be provided at their request with a copy, but not the original, of records pertaining to them.

§ 1008.9 Action in response to a request for access: initial denial of access.

(a) A request by an individual for information about or access to a record or information pertaining to that individual that is contained in a system of records may be denied only upon a determination by the appropriate System Manager, with the concurrence of the appropriate General Counsel, that:

(1) The record is subject to an exemption under §1008.12;
§ 1008.10 Action in response to a request for correction or amendment of records.

(a) The Privacy Act Officer must respond in writing to the requester for amendment of a record within 10 working days of receipt. This response shall inform the requester of the decision whenever possible.

(b) If the decision cannot be reached within 10 working days, the requester shall be informed of the reason for delay and the date (within 20 working days) it is expected that the decision will be made.

(c) The Privacy Act Officer, consistent with the recommendation of the System Manager or Managers, as concurred in by the appropriate General Counsel, if appropriate, shall do one of the following:

(1) Instruct the System Manager to make the requested correction or amendment; and advise the individual in writing of such action, providing either a copy of the corrected or amended record, or a statement as to the means whereby the correction or amendment was accomplished in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or

(2) Inform the individual in writing that his request is denied in whole or in part. Such denial shall be sent by certified or registered mail, return receipt requested, and shall provide the following information:

(i) The System Manager’s name and title;

(ii) The reasons for the denial; including citation to the appropriate sections of the Act and this part; and

(iii) Notification of the individual’s right to appeal the denial pursuant to § 1008.11 and to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 552a(g)(5).

(iv) Notification of the right of the individual to submit a statement of disagreement consistent with §1008.11(g).

(d) Whenever an individual’s record is amended pursuant to a request by that individual, the Privacy Act Officer or the System Manager, as appropriate, shall notify all persons and agencies to which the amended portion of the record had been disclosed prior to its amendment, if an accounting of such disclosure was required by the Act. The notification shall request a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record and to apprise an agency or person to which it had disclosed the record of the substance of the amendment.

(e) The following criteria will be taken into account by the DOE in reviewing a request for amendment:

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in relation to the purpose for which it was collected;
(4) If such information is used in making any determination about the individual, whether the information is as accurate, relevant, timely, and complete as is reasonably necessary to assure fairness to the individual in such determination;

(5) The degree of possibility that denial of the request could unfairly result in a determination adverse to the individual;

(6) The nature of the record sought to be corrected or amended; and

(7) The propriety and feasibility of complying with the specific means of amendment requested by the individual.

(f) The DOE will not undertake to gather evidence for the individual, but does reserve the right to verify the evidence that the individual submits.

(g) Amendment of a record requested by an individual may be denied upon a determination that:

(1) The individual has failed to establish, by a preponderance of the evidence, the propriety of the amendment in relation to the criteria stated in paragraph (c) of this section;

(2) The record sought to be amended was compiled in a terminated judicial, quasi-judicial or quasi-legislative proceeding to which the individual was a party or participant;

(3) The record sought to be amended is the subject of a pending judicial, quasi-judicial or quasi-legislative proceeding to which the individual is a party or participant;

(4) The amendment would violate a duly enacted statute or promulgated regulation;

(5) The individual has unreasonably failed to comply with the procedural requirements of this part; or

(6) The record has been properly exempted from the provisions of subsection (d) of the Act.

(4) [45 FR 61577, Sept. 16, 1980; 46 FR 31637, June 17, 1981]

§ 1008.11 Appeals of denials of requests pursuant to §1008.6.

(a) Any individual may appeal the denial of a request made by him for information about or for access to or correction or amendment of records. An appeal shall be filed within 30 calendar days after receipt of the denial. When an appeal is filed by mail, the postmark is conclusive as to timeliness. The appeal shall be in writing and must be signed by the individual. The words “PRIVACY ACT APPEAL” should appear in capital letters on the envelope and the letter. Appeals of denials relating to records maintained in government-wide systems of records reported to the OPM, shall be filed, as appropriate, with the Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management (OPM), 1900 E Street, NW., Washington, DC 20415. All other appeals relating to DOE records shall be directed to the Director, Office of Hearings and Appeals (OHA), Department of Energy, Headquarters, Washington, DC.

(b) An appeal not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the Assistant Director for Agency Compliance and Evaluation, OPM, or the Director, OHA, as appropriate. An appeal that is not properly addressed by an individual shall not be deemed to have been received for purposes of time periods in this section until actual receipt of the appeal by the Assistant Director, OPM, or the Director, OHA. In each instance when an appeal so forwarded is received, the individual filing the appeal shall be notified that the appeal was improperly addressed and the date when the appeal was received by the Assistant Director, OPM, or the Director, OHA.

(c) The appeal shall include the following:

(1) A copy of the original request for access or for amendment;

(2) A copy of the initial denial; and

(3) A statement of the reasons why the initial denial is believed to be in error.

(d) The records or record to which the individual was denied access, or which was requested to be corrected or amended, will be supplied to the appropriate appeal authority by the Privacy Act Officer who issued the initial denial. While such records normally will comprise the entire record on appeal,
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the appeal authority may seek such additional information as is necessary to assure that the final determination is fair and equitable.

(e) No personal appearance or hearing on appeal will be allowed.

(f) The appropriate appeal authority for DOE records shall act upon the appeal and issue a final determination in writing no later than 20 working days from the date on which the appeal is received. However, the appeal authority may extend the ten-day period upon a determination that a fair and equitable review cannot be made within that period. In such cases the individual shall be advised in writing of the reason for the extension and of the estimated date by which a final determination will be issued. The final determination shall be issued not later than the 30th working day after receipt of the appeal unless unusual circumstances, as defined in §1008.7, are present, whereupon an additional 30 days may be extended.

(g) If an appeal of a denial of access is granted, a copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take action consistent with §1008.8.

(h) If an appeal of a denial of correction or amendment is granted, the final determination shall identify the specific corrections or amendments to be made. A copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take steps to insure that the actions set forth in §1008.10 (a) and (b) are taken.

(i) If the appeal of a denial of access is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. The determination shall also include a statement identifying the right of the individual to administrative and judicial review pursuant to 5 U.S.C. 552a(g)(1)(B) as limited by 5 U.S.C. 552a(g)(5).

(j) If the appeal of a denial of correction or amendment is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager.

(1) The determination also shall include the following:

(i) Notice of the right of the individual to file with the Privacy Act Officer a concise, signed statement of reasons for disagreeing with the final determination, receipt of which statement will be acknowledged by the Privacy Act Officer.

(ii) An indication that any disagreement statement filed by the individual will be noted and appended to the disputed record and that a copy of the statement will be provided by the Privacy Act Officer or the System Manager, as appropriate, to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(iii) An indication that the DOE shall append to any disagreement statement filed by the individual a copy of the final determination or a summary thereof, which determination or summary also will be provided to persons and agencies to which the disagreement statement is disclosed; and,

(iv) A statement of the right of the individual to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

(2) Although a copy of the final determination or a summary thereof will be treated as part of the individual’s record for purposes of disclosure in instances where the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(3) Where an individual files a statement of disagreement consistent with paragraph (j)(1) of this section, the Privacy Act Officer shall take steps to insure that the actions provided in paragraphs (j)(1), (ii) and (iii) of this section are taken.

§ 1008.12 Exemptions.

(a) General exemptions—(1) Generally, 5 U.S.C. 552a(j)(2) allows the exemption of any system of records within the
DOE from any part of section 552a except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) of the Act if the system of records is maintained by a DOE component which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and which consists of:

(i) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders; and

(ii) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(iii) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(2) Applicability of general exemptions to DOE systems of records—Investigative Files of the Inspector General (DOE–54). This system of records is being exempted pursuant to subsection (j)(2) of the Act in order to aid the Office of the Inspector General in the performance of its law enforcement function. The system is exempted from subsections (c)(3), (d)(1)–(4), (e)(1)–(3), (f), (H), and (i); (5) and (8); and (g) of the Act. The system is exempt from these provisions for the following reasons: Notifying an individual at the individual’s request of the existence of records in an investigative file pertaining to such individual, or granting access to an investigative file could interfere with investigative and enforcement proceedings and with co-defendants’ right to a fair trial; disclose the identity of confidential sources and reveal confidential information supplied by these sources; and disclose investigative techniques and procedures.

(b) Specific exemptions. Subsection (k) of the Privacy Act establishes seven categories of systems of records which may be exempted from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (7) of the Act. The Department has exempted systems of records under four of these provisions, as follows:

(1) Classified material. (i) Subsection (k)(1) permits exemption of systems of records that are specifically authorized under criteria established under statute or Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such statute or Executive Order. Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended, are included in this exemption.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(1) to the extent they contain classified information, in order to prevent serious damage to the national defense or foreign policy that could arise from providing individuals access to classified information. Systems exempted under subsection (k)(1) are:

(A) Alien Visits and Participation (DOE–52).

(B) Clearance Board Cases (DOE–46).

(C) Security Correspondence Files (DOE–49).

(D) Foreign Travel Records (DOE–27).

(E) Legal Files (Claims, Litigations, Criminal Violation, Patents, and other Legal Files) (DOE–41).

(F) Personnel Security Clearance Files (DOE–43).

(G) Personnel Security Clearance Index (Automated) (DOE–42).

(H) Special Access Authorization for Categories of Classified Information (DOE–44).
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(I) Administrative and Analytical Records and Reports (DOE-81).

(J) Law Enforcement Investigative Records (DOE-84).

(2) Investigatory material compiled for law enforcement purposes. (i) Subsection (k)(2) permits the exemption of investigatory material compiled for law enforcement purposes: Provided, however, That if any individual is denied any right, privilege, or benefit to which he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(2) in order to prevent subjects of investigation from frustrating the investigatory process through access to records about themselves or as a result of learning the identities of confidential informants; to prevent disclosure of investigative techniques; to maintain the ability to obtain necessary information; and thereby to insure the proper functioning and integrity of law enforcement activities. Systems of records exempted under subsection (k)(2) are:

(A) Alien Visits and Participation (DOE-52).
(B) Clearance Board Cases (DOE-46).
(C) Security Correspondence Files (DOE-49).
(D) Foreign Travel Records (DOE-27).
(E) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE-41).
(F) Personnel Security Clearance Files (DOE-43).
(G) Personnel Security Clearance Index (Automated) (DOE-42).
(H) Special Access Authorization for Categories of Classified Information (DOE-44).
(I) DOE Personnel and General Employment Records (DOE-1) (only personnel investigative records concerning current and former DOE employees and applicants for employment by DOE).

(J) Investigative Files of the Inspector General (DOE-54) (only investigative records concerning past and present DOE employees).

(K) Administrative and Analytical Records and Reports (DOE-81).

(L) Law Enforcement Investigative Records (DOE-84).

(M) Allegation-Based Inspections Files of the Office of Inspector General (DOE-83).

(3) Investigatory material compiled for determining suitability for Federal employment. (i) Subsection (k)(5) permits exemption of systems of records that contain investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualification for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(5) to the extent they contain the kinds of records described in subsection (k)(5) in order to maintain DOE’s ability to obtain candid information on candidates for employment, contracts, or access to classified information and to fulfill commitments made to sources to protect the confidentiality of information, and thereby to facilitate proper selection or continuation of the best applicants or persons for a given position or contract. Systems exempted under subsection (k)(5) are:

(A) DOE Personnel and General Employment Records (DOE-1);
(B) Personnel Security Clearance Files (DOE-43);
(C) Investigative Files of the Inspector General (DOE-54);
(D) Alien Visits and Participation (DOE-52);
(E) Clearance Board Cases (DOE-46);
(F) Security Correspondence Files (DOE-49);
(G) Foreign Travel Records (DOE-27);
(H) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE-41);  
(I) Personnel Security Clearance Index (Automated) (DOE-42);  
(J) Special Access Authorization for Categories of Classified Information (DOE-44);  
(K) DOE Personnel: Supervisor-Maintained Personnel Records (DOE-2);  
(L) Applications for DOE Employment (DOE-4);  
(M) Administrative and Analytical Records and Reports (DOE-81);  
(N) Law Enforcement Investigative Records (DOE-84).  

(4) Testing or examination material. (i) Subsection (k)(6) permits exemption of systems of records that include testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process.  

(ii) The DOE systems of records listed below have been exempted to the extent they contain testing or examination material in order to protect the integrity of the personnel testing and evaluation process and to avoid providing individuals with unfair advantage, by premature or unfair disclosure of testing or rating information. Systems exempted under subsection (k)(6) are:  

(A) (DOE-2) DOE Personnel: Supervisor-Maintained Personnel Records.  
(B) (DOE-4) Applications for DOE Employment.  
(C) (DOE-1) DOE Personnel and General Employment Records.  

(c) Application of exemptions to particular requests. (1) The Privacy Act Officer, consistent with the recommendation of the System Manager and with concurrence of the appropriate General Counsel, may make available records which the DOE is authorized to withhold under this section.  

(2) With respect to records containing material or information that would reveal the identity of a source who was given an assurance of confidentiality, a determination to make records available pursuant to paragraph (c)(1) of this section shall be made only if the source consents to the release of such information to the individual, or if it is determined that the material or information is not adverse or detrimental to the individual, or for good cause shown. The exercise of discretion with respect to waiver of the exemption shall be final.  

(3) Prior to making a determination to deny access to a record in a system of records covered by exemption (k)(1) for classified material (see paragraph (b)(1) of this section), the System Manager shall consult with the Director, Division of Classification, to verify the current classification status of the information in the requested record.

§ 1008.13 Fees.  

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual. The fee charged shall be consistent with the fee schedule set forth in paragraph (b) of this section.  

(1) No fees shall be charged or collected for the following: Search for and retrieval of records; review of records; copying by the DOE incident to granting access; copying at the initiative of the DOE without a request from the individual; copying when the aggregate of fees for copying is $25 or less; time spent providing copies; transportation of records and personnel; and first class postage.  

(2) It is the policy of the DOE to provide an individual with one copy of each record corrected or amended pursuant to request without charge.  

(3) As required by the Office of Personnel Management in its published regulations implementing the Act, the DOE will charge no fee for a single copy of a personnel record covered by that Commission’s Government-wide published notice of systems of records.  

(b) The schedule of fees is as follows:  

(1) $.10 per copy of each page.  

(2) For other forms of copying and other forms of materials (e.g., cassettes, computer materials), the direct cost of the materials, personnel, and equipment shall be charged, but only...
§ 1008.14 Requests under false pretenses.

Subsection (i)(3) of the Act provides that any person who knowingly and willingly requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

§ 1008.15 Civil remedies.

Subsection (g) of the Act provides that an individual may bring suit against the DOE for a violation of the Privacy Act, as follows:

(a) If the DOE grants a request for access to an individual’s records, the court may order the DOE to provide the individual with access to his or her records and award reasonable litigation costs and attorney’s fees.

(b) If the DOE refuses to amend a record or fails to review an amendment request as required by subsection (d)(3) of the Act, the court may order the DOE to make the amendment and award reasonable litigation costs and attorney’s fees.

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(c) If the DOE makes an adverse determination based on a record which is not maintained in an accurate, timely, relevant, and complete manner, the individual may be awarded actual damages of at least $1,000. In order to prevail, the individual must show that:

1. The DOE’s action was willful and intentional; and

2. The adverse determination was based on the faulty record.

(d) If the DOE fails to comply with any other provision of the Privacy Act or agency rule promulgated under the Act, in such a way as to have an adverse effect on the individual, the court may award actual damages of at least $1,000. In order to prevail, the individual must show that:

1. The DOE’s action was willful and intentional; and

2. The agency’s action had an adverse effect on the individual; and

3. The adverse effect was causally related to the DOE’s action.

Subpart C—Disclosure to Third Parties

§ 1008.16 Prohibition against disclosure.

Except as provided in §1008.17, the DOE shall not disclose any record which is contained in a system of records, by any means of communication, to any agency or to any person other than the individual who is the subject of the record.

§ 1008.17 Conditions of disclosure.

(a) Notwithstanding the prohibition contained in §1008.16, the DOE may disclose records covered by this part (1) to the individual to whom the record pertains or to an agency or (2) to a person other than the individual where he has given his prior written consent to the disclosure or has made a written request for such disclosure.

(b) Notwithstanding the prohibition contained in §1008.16 the DOE may also disclose records covered by this part whenever the disclosure is:
§ 1008.18 Accounting for disclosures.

(a) For each disclosure of information contained in a system of records under his control, except disclosures to authorized officers and employees of DOE and disclosures required by the Freedom of Information Act, the appropriate System Manager shall keep an accurate accounting of:

1. The date, nature, and purposes of each disclosure of a record made to any person or to another agency; and
2. The name and address of the person or agency to which the disclosure was made.

(b) The accounting shall be retained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made.

(c) The accounting described in paragraph (a) of this section shall be made available to the individual named in the record upon written request to the Privacy Act Officer at the appropriate DOE location listed at § 1008.2(c) of this part. However, the accounting shall not be revealed with respect to disclosures made under § 1008.17(b)(7) of this part, pertaining to law enforcement activity; or with respect to disclosures involving system of records for which DOE had claimed an exemption from certain requirements of the Act, as provided in § 1008.12 of this part.

(d) Whenever an amendment or correction of a record or a notation of dispute concerning the accuracy of records is made by the DOE in accordance with §§ 1008.10(a)(2)(iv) and 1008.11(g) of this part, DOE shall inform any person or other agency to whom the record was previously disclosed if an accounting of the disclosure was made pursuant to the requirements of paragraph (a) of this section, unless the disclosure was made pursuant to § 1008.17(b)(7) of this part; or the disclosure involved a system of records of which DOE has
§ 1008.19 Claimed an exemption from certain requirements of the Act, as provided in §1008.12 of this part.

(e) The System Manager shall make reasonable efforts to serve notice on an individual when any record containing information about such individual in a DOE system of records is disclosed to any person under compulsory legal process when such process becomes a matter of public record.

(f) Prior to disclosing any record about an individual to any person other than an agency, unless the disclosure is pursuant to the Freedom of Information Act, the System Manager shall make reasonable efforts to assure that each record is accurate, complete, timely, and relevant for DOE’s purposes.

§ 1008.19 Criminal penalties—improper disclosure.

Subsection (i)(1) of the Act provides that a Federal employee who willfully discloses information subject to the Privacy Act in violation of the Act or rules promulgated under it shall be guilty of a misdemeanor and fined up to $5,000.

Subpart D—Maintenance and Establishment of Systems of Records

§ 1008.20 Content of systems of records.

(a) The DOE will maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose DOE is required to accomplish by statute or by Executive Order of the President, unless an exemption of this requirement has been claimed by DOE, as provided in §1008.12 of this part.

(b) The DOE will maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless it is pertinent to and within the scope of an authorized law enforcement activity.

(c) The DOE will maintain all records that are used by it to make any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in such determination.

§ 1008.21 Collection of information by DOE about an individual for a system of records.

(a) The DOE will collect information, to the greatest extent practicable, directly from the subject individual when the use of the information may result in adverse determinations about an individual’s rights, benefits and privileges under Federal programs, unless an exemption from the Act to this requirement has been claimed by DOE as provided in §1008.12.

(b) Unless an exemption from the Act has been claimed by DOE under subsection (j)(2), as provided in §1008.12, DOE shall inform each individual whom it asks to supply information, on the form or other means by which it uses to collect the information, or on a separate form that can be retained by the individual, of the following:

(1) The authority (whether granted by statute or by Executive Order of the President) that authorizes the solicitation of the information and whether the provision of such information is mandatory or voluntary;

(2) The principal purpose or purposes for which the information is intended to be used;

(3) The routine uses that may be made of the information, as published in the Federal Register pursuant to the requirements of the Act; and

(4) The effect on the individual, if any, of not providing all or any part of the requested information.

§ 1008.22 Use and collection of social security numbers.

(a) The System Manager of each system of records which utilizes social security numbers as a method of identification without statutory authorization or authorization by regulation adopted prior to January 1, 1975, shall revise the system to avoid future collection and use of the social security numbers.

(b) Heads of Headquarters Divisions and Offices and heads of the other DOE locations shall insure that employees authorized to collect information from individuals are advised that individuals...
may not be required to furnish social security numbers without statutory authorization, and that individuals who are requested to provide social security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

§ 1008.23 Public notice of systems of records.

(a) The DOE shall publish in the Federal Register at least annually a notice of the existence and character of each of its systems of records, which notice shall include:

(1) The name and location of the system;
(2) The categories of individuals on whom records are maintained in the system;
(3) The categories of records maintained in the system;
(4) Each routine use of the records contained in the system, including the categories of users and the purpose of such use, subject to paragraph (d) of this section;
(5) The policies and practices of the DOE regarding storage, retrievability, access controls, retention, and disposal of the records;
(6) The title and business address of the DOE official who is responsible for the system of records;
(7) The DOE procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;
(8) The DOE procedures whereby an individual can be notified at his request about how he can gain access to any record pertaining to him contained in the system or records, and how he can contest its content; and
(9) The categories of source of records in the systems.

(b) Notwithstanding the requirements of paragraph (a) of this section, the notice of systems of records shall not necessarily include the information in paragraphs (a) (7) through (9) of this section if DOE has claimed a general or specific exemption from the requirements of the Act, as provided in §1008.12.

(c) Copies of the notices as printed in the Federal Register shall be available at the DOE locations listed at §1008.2(c). Requests by mail for copies of such notices should be sent to Privacy Act Officer, Headquarters, U.S. Department of Energy, Washington, DC, 20585. The first copy will be furnished free of charge. For each additional copy, the costs of printing and handling may be charged.

(d) DOE shall publish in the Federal Register notice of any new routine use or intended routine use of a record in the system of records, at least 30 calendar days prior to the implementation of any new routine use of a record in a system of records, or at least 30 calendar days prior to publication of the annual notice of such routine uses, as provided in paragraph (a) of this section, an opportunity for interested persons to submit written comments consisting of data, views, or arguments regarding such use to DOE, shall be provided.

§ 1008.24 Criminal penalties—failure to publish a system notice.

Subsection (i)(2) of the Act provides that an agency officer or employee who willfully maintains a system of records without publishing a system notice as required by subsection (e)(4) of the Act shall be guilty of a misdemeanor and fined up to $5,000.

PART 1009—GENERAL POLICY FOR PRICING AND CHARGING FOR MATERIALS AND SERVICES SOLD BY DOE

Sec.
1009.1 Purpose and scope.
1009.2 Definitions.
1009.3 Policy.
1009.4 Exclusions.
1009.5 Supersessions.
1009.6 Dissemination of prices and charges.


SOURCE: 45 FR 70430, Oct. 24, 1980, unless otherwise noted.

§ 1009.1 Purpose and scope.

(a) This part establishes Department of Energy policy for establishing prices
and charges for Department materials and services sold to organizations and persons outside the Federal Government.

(b) This part applies to all elements of the Department except the Federal Energy Regulatory Commission.

§ 1009.2 Definitions.

For the purposes of this regulation:

(a) Allocable cost means a cost allocable to a particular cost objective (i.e., a specific function, project, process, or organization) if the costs incurred are chargeable or assignable to such cost objectives in accordance with the relative benefits received or other equitable relationships. Subject to the foregoing, a cost is allocable if:

(1) It is incurred solely for materials or services sold;

(2) It benefits both the customer and the Department in proportions that can be approximated through use of reasonable methods, or

(3) It is necessary to the overall operation of the Department and is deemed to be assignable in part to materials or services sold.

(b) Byproduct material means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(c) Charges means an accumulation of job related costs for materials and services sold by the Department.

(d) Commercial price means the price that a willing buyer is currently paying or would pay a willing seller for materials and services in the market.

(e) Direct cost is any cost which can be identified specifically with a particular final cost objective.

(f) Full cost includes all direct costs and all allocable costs of producing the material or providing the service consistent with generally accepted accounting principles. Direct costs and allocable costs may include, but are not limited to, the following cost elements:

(1) Direct labor.

(2) Personnel fringe benefits.

(3) Direct materials.

(4) Other direct costs.

(5) Processing materials and chemicals.

(6) Power and other utilities.

(7) Maintenance.

(8) Indirect cost, i.e., common costs which cannot be directly assigned to specific cost objectives and are therefore allocated to cost objectives in a systematic cost allocation process.

(9) Depreciation which includes depreciation costs that are directly associated with facilities and equipment utilized, and allocated depreciation costs for support and general facilities and equipment.

(10) Added factor includes general and administrative costs and other support costs that are incurred for the benefit of the Department, an organizational unit or a material or service as a whole.

(g) Prices means the monetary amounts generally established and published for recurring sales of the same materials and services.

(h) Source material means uranium or thorium.

(i) Special nuclear material means plutonium, uranium enriched in the isotope 233 or in the isotope 235, or any materials artificially enriched by any of the foregoing. Special Nuclear Material does not include source material.

§ 1009.3 Policy.

(a) The Department’s price or charge for materials and services sold to persons and organizations outside the Federal Government shall be the Government’s full cost for those materials and services, unless otherwise provided in this part.

(b) Exceptions from the Department pricing and charging policy may be authorized in accordance with the following provisions:

(1) Prices and charges for byproduct material sold pursuant to 42 U.S.C. 2111 and 2112 et seq. shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges (i) will provide reasonable compensation to the Government for such material, (ii) will not discourage the use of or the development of sources of supply independent of the DOE of such material, and (iii) will encourage research and development. In
individual cases, if (ii) and (iii) cannot be equally accommodated, greater weight will be given to encouragement of research and development.

(2) Prices and charges for materials and services sold pursuant to 42 U.S.C. 2201 shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges will provide reasonable compensation to the Government and will not discourage the development of sources of supply independent of the DOE of such material.

§ 1009.4 Exclusions.

This part shall not apply when the amount to be priced or charged is otherwise provided for by statute, Executive Order, or regulations. This part does not apply to:

(a) Fees, penalties and fines established by the Economic Regulatory Administration of DOE.
(b) Power marketing and related activities of the Alaska Power Administration, the Bonneville Power Administration, the Southwestern Power Administration, the Southwestern Power Administration, and the Western Power Administration.
(c) Crude oil, natural gas and other petroleum products and services by or from the Naval Petroleum and Oil Shale Reserves.
(d) Uranium enriching services, source material, and special nuclear material.
(e) Requests for information under the Freedom of Information Act and the Privacy Act.
(f) Energy data and information provided by the Energy Information Administration.
(g) Crude oil and related materials and services from the Strategic Petroleum Reserve.
(h) The disposal of excess and surplus property.
(i) Access permits for uranium enrichment technology issued in accordance with 10 CFR part 725.
(j) Materials and services provided pursuant to a cooperative agreement, research assistance contract or grant, or made available to a DOE contractor in connection with a contract, the primary purpose of which is to procure materials or services for DOE.

§ 1009.5 Supersessions.

Prices which appear in Federal Register Notices previously published by the Department, or its predecessor agencies, for materials and services covered by this rule are hereby superseded.

§ 1009.6 Dissemination of prices and charges.

Current prices and charges for specific materials and services are available from the DOE laboratory or office providing the material or service, or from the responsible program office. If this office cannot be determined, inquiries regarding the appropriate contact office should be addressed to the Office of Finance and Accounting, Product Accounting and Pricing Branch, Mail Station 4A–129, 1000 Independence Avenue, SW., Washington, DC 20585.
§ 1010.102 Cross-references to employee ethical conduct standards, financial disclosure regulations, and other conduct rules.

Employees of DOE are subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, the DOE regulation at 5 CFR part 3301 which supplements the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 CFR part 2634, the executive branch-wide financial interests regulations at 5 CFR part 2640, and the executive branch-wide employee responsibilities and conduct regulation at 5 CFR part 735.

[61 FR 35088, July 5, 1996, as amended at 63 FR 30111, June 3, 1998]

§ 1010.103 Reporting wrongdoing.

(a) Employees shall, in fulfilling the obligation of 5 CFR 2635.101(b)(11), report fraud, waste, abuse, and corruption in DOE programs, including on the part of DOE employees, contractors, subcontractors, grantees, or other recipients of DOE financial assistance, to the Office of Inspector General or other appropriate Federal authority.

(b) All alleged violations of the ethical restrictions described in section 1010.102 that are reported in accordance with (a) of this section to an appropriate authority within the Department shall in turn be referred by that authority to the designated agency ethics official or his delegatee, or the Inspector General.

§ 1010.104 Cooperation with the Inspector General.

Employees shall respond to questions truthfully under oath when required, whether orally or in writing, and must provide documents and other materials concerning matters of official interest. An employee is not required to respond to such official inquiries if answers or testimony may subject the employee to criminal prosecution.

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

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SOURCE: 53 FR 44385, Nov. 3, 1988, unless otherwise noted.

§ 1013.1 Basis and purpose.

at 31 U.S.C. 3801-3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) Purpose. This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 1013.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Energy.

Authority head means the Secretary or the Under Secretary of the Department of Energy.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under §1013.7 of this part.

Defendant means any person alleged in a complaint under §1013.7 of this part to be liable for a civil penalty or assessment under §1013.3 of this part.

Department means the Department of Energy.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §1013.10 or §1013.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Energy or an officer or employee of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, making or made, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.
§ 1013.3 Basis for civil penalties and assessments.

(a) Claims. (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—
   (i) Is false, fictitious, or fraudulent;
   (ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
   (iii) Includes or is supported by any written statement that—
      (A) Omits a material fact;
      (B) Is false, fictitious, or fraudulent as a result of such omission; and
      (iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each such claim.
   (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.
   (3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.
   (4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.
   (5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) Statements. (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—
   (i) The person knows or has reason to know—
      (A) Asserts a material fact which is false, fictitious, or fraudulent; or
      (B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and
   (ii) Contains or is accompanied by an express certification or affirmation of
the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(c) Application for certain benefits. (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual’s eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term “benefits” means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual’s family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 1013.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 1013.4(b) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under §1013.3 of this part, the reviewing official shall transmit to the Attorney General:

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official’s discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official’s discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 1013.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under §1013.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under §1013.3(a) of this part with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of §1013.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official’s authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 1013.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in §1013.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant’s right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in §1013.10 of this part.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 1013.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or...
§ 1013.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in §1013.9(a) of this part, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in §1013.8 of this part, a notice that an initial decision shall be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under §1013.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ’s decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant’s motion under paragraph (e) of this section is not subject to reconsideration under §1013.38 of this part.

(h) The defendant may appeal to the authority head the decision denying a defendant’s motion under paragraph (e) of this section on the grounds that extraordinary circumstances prevented the defendant from filing an answer. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant’s failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused
§ 1013.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 1013.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by §1013.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—
(1) The tentative time, date, and place, and the nature of the hearing;
(2) The legal authority and jurisdiction under which the hearing is to be held;
(3) The matters of fact and law to be asserted;
(4) A description of the procedures for the conduct of the hearing;
(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and
(6) Such other matters as the ALJ deems appropriate.

§ 1013.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 1013.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—
(1) Participate in the hearing as the ALJ;
(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or
(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 1013.15 Ex parte contacts.

No party or person (except employees of the ALJ’s office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1013.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party’s discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party’s belief that personal bias or other reason for disqualification exists and the time...
§ 1013.19 Prehearing conferences.
(a) The ALJ may schedule prehearing conferences as appropriate.
(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.
(c) The ALJ may use prehearing conferences to discuss the following:
(1) Simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;
(4) Whether the parties can agree to submission of the case on a stipulated record;
(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;
§ 1013.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under §1013.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in §1013.5 of the part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to §1013.9 of this part.

§ 1013.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§1013.22 and 1013.23 of this part, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) Motions for discovery. (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in §1013.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under §1013.24 of this part.

(e) Depositions. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in §1013.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or
§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(f) Each party shall bear its own costs of discovery.

§ 1013.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §1013.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1013.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §1013.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;
§ 1013.25

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 1013.25 Witness fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 1013.26 Form, filing and service of papers.

(a) Form. (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) Service. A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in §1013.8 of this part shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party’s last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) Proof of service. A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 1013.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturday, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 1013.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.
§ 1013.31  Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statement) charged in the complaint:

1. The number of false, fictitious, or fraudulent claims or statements;
2. The time period over which such claims or statements were made;
3. The degree of the defendant’s culpability with respect to the misconduct;
4. The amount of money or the value of the property, services, or benefit falsely claimed;
5. The value of the Government’s actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;
6. The relationship of the amount imposed as civil penalties to the amount of the Government’s loss;
7. The potential or actual impact of the misconduct upon national defense,
§ 1013.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 1013.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in §1013.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;
(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 1013.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to §1013.24 of this part.

§ 1013.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to §1013.24 of this part.

§ 1013.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1013.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate §1013.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in §1013.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.
§ 1013.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with §1013.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with §1013.39 of this part.

§ 1013.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if any party files a motion for reconsideration under §1013.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under §1013.38 of this part has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.
(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head’s decision, a determination that a defendant is liable under §1013.3 of this part is final and is not subject to judicial review.

§ 1013.40 Stay ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1013.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 1013.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 1013.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorizes actions for collection of civil penalties and assessments imposed under this part and specifies the procedures for such actions.

§ 1013.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §1013.42 or §1013.43 of this part, or any amount agreed upon in a compromise or settlement under §1013.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 1013.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 1013.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under §1013.42 of this part or during the pendency of any action to collect penalties and assessments under §1013.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under §1013.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.
§ 1013.47 Limitations.
(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in §1013.8 of this part within 6 years after the date on which such claim or statement is made.
(b) If the defendant fails to file a timely answer, service of notice under §1013.10(b) of this part shall be deemed a notice of a hearing for purposes of this section.
(c) The statute of limitations may be extended by agreement of the parties.

§ 1013.47 Limitations.
(a) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.
(b) Any compromise or settlement must be in writing.

PART 1014--ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Sec.
1014.1 Scope of regulations.
1014.2 Administrative claim; when presented; appropriate office.
1014.3 Administrative claim; who may file.
1014.4 Administrative claims; evidence and information to be submitted.
1014.5 Authority to adjust, determine, compromise, and settle.
1014.6 Limitation on authority.
1014.7 Referral to Department of Justice.
1014.8 Investigation and examination.
1014.9 Final denial of claim.
1014.10 Action on approved claims.
1014.11 Penalties.


S O U R C E : 45 FR 7768, Feb. 4, 1980, unless otherwise noted.

§ 1014.1 Scope of regulations.
(a) These regulations shall apply only to claims asserted under the Federal Tort Claims Act, as amended, accruing on or after January 18, 1967, for money damages against the United States for injury to, or loss of, property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Energy (DOE) while acting within the scope of office or employment.
(b) The terms DOE, Department, and Department of Energy as used in this part mean the agency established by the Department of Energy Organization Act (Pub. L. 95–91), 42 U.S.C. 7101, et seq., including the Federal Energy Regulatory Commission, but do not include any contractor of the Department.
(c) A claim may be amended by the claimant at any time before final DOE action or before the exercise of the claimant’s option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or a duly authorized agent or legal representative. If an amendment to a pending claim is filed in time, the DOE shall have 6 months to decide the claim as amended. The claimant’s option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

§ 1014.4 Administrative claims; evidence and information to be submitted.

(a) Death. In support of a claim based on death, the claimant may be required to submit the following evidence or information:

1. An authenticated death certificate or other competent evidence showing the cause of death, the date of death, and the age of the decedent.
2. Decedent’s employment or occupation at time of death, including monthly or yearly salary or earnings (if any), and the duration of last employment or occupation.
3. Full names, addresses, birth dates, kinship, and marital status of the decedent’s survivors, including identification of those survivors who were dependent for support upon the decedent at the time of death.
4. The degree of support afforded by the decedent to each survivor dependent upon decedent for support at the time of death.
5. Decedent’s general physical and mental condition before death.
6. Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.
7. If damages for pain and suffering prior to death are claimed, a physician’s detailed statement specifying the injuries suffered, the duration of pain and suffering, any drugs administered for pain, and the decedent’s physical condition between injury and death.
8. Any other evidence or information that may have a bearing on either the responsibility of the United States for the death or the amount of damages claimed.

(b) Personal injury. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

1. A written report by the attending physician or dentist setting forth the nature and extent of the injury, the nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, the period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to
§ 1014.5 Authority to adjust, determine, compromise, and settle.

The General Counsel, the Deputy General Counsel, the Deputy General Counsel for Legal Services, the Assistant General Counsel for Legal Counsel, and any employees of the Department designated by the General Counsel to receive and act on tort claims at Headquarters and field locations are authorized to act on claims.

§ 1014.6 Limitation on authority.

(a) An award, compromise, or settlement of a claim in excess of $25,000 shall be made only with the prior written approval of the Attorney General or his or her designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised, or settled only after the Department of Justice has been consulted if, in the opinion of the General Counsel or designee:

(1) A new precedent may be involved;
(2) A question of policy may be involved;
(3) The United States may be entitled to indemnity or contribution from a third party and the DOE is unable to adjust the third party claim; or
(4) The compromise of a particular claim, as a practical matter, may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled only after consultation with the Department of Justice when the DOE is aware that the United States or an employee, agent, or cost-type contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

(d) The authority of DOE subordinate claims officials to make awards, compromises, and settlements of over $10,000 is subject to the approval of the General Counsel, the Deputy General Counsel, or the Deputy General Counsel for Legal Services.
§ 1014.7 Referral to Department of Justice.
   (a) When Department of Justice approval or consultation is required under §1014.6, the referral or request shall be transmitted to the Department of Justice by the General Counsel or designee.
   (b) When a designee of the General Counsel is processing a claim requiring consultation with, or approval of, either the DOE General Counsel or the Department of Justice, the referral or request shall be sent to the General Counsel in writing and shall contain:
      (1) A short and concise statement of the facts and of the reasons for the referral or request,
      (2) Copies of relevant portions of the claim file, and
      (3) A statement of recommendations or views.

§ 1014.8 Investigation and examination.
   The DOE may investigate, or may request any other Federal agency to investigate, a claim and may conduct, or request another Federal agency to conduct, a physical examination of a claimant and provide a report of the physical examination.

§ 1014.9 Final denial of claim.
   (a) Final denial of an administrative claim shall be in writing and sent to the claimant, or the claimant’s attorney or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department’s action, the claimant may file suit in an appropriate U.S. District Court not more than 6 months after the notification is mailed.
   (b) Before the commencement of suit and before the 6-month period provided in 28 U.S.C. 2401(b) expires, a claimant, or the claimant’s duly authorized agent, or legal representative, may file a written request with the DOE General Counsel for reconsideration of a final denial of a claim. Upon the timely filing of a request for reconsideration the DOE shall have 6 months from the date of filing to decide the claim, and the claimant’s option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the request for reconsideration is filed. Final DOE action on a request for reconsideration shall be made in accordance with the provisions of paragraph (a) of this section.

§ 1014.10 Action on approved claims.
   (a) Payment of any approved claim shall not be made unless the claimant executes (1) a Standard Form 1145, (2) a claims settlement agreement, or (3) a Standard Form 95, as appropriate consistent with applicable rules of the Department of Justice, Department of the Treasury, and the General Accounting Office. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and the attorney as payees, and the check shall be delivered to the attorney, whose address shall appear on the voucher.
   (b) If the claimant or the claimant’s agent or legal representative accepts any award, compromise, or settlement made pursuant to the provisions of section 2672 or 2677 of title 28, United States Code, that acceptance shall be final and conclusive on the claimant, the claimant’s agent or legal representative, and any other person on whose behalf or for whose benefit the claim has been presented. The acceptance shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 1014.11 Penalties.
   A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment for not more than 5 years, or both (18 U.S.C. 1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C 231).

PART 1015—COLLECTION OF CLAIMS OWED THE UNITED STATES
§ 1015.1 Purpose.

This part establishes procedures for the Department of Energy (DOE) to collect, compromise, or terminate collection action on claims of the United States for money or property arising from activities under DOE jurisdiction. It specifies the agency procedures and the rights of the debtor applicable to claims for the payment of debts owed to the United States. It incorporates, as appropriate, the Federal Claims Collection Standards (4 CFR parts 101–105).

It sets forth procedures by which DOE:

(a) Will collect claims owed to the United States;

(b) Will determine and collect interest and other charges on those claims;

(c) Will compromise claims; and

(d) Will refer unpaid claims for litigation.

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.2 Applicability.

(a) This part applies to all claims due the United States under the Federal Claims Collection Act, as amended by the Debt Collection Act (31 U.S.C. 3701–3719), arising from activities under the jurisdiction of DOE unless such claims are otherwise subject to applicable laws or regulations. For purposes of this part, claims include, but are not limited to, amounts due the United States from fees, loans, loan guarantees, overpayments, fines, civil penalties, damages, interest, sale of products and services, and other sources. This part provides the procedures for collection of claims by administrative offset under 31 U.S.C. 3716. DOE 2200.2, Collection From Employees for Indebtedness to the United States, provides the procedures for collection of claims by Federal salary offset under 5 U.S.C. 5514. The failure of DOE to include in this part any provision of the Federal Claims Collection Standards does not prevent DOE from applying the provision. The failure of DOE to comply with any provision of this part or of the Federal Claims Collection Standards shall not be available as a defense to any debtor in terms of affecting the merits of the underlying indebtedness.

(b) All claims due from Federal employees will be collected in accordance with DOE 2200.2, Collection from Employees for Indebtedness to the United States, or successor internal directives. DOE 2200.2 provides for hearings as required under 5 U.S.C. 5514 and 4 CFR part 102.

(c) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with regulations published under the authority of 31 U.S.C. 3726 (see 41 CFR parts 101–141, administered by the Director, Office of Transportation Audits, General Services Administration) and are otherwise excepted from these regulations.

(d) (1) Claims arising out of acquisition contracts, subcontracts, and purchase orders which are subject to the Federal Acquisition Regulation Systems, including the Federal Acquisition Regulation, 48 CFR subpart 32.6, and the Department of Energy Acquisition Regulations, 48 CFR subpart 32.6, shall be determined or settled in accordance with those regulations.

(2) Claims arising out of financial assistance instruments (e.g., grants, subgrants, contracts under grants, cooperative agreements, and contracts under cooperative agreements) and loans and loan guarantees shall be determined or settled in accordance with internal DOE directives. Relevant provisions currently are set forth primarily at 10 CFR 600.26 and 10 CFR 600.112(f).

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.3 Demand for payment.

(a) A total of three progressively stronger written demands at not more than approximately 30-day intervals will normally be made unless a response or other information indicates
that a further demand would be futile or unnecessary. When necessary to protect the Government’s interest, written demand may be preceded by other appropriate actions under the Federal Claims Collection Standards, including immediate offset, as provided in paragraph (d)(2) of this section, and/or referral for litigation.

(b) The initial written demand for payment should inform the debtor of the following:

(1) The basis for the claim;
(2) The amount of the claim;
(3) Any right to a review of the claim within DOE;
(4) The date by which DOE expects full payment and after which the account is considered delinquent (this is the due date and is normally not more than 30 days from the date the written initial demand was either mailed, hand-delivered, or otherwise transmitted);
(5) The provision for interest, penalties, and administrative charges in accordance with 31 U.S.C. 3717, if payment is not received by the due date (see §1015.4 for details regarding interest, administrative charges, and penalty charges); and
(6) The DOE’s intent to utilize any applicable collection actions made available by the Debt Collection Act of 1982 and the Federal Claims Collection Standards. When determined necessary to protect the Government’s interest, DOE may initiate any of the actions available under the referenced Act and/or Standards. These actions may include, but are not limited to, immediate referral for litigation, administrative offset (as provided in paragraph (d)(2) of this section), reports to credit bureaus, and referrals to collection agencies.

(c) If the debt is not paid by the date specified in the initial written demand, two progressively stronger demands shall be sent to the debtor unless a response or other information indicates that additional written demands would either be futile or unnecessary. These written demands will be timed so as to provide an adequate period of time within which the debtor could be expected to respond. While shorter periods of time are acceptable, intervals of approximately 30 days should be sufficient. Depending on the circumstances of the particular case, the demand letters may state:

(1) The amount of any late payment charge (interest, penalties, and administrative charges) added to the debt;
(2) That the delinquent debt may be reported to a credit reporting agency;
(3) That the debt may be referred to a private collection agency for collection;
(4) That the debt may be collected through administrative offset in accordance with the Federal Claims Collection Standards (4 CFR part 102); and
(5) That the debt may be referred for litigation.

(d)(1) Before collecting a debt by administrative offset, the debtor shall be advised of the following information either in the initial written demand and/or subsequent written demands, or by separate notice of DOE’s intent to collect the debt by administrative offset:

(i) Nature and amount of debt;
(ii) Payment due date;
(iii) The intent of DOE to collect by administrative offset (in accordance with the Federal Claims Collection Standards (4 CFR part 102)), including requesting other Federal agencies to help in the offset whenever possible, if the debtor has not made voluntary payment, has not requested a hearing or review of the claim within DOE as set out in paragraph (d)(1)(v) of this section, or has not made arrangements for payment as set out in paragraph (d)(1)(vi) of this section by the payment due date;
(iv) The right of the debtor to inspect and copy the DOE records related to the claim. Any costs associated therewith shall be borne by the debtor. The debtor shall give reasonable notice in advance to DOE of the date upon which it intends to inspect and copy the records involved;
(v) The right of the debtor to a hearing or review of the claim. DOE shall provide the debtor with a reasonable opportunity for an oral hearing when: (A) An applicable statute authorizes or requires DOE to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or (B) the debtor requests reconsideration of
§ 1015.3

the debt and DOE determines that the question of indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although DOE will document all significant matters discussed at the hearing. This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity and DOE has determined that review of the written record is ordinarily an adequate means to correct prior mistakes. In administering such a system, DOE is not required to sift through all of the requests received in order to accord oral hearings in those few cases which may involve issues of credibility or veracity. In those cases where an oral hearing is not required by this section, DOE will accord the debtor a "paper" hearing, that is, DOE will make its determination on the request for waiver or reconsideration based upon a review of the written record. If the claim is disputed in full or in part, the debtor’s written response to the demand must include a request for review of the claim within DOE. If the debtor disputes the claim, the debtor shall explain why the debt is incorrect. The explanation should be supported by affidavits, canceled checks, or other relevant information. The written response must reach DOE by the payment due date. A written response received after the payment due date may be accepted if the debtor can show that the delay was due to circumstances beyond the debtor’s control or failure to receive notice of the time limit. The debtor’s written response shall state the basis for the dispute. If only part of the claim is disputed, the undisputed portion should be paid by the date stated in the initial demand. DOE shall notify the debtor, within 30 days whenever feasible, whether DOE’s determination of the debt has been sustained, amended, or canceled. If DOE either sustains or amends its determination, it shall notify the debtor of its intent to collect by administrative offset unless payment is received within 15 days of the mailing of the notification of its decision; and

(vi) The right of the debtor to offer to make a written agreement to repay the amount of the claim. The acceptance of such an agreement is discretionary with DOE. If the debtor requests a repayment arrangement because a payment of the amount due would create a financial hardship, DOE will assess the debtor’s financial condition based on financial statements submitted by the debtor. Dependent upon the evaluation of the financial condition of the debtor, DOE and the debtor may agree to a written installment repayment schedule. The debtor should execute a confess-judgment note which specifies all of the terms of the arrangement. The size and frequency of the installment payments should bear a reasonable relation to the size of the debt and the debtor’s ability to pay. Interest, administrative charges, and penalty charges shall be provided for in the note. The debtor shall be provided with a written explanation of the consequences of signing a confess-judgment note. The debtor shall sign a statement acknowledging receipt of the written explanation which shall provide that the statement was read and understood before execution of the note and that the note is being signed knowingly and voluntarily. Some form of objective evidence of these facts will be maintained in DOE’s file on the debtor.

(2) In cases in which the procedural requirements specified in this paragraph have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, DOE is not required to duplicate those requirements before taking administrative offset. Furthermore, DOE may effect administrative offset against a payment to be made to a debtor prior to completion of the required procedures if failure to take the offset would substantially prejudice the Government’s ability to collect the debt and the time before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset will be promptly followed...
§ 1015.4 Interest, administrative charges, and penalty charges.

(a) DOE shall assess interest on unpaid claims at the rate of the current value of funds to the Treasury as prescribed by the Secretary of the Treasury on the date the computation of interest begins unless a higher rate of interest is necessary to protect the interests of the Government. DOE shall assess administrative charges to cover the costs of processing and handling overdue claims. Administrative charges will be assessed concurrent with the interest assessment and will be based on actual costs incurred or an average of additional costs incurred in processing and handling claims in similar stages of delinquency. DOE shall assess penalty charges of six percent a year on any part of a debt more than 90 days past due. Such assessment will be retroactive to the first day the debt became delinquent. The imposition of interest, administrative charges, and penalty charges is made in accordance with 31 U.S.C. 3717.

(b) Interest will be computed from the date the initial demand is mailed, hand-delivered, or otherwise transmitted to the debtor. If the claim or any portion thereof is paid within 30 days after the date on which interest began to accrue, the associated interest shall be waived. This period for waiver of interest may be extended in individual cases if there is good cause to do so and it is in the public interest. Interest will only be computed on the principal of the claim and the interest rate will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. A new rate which reflects at a minimum the current value of funds to the Treasury at the time the new agreement is executed may be set, if applicable, and interest on interest and related charges may be charged where the debtor has defaulted on a previous repayment agreement. Charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under the new repayment schedule.

(c) DOE may waive interest, administrative charges, or penalty charges if it finds that one or more of the following conditions exist:

(1) The debtor is unable to pay any significant sum toward the claim within a reasonable period of time;

(2) Collection of interest, administrative charges, or penalty charges will jeopardize collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including the situation in which an offset or installment payment agreement is in effect.

(d) Exemptions. (1) The provisions of 31 U.S.C. 3717 do not apply:

(i) To debts owed by any State or local government;

(ii) To debts arising under contracts which were executed prior to, and were in effect on (i.e., were not completed as of) October 25, 1982;

(iii) To debts where an applicable statute, regulation required by statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts involved; or

(iv) Debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(2) DOE may, however, assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]
§ 1015.5 Responsibility for collection.

(a) Heads of DOE Headquarters Elements and Field Elements or their designees must immediately notify the appropriate finance office of claims arising from their operations. A claim will be recorded and controlled by the responsible finance office upon receipt of documentation from a competent authority establishing the amount due.

(b) The collection of claims under the control of the finance offices will be aggressively pursued in accordance with the provisions of part 102 of the Federal Claims Collection Standards (4 CFR part 102). Whenever feasible, debts owed to the United States, together with interest, administrative charges, and penalty charges, should be collected in full in one lump sum. If the debtor requests installment payments, the finance offices will be responsible for determining the financial hardship of debtors and, when appropriate, shall arrange installment payment schedules. Claims which cannot be collected directly or by administrative offset shall be written off as administratively uncollectible in accordance with authority delegated to the Heads of DOE Field Elements and the Controller.

(c) The Controller or designee, in consultation with the General Counsel or other designated Counsel at Headquarters, or Heads of DOE Field Elements or designees, in consultation with the Chief Counsels or other designated Counsels in field locations, may compromise or suspend or terminate collection action on referred claims that do not exceed $20,000, exclusive of interest, penalties, and administrative charges, in accordance with the Federal Claims Collection Act and the Federal Claims Collection Standards, parts 103 and 104. (4 CFR parts 103 and 104). Recommendations to compromise or suspend or terminate collection action on claims that exceed $20,000, exclusive of interest, penalties, and administrative charges, will be referred to the Department of Justice in accordance with paragraph (c) of this section.

(d) DOE is not authorized by 31 U.S.C. 3716 to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) Debts owed to the United States, together with interest, administrative charges, and penalty charges, if the total amount of such debts exceeded $20,000, exclusive of interest, penalties, and administrative charges.

§ 1015.6 Collection by administrative offset.

(a) Administrative offset.

(1) Whenever feasible and not otherwise prohibited, after a debtor fails to pay the claim, request a review of the claim, or make an arrangement for payment, DOE shall collect claims under this part by means of administrative offset against obligations of the United States to the debtor, pursuant to 31 U.S.C. 3716. In appropriate circumstances, DOE may give due consideration to the debtor's financial condition or whether offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset will generally be inappropriate. This concept generally does not apply, however, where payment is in the form of reimbursement. Determination as to whether collection by administrative offset is feasible will be made by DOE, in consultation with the appropriate official of the Government, on a case-by-case basis, in the exercise of sound discretion. DOE will consider not only whether administrative offset can be accomplished both practically and legally, but also whether offset is best suited to further and protect all of the Government's interests.

(2) DOE will not initiate administrative action to collect a debt under 31 U.S.C. 3716 more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the DOE official or officials who were charged with the responsibility to discover and collect such debt. DOE will not initiate administrative action to collect a debt under 31 U.S.C. 3716 if the debtor is unable to pay the debt in full.

(3) DOE is not authorized by 31 U.S.C. 3716 to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) Debts owed to the United States, together with interest, administrative charges, and penalty charges, if the total amount of such debts exceeded $20,000, exclusive of interest, penalties, and administrative charges.
(iii) Any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute. However, unless otherwise provided for by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(4) Salary offsets and offsets against military retired pay are governed by 5 U.S.C. 5514.

(5) Collection by administrative offset of amounts payable from the Civil Service Retirement and Disability Fund will be made pursuant to 31 U.S.C. 3716 and 5 U.S.C. 5705 and regulations thereunder.

(6) Collections made by administrative offset under 31 U.S.C. 3716, shall be in accordance with the procedural requirements set forth in §1015.3(d) of this part.

(b) Interagency requests. (1) Requests to DOE by other Federal agencies for administrative offset should be in writing and forwarded to the Department of Energy, Office of the Controller (MA–3), 1000 Independence Avenue, SW., Washington, DC 20585.

(2) Requests by DOE to other Federal agencies holding funds payable to the debtor should be in writing and forwarded, certified return receipt, as specified by that agency in its regulations. If such rule is not readily available or identifiable, the request should be submitted to that agency’s office of legal counsel with a request that it be processed in accordance with their internal procedures.

(3) Requests to DOE should be processed within 30 calendar days of receipt. If such processing is not practical or feasible, notice to extend the time period for another 30 calendar days should be forwarded 10 calendar days prior to the expiration of the first 30-day period.

(4) Requests to or from DOE must be accompanied by a written certification that the debtor owes the debt (including the amount) and that the requesting agency has fully complied with the provisions of 4 CFR 102.3. DOE will cooperate with other agencies in effecting collection unless the offset would be otherwise contrary to law.

(5) If administrative offset cannot be effected through DOE or other known Federal agency accounts payable, then DOE will place a complete stop order against amounts otherwise payable to the debtor by placing the name of that debtor on the Department of the Army “List of Contractors Indebted to the United States.” If any amounts are discovered under this procedure, they will be offset against the debt owed to DOE provided that applicable provisions of 4 CFR parts 101–105 have been met and the offset would not otherwise be contrary to law.

§1015.7 Settlement of claims.

(a) In accordance with the provisions of 4 CFR part 103, DOE officials listed in §1015.5(c) of this part may settle claims not exceeding $20,000, exclusive of interest, penalties, and administrative charges, by compromise at less than the principal of the claim if:

(1) The debtor shows an inability to pay the full amount within a reasonable time or refuses to pay the claim in full and DOE is unable to enforce collection in full within a reasonable time by enforced collection proceedings;

(2) There is real doubt concerning the Government’s ability to prove its case in court for the full amount claimed, either because of the legal issues involved or a bona fide dispute as to the facts;

(3) The amount of the claim does not justify the actual foreseeable cost of collecting the claim; or

(4) A combination of the above reasons.

(b) DOE may suspend or terminate collection action in accordance with the terms and procedures contained in 4 CFR part 104.

§1015.8 Referral for litigation.

Claims on which aggressive collection action has been taken in accordance with 4 CFR part 102 and which cannot be compromised or on which collection action cannot be suspended or terminated under 4 CFR parts 103 and 104 will be referred to the General Accounting Office or the Department
§ 1015.9 Disclosure to consumer reporting agencies and referral to collection agencies.

DOE may disclose delinquent debts to consumer reporting agencies in accordance with 31 U.S.C. 3711(f) and may refer delinquent debts to debt collection agencies under the revised Federal Claims Collection Standards and other applicable authorities. Information will be disclosed to reporting agencies and referred to collection agencies in accordance with the terms and conditions of agreements entered into between the General Services Administration, DOE, and the reporting and collection agencies. The terms and conditions of such agreements shall specify that all of the rights and protections afforded to the debtor under 31 U.S.C. 3711(f) have been fulfilled.

§ 1015.10 Credit report.

In order to aid DOE in making appropriate determinations as to the collection and compromise of claims; the collection of interest, administrative charges, and penalty charges; the use of administrative offset; the use of other collection methods; and the likelihood of collecting the claim, DOE may institute a credit investigation of the debtor at any time following receipt of knowledge of the claim.

PART 1016—SAFEGUARDING OF RESTRICTED DATA

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SOURCE: 48 FR 36432, Aug. 10, 1983, unless otherwise noted.

GENERAL PROVISIONS

§ 1016.1 Purpose.

The regulations in this part establish requirements for the safeguarding of Secret and Confidential Restricted Data received or developed under an access permit. This part does not apply to Top Secret information since no such information may be forwarded to an access permittee within the scope of this regulation.

§ 1016.2 Scope.

The regulations in this part apply to all persons who may require access to Restricted Data used, processed, stored, reproduced, transmitted, or handled in connection with an access permit.
§ 1016.3 Definitions.

(a) Access authorization or security clearance. An administrative determination by the DOE that an individual who is either a DOE employee, applicant for employment, consultant, assignee, other Federal department or agency employee (and other persons who may be designated by the Secretary of Energy), or a DOE contractor or subcontractor employee and an access permittee is eligible for access to Restricted Data. Access authorizations or security clearances granted by DOE are designated as “L,” “Q,” “Q(X),” “L(X),” “Top Secret,” or “Secret.” For the purpose of this chapter only “Q,” “Q(X),” “L,” and “L(X)” access authorizations or clearances will be defined.

1. “Q” access authorizations or clearances are based upon full field investigations conducted by the Federal Bureau of Investigation, Office of Personnel Management, or another Government agency which conducts personnel security investigations. They permit an individual to have access, on a “need to know” basis, to Top Secret, Secret, and Confidential Restricted Data, Formerly Restricted Data, National Security Information, or special nuclear material in Category I or II quantities as required in the performance of duties.

2. “Q(X)” access authorizations or clearances are based upon full field investigations as described in §1016.3(a)(1), above. When “Q” access authorizations or clearances are granted to access permittees they are identified as “Q(X)” access authorizations or clearances and authorize access only to the type of Secret Restricted Data as specified in the permit and consistent with appendix A, 10 CFR part 725, “Categories of Restricted Data Available.”

3. “L” access authorizations or clearances are based upon National Agency Checks and Inquiries (NACI) for Federal employees, or National Agency Checks (NAC) for non-Federal employees, conducted by the Office of Personnel Management. They permit an individual to have access, on a “need to know” basis, to Confidential Restricted Data, Secret and Confidential National Security Information, required in the performance of duties, provided such information is not designated “CRYPTO” (classified cryptographic information), other classified communications security (“COMSEC”) information, or intelligence information.

4. “L(X)” access authorizations or clearances are based upon the same National Agency Checks as described in paragraph (a)(3), of this section. When “L” access authorizations or clearances are granted to access permittees, they are identified as “L(X)” access authorizations or clearances and authorize access only to the type of Confidential Restricted Data as specified in the permit and consistent with appendix A, 10 CFR part 725, “Categories of Restricted Data Available.”


(c) Authorized classifier. An individual authorized in writing by appropriate DOE authority to classify, declassify, or downgrade the classification of information, work, projects, documents, and materials.

(d) Classified mail address. A mail address established for each access permittee approved by the DOE to which all Restricted Data for the permittee is to be sent.

(e) Classified matter. Documents and material containing classified information.

(f) Combination lock. A built-in combination lock on a security container which is of tempered steel alloy hard plate, at least ¼” in thickness and Rockwell hardness of C-63 to C-65, of sufficient size and so located as to sufficiently impede access to the locking mechanism by drilling of the lock or container.

(g) DOE. The United States Department of Energy or its duly authorized representatives.

(h) Document. Any piece of recorded information regardless of its physical form or characteristics.

(i) Formerly Restricted Data. Classified information jointly determined by the DOE and the Department of Defense to be related primarily to the military utilization of atomic weapons and removed by the DOE from the Restricted Data category pursuant to section
§ 1016.4 Communications.

Communications concerning rule-making, i.e., petition to change part 1016, should be addressed to the Assistant Secretary for Defense Programs (DP-1), U.S. Department of Energy, Washington, D.C. 20545. All other communications concerning the regulations in this part should be addressed to U.S. Department of Energy Operations Offices as listed in appendix B of 10 CFR part 725, administering access permits for the geographical area.

§ 1016.5 Submission of procedures by access permit holder.

No access permit holder shall have access to Restricted Data until he shall have submitted to the DOE a written statement of his procedures for the safeguarding of Restricted Data and for the protection of special nuclear material; or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Act.
the security education of his employees, and DOE shall have determined and informed the permittee that his procedures for the safeguarding of Restricted Data are in compliance with the regulations in this part and that his procedures for the security education of his employees, who will have access to Restricted Data, are informed about and understand the regulations in this part.

§ 1016.6 Specific waivers.

DOE may, upon application of any interested party, grant such waivers from the requirements of this part as it determines are authorized by law and will not constitute an undue risk to the common defense and security.

§ 1016.7 Interpretations.

Except as specifically authorized by the Secretary of Energy in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

PHYSICAL SECURITY

§ 1016.8 Approval for processing access permittees for security facility approval.

(a) An access permittee who has a need to use, process, store, reproduce, transmit, or handle Restricted Data at any location in connection with its permit shall promptly request a DOE security facility approval.

(b) The request shall include the following information: The name and address of the permittee; the extent and scope of the classified activity and the highest classification of Restricted Data to be received; a written statement in the form of a security plan which outlines the permittee’s proposed security procedures and controls for the protection of Restricted Data, including a floor plan of the area(s) in which the classified matter is to be used, processed, stored, reproduced, transmitted, and handled.

(c) The DOE will promptly inform the permittee of the acceptability of the request for further processing and will notify the permittee of its decision in writing.

§ 1016.9 Processing security facility approval.

The following receipt of an acceptable request for security facility approval, the DOE will perform an initial security survey of the permittee’s facility to determine that granting a security facility approval would be consistent with the national security. If DOE makes such a determination, security facility approval will be granted. If not, security facility approval will be withheld pending compliance with the security survey recommendations or until a waiver is granted pursuant to §1016.6 of this part.

§ 1016.10 Grant, denial, or suspension of security facility approval.

Notification of the DOE’s grant, denial, or suspension of security facility approval will be furnished the permittee in writing, or orally with written confirmation. This information may also be furnished to representatives of the DOE, DOE contractors, or other Federal agencies having a need to transmit Restricted Data to the permittee.

§ 1016.11 Cancellation of requests for security facility approval.

When a request for security facility approval is to be withdrawn or cancelled, the DOE Operations Office will be notified by the requester immediately by telephone and confirmed in writing so that processing of this approval may be terminated.

§ 1016.12 Termination of security facility approval.

Security facility approval will be terminated when:

(a) There is no longer a need to use, process, store, reproduce, transmit, or handle Restricted Data at the facility; or

(b) The DOE makes a determination that continued security facility approval is not in the interest of national security.

In such cases the permittee will be notified in writing of the determination, and the procedures outlined in §1016.39 of this part will apply.
§ 1016.21 Protection of Restricted Data in storage.

(a) Persons who possess Restricted Data pursuant to an Access Permit shall store Secret and Confidential documents and material when not in use in accordance with one of the following methods:

1. In a locked vault, safe, or safe-type steel file cabinet having a 3-position dial-type combination lock; or

2. In a dual key, bank safety deposit box; or

3. In a steel file cabinet secured by a steel lock bar and a 3-position dial-type changeable combination padlock; or

4. In a locked steel file cabinet when located in a security area established under §1016.23 or when the cabinet or the place in which the cabinet is located is under DOE-approved intrusion alarm protection.

(b) Changes of combination: Each permittee shall change the combination on locks of his safekeeping equipment whenever such equipment is placed in use, whenever an individual knowing the combination no longer requires access to the repository as a result of change in duties or position in the permittee's organization, or termination of employment with the permittee or whenever the combination has been subjected to compromise, and in any event at least once a year. Permittees shall classify records of combinations no lower than the highest classification of the documents and material authorized for storage in the safekeeping equipment concerned.

(c) The lock on safekeeping equipment of the type specified in paragraph (a)(4) of this section shall be replaced immediately whenever a key is lost.

§ 1016.22 Protection while in use.

While in use, documents and material containing Restricted Data shall be under the direct control of an appropriately cleared individual, and the Restricted Data shall be capable of being removed from sight immediately.

§ 1016.23 Establishment of security areas.

(a) When, because of their nature or size, it is impracticable to safeguard documents and material containing Restricted Data in accordance with the provisions of §§1016.21 and 1016.22, a security area to protect such documents and material shall be established.

(b) The following controls shall apply to security areas:

1. Security areas shall be separated from adjacent areas by a physical barrier designed to prevent entrance into such areas, and access to the Restricted Data within the areas, by unauthorized individuals.

2. During working hours, admittance shall be controlled by an appropriately cleared individual posted at each unlocked entrance.

3. During nonworking hours, admittance shall be controlled by protective personnel on patrol, with protective personnel posted at unlocked entrances, or by such intrusion alarm system as DOE may approve.

4. Each individual authorized to enter a security area shall be issued a distinctive badge or pass when the number of employees assigned to the area exceeds thirty.

§ 1016.24 Special handling of classified material.

When the Restricted Data contained in material is not ascertainable by observation or examination at the place where the material is located and when the material is not readily removable because of size, weight, radioactivity, or similar factors, DOE may authorize the permittee to provide such lesser protection than is otherwise required by §§1016.21 to 1016.23 inclusive, as DOE determines to be commensurate with the difficulty of removing the material.

§ 1016.25 Protective personnel.

Whenever protective personnel are required by §1016.23, such protective personnel shall:

(a) Possess a “Q” or “L” security clearance or access authorization or “Q(X)” or “L(X)” access authorization if the Restricted Data being protected is classified Confidential, or a “Q” security clearance or access authorization or “Q(X)” access authorization if the Restricted Data being protected is classified Secret.

(b) Be armed with sidearms of not less than .38 caliber.
§ 1016.31 Access to Restricted Data.

(a) Except as DOE may authorize, no person subject to the regulations in this part shall permit any individual to have access to Secret or Confidential Restricted Data in his possession unless the individual has an appropriate security clearance or access authorization granted by DOE, or has been certified by DOD or NASA through DOE, and;

(1) The individual is authorized by an Access Permit to receive Restricted Data in the categories involved and, in the case of Secret Restricted Data, the permittee determines that such access is required in the course of his duties, or

(2) The individual needs such access in connection with such duties as a DOE employee or DOE contractor employee, or as certified by DOD or NASA.

(b) Inquiries concerning the clearance status of individuals, the scope of Access Permits, or the nature of contracts should be addressed to the DOE Operations Office administering the permit as set forth in appendix B of part 725.

§ 1016.32 Classification and preparation of documents.

(a) Classification. Restricted Data generated or possessed by an Access Permit holder must be appropriately marked. CG–UF–3, “Guide to the Unclassified Fields of Research,” will be furnished each permittee. In the event a permittee originates classified information which falls within the definition of Restricted Data or information which he is not positive is not within that definition and CG–UF–3 does not provide positive classification guidance for such information, he shall designate the information as Confidential, Restricted Data and request classification guidance from the DOE through the Classification Officer at the Operations Office administering the Permit, who will refer the request to the Director, Office of Classification, U.S. DOE, Washington, D.C. 20545 if he does not have authority to provide the guidance.

(b) Classification consistent with content. Each document containing Restricted Data shall be classified Secret or Confidential according to its own content.

(c) Document which custodian believes improperly classified or lacking appropriate classification markings. If a person receives a document which, in his opinion, is not properly classified, or omits the appropriate classification markings, he shall communicate with the sender and suggest the classification which he believes appropriate. Pending final determination of proper classification, such documents shall be safeguarded with the highest classification in question.

(d) Classification markings. Unless otherwise authorized below, the assigned classification of a document shall be conspicuously marked or stamped at the top and bottom of each page and on the front cover, if any, and the document shall bear the following additional markings on the first page and on the front cover:

RESTRICTED DATA
This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its transmittal or the disclosure of its contents in any manner to an unauthorized person is prohibited.

(e) Documentation. (1) All Secret documents shall bear on the first page a properly completed documentation stamp such as the following: This document consists of _ pages. Copy No. _ of _ Series _.

(2) The series designation shall be a capital letter beginning with the letter “A” designating the original set of copies prepared. Each subsequent set of copies of the same documents shall be identified by the succeeding letter of the alphabet.

(f) Letter of transmittal. A letter of transmitting Restricted Data shall be marked with a classification at least as high as its highest classified enclosure. When the contents of the letter of transmittal warrant lower classification or requires no classification, a stamp or marking such as the following shall be used in the letter:

When separated from enclosures handle this document as ___.

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§ 1016.33 External transmission of documents and material.

(a) Restrictions. (1) Documents and material containing Restricted Data shall be transmitted only to persons who possess appropriate clearance or access authorization and are otherwise eligible for access under the requirements of §1016.31.

(2) In addition, such documents and material shall be transmitted only to persons who possess facilities for their physical security consistent with this part. Any person subject to the regulations in this part who transmits such documents or material shall be deemed to have fulfilled his obligations under this subparagraph by securing a written certification from the prospective recipient that such recipient possesses facilities for its physical security consistent with this part.

(b) Preparation of documents. Documents containing Restricted Data shall be prepared for transmission outside an individual installation in accordance with the following:

(1) They shall be enclosed in two sealed, opaque envelopes or wrappers.

(2) The inner envelope or wrapper shall be addressed in the ordinary manner and sealed with tape, the appropriate classification shall be placed on both sides of the envelope, and the additional marking referred to in §1016.32(d) shall be placed on the side bearing the address.

(3) The outer envelope or wrapper shall be addressed in the ordinary manner. No classification, additional marking, or other notation shall be affixed which indicates that the document enclosed therein contains classified information or Restricted Data.

(4) A receipt which identifies the document, the date of transfer, the recipient, and the person transferring the document shall accompany the document and shall be signed by the recipient and returned to the sender whenever the custody of a Secret document is transferred.

(c) Preparation of material. Material, other than documents, containing Restricted Data shall be prepared for shipment outside an individual installation in accordance with the following:

(1) The material shall be so packaged that the classified characteristics will not be revealed.

(2) A receipt which identifies the material, the date of shipment, the recipient, and the person transferring the material shall accompany the material, and the recipient shall sign such receipt whenever the custody of Secret material is transferred.

(d) Methods of transportation. (1) Secret matter shall be transported only by one of the following methods:

(i) By messenger-courier system specifically created for that purpose.

(ii) Registered mail.

(iii) By protective services provided by United States air or surface commercial carriers under such conditions as may be preserved by the DOE.
(iv) Individuals possessing appropriate DOE security clearance or access authorization who have been given written authority by their employers.

(2) Confidential matter may be transported by one of the methods set forth in paragraph (d)(1) of this section or by U.S. first class, express, or certified mail.

(e) Telecommunication of classified information. There shall be no telecommunication of Restricted Data unless the secure telecommunication system has been approved by the DOE.

(f) Telephone conversations. Classified information shall not be discussed over the telephone.

§ 1016.34 Accountability for Secret Restricted Data.

Each permittee possessing documents containing Secret Restricted Data shall establish a document accountability procedure and shall maintain records to show the disposition of all such documents which have been in his custody at any time.

§ 1016.35 Authority to reproduce Restricted Data.

Secret Restricted Data will not be reproduced without the written permission of the originator, his successor, or high authority. Confidential Restricted Data may be reproduced to the minimum extent necessary consistent with efficient operation without the necessity for permission.

§ 1016.36 Changes in classification.

Documents containing Restricted Data shall not be downgraded or declassified except as authorized by DOE. Requests for downgrading or declassification shall be submitted to the DOE Operations Office administering the permit; or U.S. DOE, Washington, DC 20545, Attention: Office of Classification. If the appropriate authority approves a change of classification or declassification marking shall be canceled and the following statement, properly completed, shall be placed on the first page of the document:

Classification canceled (or changed to)

(Insert appropriate classification)

by

(Person authorizing change in classification)

by

(Signature of person making change and date thereof)

Any persons making a change in classification or receiving notice of such a change shall forward notice of the change in classification to holders of all copies as shown in their records.

§ 1016.37 Destruction of documents or material containing Restricted Data.

Documents containing Restricted Data may be destroyed by burning, pulping, or another method that assures complete destruction of the information which they contain. If the document contains Secret Restricted Data, a permanent record of the subject, title, report number of the document, its date of preparation, its series designation and copy number, and the date of destruction shall be signed by the person destroying the document and shall be maintained in the office of the last custodian. Restricted Data contained in material, other than documents, may be destroyed only by a method that assures complete obliteration, removal, or destruction of the Restricted Data.

§ 1016.38 Suspension or revocation of access authorization.

In any case where the access authorization of an individual subject to the regulations in this part is suspended or revoked in accordance with the procedures set forth in 10 CFR part 710, such individual shall, upon due notice from DOE of such suspension or revocation and demand by DOE, deliver to DOE any and all Restricted Data in his possession for safekeeping and such further disposition as DOE determines to be just and proper.

§ 1016.39 Termination, suspension, or revocation of security facility approval.

(a) If the need to use, process, store, reproduce, transmit, or handle classified matter no longer exists, the security facility approval will be terminated. The permittee may deliver all Restricted Data to the DOE or to a person authorized to receive them; or the
§ 1016.40 Termination of employment or change of duties.

Each permittee shall furnish promptly to DOE written notification of the termination of employment of each individual who possesses an access authorization under his Permit or whose duties are changed so that access to Restricted Data is no longer needed. Upon such notification, DOE may:

(a) Terminate the individual's access authorization, or

(b) Transfer the individual's access authorization to the new employer of the individual to allow continued access to Restricted Data where authorized, pursuant to DOE regulations.

§ 1016.41 Continued applicability of the regulations in this part.

The expiration, suspension, revocation, or other termination of a security clearance or access authorization or security facility approval shall not relieve any person from compliance with the regulations in this part.

§ 1016.42 Reports.

Each permittee shall immediately report to the DOE office administering the permit any alleged or suspected violation of the Atomic Energy Act of 1954, as amended, Espionage Act, or other Federal statutes related to Restricted Data. Additionally, the permittee shall report any infractions, losses, compromises, or possible compromise of Restricted Data.

§ 1016.43 Inspections.

The DOE shall make such inspections and surveys of the premises, activities, records, and procedures of any person subject to the regulations in this part as DOE deems necessary to effectuate the purposes of the Act, E.O. 12356, and DOE orders and procedures.

§ 1016.44 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any regulation or order issued thereunder. Any person who willfully violates, attempts to violate, or conspires to violate any provision of the Act or any regulation or order issued thereunder, including the provisions of this part, may be guilty of a crime and upon conviction may be punished by fine or imprisonment, or both, as provided by law.

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

Sec. 1017.1 Purpose and scope.

1017.2 Applicability.

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SOURCE: 50 FR 15822, Apr. 22, 1985, unless otherwise noted.
of the Atomic Energy Act which prohibits the unauthorized dissemination of certain unclassified government information. This information, identified by the term “Unclassified Controlled Nuclear Information” (UCNI), is limited to information concerning atomic energy defense programs.

(b) These regulations—

(1) Provide for the review of information prior to its designation as UCNI;

(2) Describe how information is determined to be UCNI;

(3) Establish minimum physical protection standards for documents and material containing UCNI;

(4) Specify who may have access to UCNI; and

(5) Establish a procedure for the imposition of penalties on persons who violate section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations.

§ 1017.2 Applicability.

These regulations apply to—

(a) Any person authorized access to UCNI;

(b) Any person not authorized access to UCNI who acquires, attempts to acquire, or conspires to acquire, in violation of these regulations, Government information in any document or material containing UCNI;

(c) Any person not authorized access to UCNI but who wants to be authorized access to UCNI.

§ 1017.3 Definitions.

As used in this part—


(b) Atomic Energy Defense Programs means activities, equipment, and facilities of the DOE or other Government agencies utilized or engaged in support of the—

(1) Development, production, testing, sampling, maintenance, repair, modification, assembly, utilization, transportation, or retirement of nuclear weapons or components of nuclear weapons;

(2) Production, utilization, or transportation of nuclear material for military applications; or

(3) Safeguarding of activities, equipment, or facilities which support the functions in paragraphs (b)(1) and (b)(2) of this section, including the protection of nuclear weapons, components of nuclear weapons, or nuclear material for military applications at a fixed facility or in transit.

(c) Authorized Individual means a person who has been granted routine access to UCNI under §1017.16(a).

(d) Component means any operational, experimental, or research-related part, subsection, design, or material used in the manufacture or utilization of a nuclear weapon, nuclear explosive device, or nuclear weapon test assembly.

(e) Controlling Official means an individual authorized under §1017.7(a) to make a determination that specific Government information is, is not, or is no longer UCNI, such determination serving as the basis for determinations by a Reviewing Official that a document or material contains, does not contain, or no longer contains UCNI.

(f) Denying Official means an individual authorized under §1017.12(b) to deny a request made under statute or Executive order for all or any portion of a document or material containing UCNI.

(g) Document or Material means the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

(h) Formerly Restricted Data means a category of information classified under section 142 d. of the Atomic Energy Act.

(i) Government means the Executive Branch of the United States Government.

(j) Government Information means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government.

(k) In Transit means the physical movement of a nuclear weapon, a component of a nuclear weapon, or nuclear material from one part to another part.
§ 1017.4 Policy.

It is the policy of the DOE to make information publicly available to the fullest extent possible. These regulations shall be interpreted and implemented so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, consistent with the requirement in section 148 of the
Atomic Energy Act to prohibit the unauthorized dissemination of UCNI. For example—

(a) Although UCNI is not subject to disclosure under the Freedom of Information Act (FOIA), documents or material containing both UCNI and other information which is not UCNI shall have the portions of the document or material not containing UCNI released to the maximum possible extent in response to a request made under the FOIA, subject to other exemptions of the FOIA; and

(b) To the fullest extent possible, the fundamental DOE policy of full disclosure of documents prepared under the National Environmental Policy Act (NEPA) and its implementing regulations will be followed. In some cases, this will mean that UCNI may be excised from documents to be made publicly available and prepared as an appendix, or otherwise segregated so as to allow the release of the nonsensitive portions of a document.

§ 1017.5 Prohibitions.

Government information shall not be controlled as UCNI in order to—

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person or organization;

(c) Restraine competition; or

(d) Prevent or delay the release of any information that does not properly qualify as UCNI.

§ 1017.6 Exemptions.

(a) Information exempt from these regulations includes—

(1) Information that is not government information;

(2) Information that concerns activities, facilities, or equipment outside the scope of atomic energy defense programs;

(3) Information that is classified as Restricted Data, Formerly Restricted Data, or National Security Information, or that is protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167);

(4) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);

(5) Applied scientific information (i.e., information resulting from research whose objective is to gain knowledge or understanding necessary for determining the means by which a specific need may be met) but not including that pertaining to:

(i) The design of production facilities or utilization facilities;

(ii) Security measures (including security plans, procedures, and equipment) for the physical protection of:

(A) Production or utilization facilities,

(B) Nuclear material contained in such facilities, or

(C) Nuclear material in transit; or

(iii) The design, manufacture, or utilization of any nuclear weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category by the Secretary (or the head of the predecessor agency of the Department of Energy) pursuant to section 142 of the Atomic Energy Act;

(6) Safety information used to protect employees from occupational hazards, except for government information that reveals an exploitable vulnerability or design element that is UCNI;

(7) Radiation exposure data and all other personal health information;

(8) Information pertaining to the public health and safety and to the protection of the environment, except for government information that reveals an exploitable vulnerability or design element that is UCNI;

(9) Information concerning the transportation of low level or commercially generated radioactive waste; and

(10) Waste Isolation Pilot Plant (WIPP) information, except for government information that deals with safeguards or physical security for the WIPP project.

(b) Documents exempt from these regulations include—

(1) Documents prepared under Council on Environmental Quality regulations or DOE guidelines complying
§ 1017.7 Identification of unclassified controlled nuclear information.

(a) Authorities—(1) Controlling Officials. A Controlling Official having cognizance over certain government information is authorized to make a determination that the government information is or is not UCNI. A Controlling Official with overall cognizance over UCNI under consideration for decontrol is authorized to make a determination that the information is no longer UCNI. Each Controlling Official having cognizance over UCNI under consideration for decontrol shall concur in the determination to decontrol the UCNI prior to the UCNI being decontrolled.

(2) Designation. The Secretary may designate the Deputy Secretary, the Under Secretary, a Secretarial Officer of the DOE, or a Manager of a DOE Operations Office to be a Controlling Official for government information within his or her cognizance. The Controlling Official may redelegate his or her authority in accordance with the redelegation provisions in the designation of authority from the Secretary.

(3) Controlling Officials shall exercise their authorities in strict compliance with the rules, prohibitions, and exemptions described in these regulations.

(b) Criteria. Prior to a specific type of information being identified and controlled as UCNI, a Controlling Official shall insure that the information under review meets each of the following criteria:

(1) The information is government information.

(2) The information is limited to information concerning atomic energy defense programs.

(3) The information is within the scope of at least one of the three categories of UCNI in §1017.8.

(4) Unauthorized dissemination of the information under review meets the adverse effect test in §1017.9.

(5) The information is the minimum amount of information necessary to be controlled to protect the health and safety of the public or the common defense and security.

(6) The purpose for controlling the information is not prohibited under §1017.5.

(7) The information is not exempt from these regulations under §1017.6.

(c) Procedures. A Controlling Official shall report each determination to control or decontrol UCNI to the Assistant Secretary for Defense Programs for—

(1) Inclusion in the quarterly report required in §1017.11; and

(2) Incorporation into guidelines which Reviewing Officials consult in their review of documents and material for UCNI.

§ 1017.8 Categories of unclassified controlled nuclear information.

In order for information to be considered for control as UCNI, it must be within the scope of at least one of the following categories and it must meet each of the other criteria in §1017.7(b).

(a) Category A—Unclassified Controlled Production or Utilization Facility Design Information. This category includes certain unclassified government information concerning—

(1) The design of production or utilization facilities which are related to atomic energy defense programs; or

(2) Design-related operational information concerning the production, processing, or utilization of nuclear material for atomic energy defense programs.

(b) Category B—Unclassified Controlled Safeguards and Security Information. This category includes certain unclassified government information concerning security measures for the protection of—

(1) Production or utilization facilities related to atomic energy defense programs;

(2) Nuclear material to be used for military applications, regardless of its
§ 1017.11 Quarterly report.

The Assistant Secretary for Defense Programs shall prepare a report on a quarterly basis, to be made available
upon request to any interested person, detailing the application during the previous quarter of each regulation or order prescribed or issued under section 148 of the Atomic Energy Act, including these regulations. Requests for this report may be sent to the Assistant Secretary for Defense Programs (refer to §1017.16(b)(1) for the address).

This report must—

(a) Identify types of government information determined to be UCNI by any Controlling Official during the previous quarter;

(b) Include a justification specifying why the government information is UCNI; and

(c) Include a justification that these regulations have been applied so as to protect from disclosure only the minimum amount of government information necessary to protect the health and safety of the public or the common defense and security.

§1017.12 Review and denial of documents or material.

(a) Reviewing Officials. A Reviewing Official with cognizance over the information contained in a document or material is authorized to—

(1) Make a determination, based on guidelines which reflect decisions of Controlling Officials, that the document or material contains, does not contain, or no longer contains UCNI; and

(2) Apply or remove UCNI markings to or from the document or material.

(b) Denying Officials. A Denying Official with cognizance over the information contained in a document or material is authorized to deny a request made under a statute or Executive order for all or any portion of the document or material that contains UCNI. The Denying Official bases his or her denial on guidelines which reflect decisions of Controlling Officials. The Denying Official insures that the Reviewing Official who determined that the document or material contains UCNI correctly applied and interpreted the guidelines.

(c) Designation. Reviewing and Denying Officials are designated in accordance with Departmental directives issued by the Secretary.

§1017.13 Retirement of documents or material.

(a) Unmarked documents or material. Any document or material which is not marked as containing UCNI but which contains government information within the scope of the categories in §1017.8 shall be marked with the notice in §1017.15(a)(2) upon retirement to a repository (e.g., an agency’s centralized records storage area, a Federal Records Center, the National Archives of the United States). The Secretary may approve alternative procedures to those described in this paragraph.

(b) Marked documents or material. A document or material containing an UCNI notice (refer to §1017.15) is not required to be reviewed by a Reviewing Official upon or subsequent to retirement, except that a Reviewing Official shall review any retired document or material upon request for its release into the public domain.

(c) Existing documents or material. Any document or material retired to a repository prior to the effective date of these regulations need not be reviewed for UCNI. However, any such document or material that is subsequently determined by a Reviewing Official to contain UCNI must be marked and protected by the repository in accordance with these regulations, upon notification from the Reviewing Official to the repository having the document or material.

§1017.14 Joint information, documents, or material.

(a) Joint Information. A Controlling Official shall coordinate with any other Government agency or DOE organization having cognizance over the information under consideration for control or decontrol prior to making the determination that the information is or is no longer UCNI.

(b) Joint documents or material. A Reviewing Official or a Denying Official reviewing a document or material for decontrol and public release shall coordinate this review with the DOE organization or Government agency originating the document or material and with each DOE organization or Government agency having cognizance over any information contained in the document or material.
(c) Resolution of disagreements. Since the DOE has overall cognizance over all UCNI and sole responsibility for implementation of section 148 of the Atomic Energy Act, the Secretary has the final authority to resolve all disagreements concerning—

(1) The identification of UCNI that is within the cognizance of more than one DOE organization or of a Government agency in addition to the DOE; or

(2) The control or decontrol or all or any part of any document or material originated by or for the DOE or another Government agency that contains UCNI.

(d) Notification of determinations. An official making a determination concerning joint information, documents, or material shall inform affected organizations within the DOE or in other Government agencies of his or her determination.

(e) Other government information control systems. A document containing information within the scope of section 148 of the Atomic Energy Act may also contain information within the scope of other government information control systems. Where this is the case, the requirements of the more restrictive system apply.

§ 1017.15 Markings on documents or material.

(a) Documents or material which may contain UCNI. (1) Any person who originates or has in his or her possession a document or material that the person believes may contain UCNI, may mark in a conspicuous manner the document or material with the notice in the paragraph (a)(2) of this section prior to transmitting the document or material to a Reviewing Official for a formal determination.

(2) Any Authorized Individual who originates or has in his or her possession a document or material that the Authorized Individual believes may contain UCNI, shall mark in a conspicuous manner the document or material with the following notice—

(i) Prior to transmitting the document or material outside of the Authorized Individual’s organization;

(ii) Prior to transmitting the document or material to a Reviewing Official; or

(iii) Upon the retirement of the document or material under §1017.13:

NOT FOR PUBLIC DISSEMINATION

May contain Unclassified Controlled Nuclear Information subject to section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168). Approval by the Department of Energy prior to release is required.

(b) Documents or material which contain UCNI. A Reviewing Official shall mark in a conspicuous manner each document or material that the Reviewing Official determines to contain UCNI with one of the following notices:

(1) UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION NOT FOR PUBLIC DISSEMINATION


(2) NOT FOR PUBLIC DISSEMINATION

Unauthorized dissemination subject to civil and criminal sanctions under 42 U.S.C. 2168.

(c) Other markings. UCNI markings may be applied regardless of any other distribution control markings (e.g., “Official Use Only,” “company proprietary) that are also on a document or material.

§ 1017.16 Access to unclassified controlled nuclear information.

(a) Routine access. (1) A Reviewing Official is an Authorized Individual for documents or material that the Reviewing Official determines to contain UCNI.

(2) An Authorized Individual, for UCNI in his or her possession or control, may determine that another person is an Authorized Individual who may be granted access to the UCNI, subject to the following limitations, and who may further disseminate the UCNI under the provisions of this section. The person to be granted routine access to the UCNI must—

(i) Have a need-to-know in the performance of official duties or DOE authorized activities for the UCNI to which routine access is to be granted; and

(ii) Be a U.S. citizen who is—

(A) A Government employee or a member of the U.S. Armed Forces;
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(B) An employee of a Government contractor or subcontractor, or of a prospective Government contractor or subcontractor for the purpose of bidding on a Government contract or subcontract;

(C) A Government consultant or DOE advisory committee member;

(D) A Member of Congress;

(E) A staff member of a congressional committee or of an individual Member of Congress;

(F) The Governor of a State, his or her designated representative, or a State government official;

(G) A local government official or an Indian tribal government official;

(H) A member of a State, local, or Indian tribal law enforcement or emergency response organization; or

(i) A DOE access permittee authorized access by the Secretary under part 725 of this title to Restricted Data applicable to civil use of atomic energy; or

(ii) Be a person who is not a U.S. citizen but who is—

(A) A Government employee or a member of the U.S. Armed Forces;

(B) An employee of a Government contractor or subcontractor; or

(C) A Government consultant or DOE advisory committee member; or

(iv) Be a person who is not a U.S. citizen but who may be granted routine access to UCNI by an Authorized Individual in conjunction with—

(A) An international nuclear cooperative activity approved by the Government;

(B) U.S. diplomatic dealings with foreign government officials;

(C) An agreement for cooperation under section 123 of the Atomic Energy Act; or

(D) Provisions of treaties, mutual defense acts, Government contracts or subcontracts.

(3) The Secretary may impose additional administrative controls concerning the granting of routine access to UCNI by an Authorized Individual to a person who is not a U.S. citizen.

(4) An Authorized Individual may only disseminate UCNI to another Authorized Individual or to a person granted special access to UCNI under paragraph (b) of this section.

(5) The Assistant Secretary for Defense Programs may waive any of the requirements for determination of routine access to UCNI specified in paragraph (a) of this section.

(b) Special access. (1) A person not authorized routine access to UCNI under paragraph (a) of this section may submit a request for special access to UCNI to the—

Assistant Secretary for Defense Programs, U.S. Department of Energy, Washington, DC 20585

(2) Such a request must include—

(i) The name, current residence or business address, birthplace, birthdate, and country of citizenship of the person submitting the request;

(ii) A description of the UCNI for which special access is being requested;

(iii) A description of the purpose for which the UCNI is needed; and

(iv) Certification by the requester of his or her understanding of and willingness to abide by these regulations.

(3) The Assistant Secretary for Defense Programs shall base his or her decision to grant special access to UCNI on an evaluation of—

(i) The sensitivity of the UCNI for which special access is being requested (i.e., the worst-case, adverse effect on the health and safety of the public or the common defense and security which would result from illegal use of the UCNI);

(ii) The purpose for which the UCNI is needed (e.g., will the UCNI be used for commercial or other private purposes or will it be used for public benefit to fulfill statutory or regulatory responsibilities);

(iii) The likelihood of unauthorized dissemination by the requester of the UCNI; and

(iv) The likelihood of the requester using the UCNI for illegal purposes.

(4) The Assistant Secretary for Defense Programs shall attempt to notify a person who requests special access to UCNI within 30 days of receipt of the request as to whether or not special access to the requested UCNI is granted. If a final determination on the request cannot be made within 30 days or receipt of the request, the Assistant Secretary for Defense Programs shall notify the requester, within 30 days of the
request, as to when the final determination on the request may be made.

(5) A person granted special access to UCNI is not an Authorized Individual under paragraph (a) of this section and shall not further disseminate the UCNI.

(c) Notification of responsibilities—(1) Routine access. An Authorized Individual granting routine access to UCNI to another person under paragraph (a) of this section shall notify each person granted such access (other than when the person being granted such access is a Government employee, a member of the U.S. Armed Forces, or an employee of a Government contractor or subcontractor) of applicable regulations and orders concerning UCNI and of any special redistribution limitations that the Authorized Individual determines to apply for the specific UCNI to which routine access is being granted.

(2) Special access. The Assistant Secretary for Defense Programs shall notify each person granted special access to UCNI under paragraph (b) of this section of applicable regulations concerning UCNI prior to dissemination of the UCNI to the person.

(d) Other persons. Persons not granted routine access to UCNI under paragraph (a) of this section or special access to UCNI under paragraph (b) of this section shall not have access to UCNI.

§ 1017.17 Physical protection requirements.

(a) General. UCNI requires protection from unauthorized dissemination. UCNI must be protected and controlled in a manner consistent with that customarily accorded other types of unclassified but sensitive information (e.g., proprietary business information, personnel or medical records of employees, attorney-client information). Each Government agency and Government contractor authorized access to UCNI shall establish and maintain a system for the protection of UCNI in their possession or under their control that is consistent with the physical protection standards established in this section. Each Authorized Individual or person granted special access to UCNI under §1017.16(b) who receives, acquires, or produces UCNI or a document or material containing UCNI shall take reasonable and prudent steps to ensure that it is protected from unauthorized dissemination by adhering to these regulations and their implementing directives.

(b) Protection in use or storage. An Authorized Individual or a person granted special access to UCNI under §1017.16(b) shall maintain physical control over any document or material containing an UCNI notice that is in use so as to prevent unauthorized access to it. When any document or material containing an UCNI notice is not in use, it must be stored in a secure container (e.g., locked desk or file cabinet) or in a location where access is limited (e.g., locked or guarded office, controlled access facility).

(c) Reproduction. A document or material containing an UCNI notice may be reproduced to the minimum extent necessary consistent with the need to carry out official duties without permission of the originator, provided the reproduced document or material is marked and protected in the same manner as the original document or materials.

(d) Destruction. A document or material containing an UCNI notice may be disposed of by any method which assures sufficiently complete destruction to prevent its retrieval (providing the disposal is authorized by the Archivist of the United States under 41 CFR 101–11.4 and by agency records disposition schedules).

(e) Transmission. (1) A document or material containing an UCNI notice must be packaged to prevent disclosure of the presence of UCNI when transmitted by a means which could allow access to the document or material by a person who is not an Authorized Individual or a person granted special access to UCNI under §1017.16(b). The address and return address must be indicated on the outside of the package.

(2) A document or material containing an UCNI notice may be transmitted by—

(i) U.S. first class, express, certified, or registered mail;
(ii) Any means approved for the transmission of classified documents or material;
(iii) An Authorized Individual or a person granted special access to UCNI under §1017.16(b), when he or she can control access to the document or material being transmitted; or

(iv) Any other means determined by the Assistant Secretary for Defense Programs to be sufficiently secure.

(3) UCNI may be discussed or transmitted over an unprotected telephone or telecommunications circuit when required by operational considerations. More secure means of communication should be utilized whenever possible.

(f) Automated Data Processing (ADP). UCNI may be processed or produced on any ADP system which is certified for classified information or which complies with the guidelines of Office of Management and Budget Circular No. A-71, “Security of Federal Automated Information Systems” or which has been approved for such use in accordance with the provisions of applicable DOE directives.

§ 1017.18 Violations.

(a) Civil penalty. Any person who violates section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, is subject to a civil penalty. The Assistant Secretary for Defense Programs may recommend to the Secretary imposition of this civil penalty, which shall not exceed $110,000 for each violation.

(i) Whenever the Assistant Secretary for Defense Programs believes that a person is subject to imposition of a civil penalty under the provisions of section 148b(1) of the Atomic Energy Act, the Assistant Secretary for Defense Programs shall notify the person in writing by certified mail, return receipt requested, of—

(A) The date, facts, and nature of each act or omission with which the person is charged;

(B) The particular provision of section 148 of the Atomic Energy Act or its implementing regulations or orders involved in the violation;

(C) Each penalty which the Assistant Secretary for Defense Programs proposes to recommend the Secretary impose and its amount;

(D) The right of the person to submit to the Assistant Secretary for Defense Programs the person’s written reply to each of the allegations in the notification letter. The person shall mail or deliver any reply letter within twenty days of receipt of the notification letter from the Assistant Secretary for Defense Programs.

(ii) The Assistant Secretary for Defense Programs a written request for a hearing under paragraph (a)(2) of this section.

(iii) The fact that, upon failure of the person to pay any civil penalty imposed by the Secretary, the penalty may be collected by civil action under paragraph (a)(5) of this section.

(iv) The right of the person to submit to the Assistant Secretary for Defense Programs a written request for a hearing under paragraph (a)(2) of this section.

(b) Hearing.

Any person who receives a notification letter under paragraph (a)(1)(i) of this section may request a hearing to answer under oath or affirmation the allegations contained in the notification letter. The person shall mail or deliver any hearing request letter to the Assistant Secretary for Defense Programs within twenty days of receipt of the notification letter. Upon receipt from the person of a written request for a hearing, the Assistant Secretary for Defense Programs shall request that the Secretary appoint a Hearing Officer and, if necessary, a Hearing Counsel.

(i) The Hearing Counsel. The Hearing Counsel, if appointed, shall—

(A) Represent the Department;

(B) Consult with the person or the person’s counsel prior to the hearing;

(C) Examine and cross-examine witnesses during the hearing.

(ii) The Hearing Officer. The Hearing Officer shall—

(A) Be responsible for the administrative preparations for the hearing;

(B) Convene the hearing as soon as is reasonable;
(C) Conduct the hearing in a manner which is fair and impartial;
(D) Arrange for the presence of witnesses and physical evidence at the hearing;
(E) Make a recommendation that violation of section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, has occurred only if the DOE proves by the preponderance of the evidence that such a violation occurred; and
(F) Submit his or her recommendation, accompanied by a statement of the findings and reasons supporting them, to the Secretary for the Secretary’s final determination on the imposition of a civil penalty.

(iii) Rights of the person. The person may—
(A) Present evidence in his or her own behalf, through witnesses, or by documents;
(B) Cross-examine witnesses and rebut records or other physical evidence (except as provided in paragraph (a)(2)(iv)(D) of this section);
(C) Be present during the entire hearing (except as provided in paragraph (a)(2)(iv)(D) of this section);
(D) Be accompanied, represented, and advised by counsel of his or her own choosing; and
(E) Testify in his or her own behalf.

(iv) Conduct of the Hearing.
(A) A summarized record of the hearing shall be made.
(B) All relevant and material evidence is admissible (except as provided in paragraph (a)(2)(iv)(D) of this section); however, formal rules of evidence are not applicable.
(C) Witnesses shall testify under oath and are subject to cross-examination (except as provided in paragraph (a)(2)(iv)(D) of this section).
(D) If the Hearing Officer determines that the testimony of a witness or any documentary or physical evidence contains classified information or UCNI, such testimony or evidence will not be considered unless it is material. If it is material, a nonsensitive summary of the testimony or records or description of the physical evidence shall be made available to the person to the maximum extent possible, consistent with the requirements of national security or the public health and safety. In all such cases, the Hearing Officer, in considering such testimony or evidence, shall take into account that the person did not have an opportunity to cross-examine the witness or review the actual document or evidence.
(E) The DOE bears the burden of proving that a violation of section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, has occurred.

(v) Failure to request a hearing. If the person fails to file a written request for a hearing within the specified time period, the person relinquishes his or her right to a hearing. If the person does not request a hearing, the Assistant Secretary for Defense Programs shall transmit his or her recommendation, with any supporting materials, to the Secretary for the Secretary’s final determination on the imposition of the civil penalty.

(3) Final determination. The Secretary makes the final determination on the disposition of a violation. The Secretary may uphold, compromise or mitigate, or remit any penalty recommended by the Assistant Secretary for Defense Programs.

(4) Appeal. A person whom the Secretary has determined violated section 148 of the Atomic Energy Act or any regulations or orders of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, may appeal the determination of the Secretary to an appropriate United States District Court.

(5) Collection of Penalty. (i) The Secretary may request the Attorney General to institute a civil action to collect a penalty imposed by the Secretary under this section.
(ii) The Attorney General has the exclusive power to uphold, compromise or mitigate, or remit any civil penalty imposed by the Secretary under this section and referred to the Attorney General for collection.

(b) Criminal penalty. Any person who violates section 148 of the Atomic Energy Act or any regulations or orders of the Secretary issued under section
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148 of the Atomic Energy Act, including these regulations may be subject to a criminal penalty under section 223 of the Atomic Energy Act. In such case, the Secretary refers the matter to the Attorney General for investigation and possible prosecution.


PART 1018—REFERRAL OF DEBTS TO IRS FOR TAX REFUND OFFSET

Sec.
1018.1 Purpose.
1018.2 Applicability and scope.
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1018.4 Notice requirement before offset.
1018.5 Review within the Department.
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1018.7 Stay of offset.


SOURCE: 54 FR 773, Jan. 9, 1989 (interim), unless otherwise noted.

§ 1018.1 Purpose.

This part establishes procedures for the Department of Energy (DOE) to refer past-due debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to DOE. It specifies the agency procedures and the rights of the debtor applicable to claims for the payment of debts owed to DOE.

§ 1018.2 Applicability and scope.

(a) These regulations implement 31 U.S.C. 3720A which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(3) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Department against amounts payable to or on behalf of the debtor by or on behalf of the Department;

(4) With respect to which DOE has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or legally enforceable, has considered evidence presented by such taxpayer, and has determined that an amount of such debt is past-due and legally enforceable;

(5) Has been disclosed by DOE to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which DOE has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any overpayment of tax;

(7) Is at least $25.00;

(8) All other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations codified at 26 CFR 301.6402–T relating to the eligibility of a debt for tax return offset have been satisfied.

§ 1018.3 Administrative charges.

In accordance with 10 CFR part 1015, all administrative charges incurred in connection with the referral of the debts to the IRS shall be assessed on the debt and thus increase the amount of the offset.

§ 1018.4 Notice requirement before offset.

A request for reduction of an IRS tax refund will be made only after the DOE makes a determination that an amount is owed and past-due and provides the debtor with 60 days written notice. The DOE’s notice of intention to collect by IRS tax refund offset (Notice of Intent) will state:

(a) The amount of the debt;

(b) That unless the debt is repaid within 60 days from the date of the DOE’s Notice of Intent, DOE intends to collect the debt by requesting the IRS to reduce any amounts payable to the
debtor as refunds of Federal taxes paid by an amount equal to the amount of the debt and all accumulated interest and other charges; and
(c) That the debtor has a right to present evidence that all or part of the debt is not past-due or not legally enforceable; and
(d) A mailing address for forwarding any written correspondence and a contact name and phone number for any questions.

§ 1018.5 Review within the Department.
(a) Notification by debtor. A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past-due or not legally enforceable. To exercise this right, the debtor must:
(1) Send a written request for a review of the evidence to the address provided in the notice.
(2) State in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable.
(3) Include in the request any documents which the debtor wishes to be considered or state that additional information will be submitted within the remainder of the 60-day period.
(b) Submission of evidence. The debtor may submit evidence showing that all or part of the debt is not past-due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within 60 days will result in an automatic referral of the debt to the IRS without further action by DOE.
(c) Review of the evidence. DOE will consider all available evidence related to the debt. Within 30 days, if feasible, DOE will notify the debtor whether DOE has sustained, amended, or cancelled its determination that the debt is past-due and legally enforceable.

§ 1018.6 Departmental determination.
(a) Following review of the evidence, DOE will issue a written decision which will include the supporting rationale for the decision.
(b) If DOE either sustains or amends its determination, it shall notify the debtor of its intent to refer the debt to the IRS for offset against the debtor’s Federal income tax refund. If DOE cancels its original determination, the debt will not be referred to IRS.

§ 1018.7 Stay of offset.
If the debtor timely notifies the DOE that he or she is exercising the right described in §1018.5(a) of this part and timely submits evidence in accordance with §1018.5(b) of this part, any notice to the IRS will be stayed until the issuance of a written decision which sustains or amends its original determination.

PART 1021—NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES

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CLASSES OF ACTIONS THAT NORMALLY REQUIRE EAS BUT NOT NECESSARILY EIS
APPENDIX D TO SUBPART D TO PART 1021—
CLASSES OF ACTIONS THAT NORMALLY REQUIRE EIS

Authority: 42 U.S.C. 7254; 42 U.S.C. 4321 et seq.

Source: 57 FR 15144, Apr. 24, 1992, unless otherwise noted.

Subpart A—General

§ 1021.100 Purpose.

The purpose of this part is to establish procedures that the Department of Energy (DOE) shall use to comply with section 102(2) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)) and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). This part supplements, and is to be used in conjunction with, the CEQ Regulations.

§ 1021.101 Policy.

It is DOE’s policy to follow the letter and spirit of NEPA; comply fully with the CEQ Regulations; and apply the NEPA review process early in the planning stages for DOE proposals.

§ 1021.102 Applicability.

(a) This part applies to all organizational elements of DOE except the Federal Energy Regulatory Commission.

(b) This part applies to any DOE action affecting the environment of the United States, its territories or possessions. DOE actions having environmental effects outside the United States, its territories or possessions are subject to the provisions of Executive Order 12114, “Environmental Effects Abroad of Major Federal Actions” (3 CFR, 1979 Comp., p. 356; 44 FR 1957, January 4, 1979), DOE guidelines implementing that Executive Order (46 FR 1007, January 5, 1981), and the Department of State’s “Unified Procedures Applicable to Major Federal Actions Relating to Nuclear Activities Subject to Executive Order 12114” (44 FR 65560, November 15, 1979).

§ 1021.103 Adoption of CEQ NEPA regulations.

DOE adopts the regulations for implementing NEPA published by CEQ at 40 CFR parts 1500 through 1508.

§ 1021.104 Definitions.

(a) The definitions set forth in 40 CFR part 1508 are referenced and used in this part.

(b) In addition to the terms defined in 40 CFR part 1508, the following definitions apply to this part:

Action means a project, program, plan, or policy, as discussed at 40 CFR 1508.18, that is subject to DOE’s control and responsibility. Not included within this definition are purely ministerial actions with regard to which DOE has no discretion. For example, ministerial actions to implement congressionally mandated funding for actions not proposed by DOE and as to which DOE has no discretion (i.e., statutorily mandated, congressionally initiated “passthroughs”).

Advance NOI means a formal public notice of DOE’s intent to prepare an EIS, which is published in advance of an NOI in order to facilitate public involvement in the NEPA process.

American Indian tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska native entity, which is recognized as eligible for the special programs or services provided by the United States because of their status as Indians.

Categorical exclusion means a category of actions, as defined at 40 CFR 1508.4 and listed in appendix A or B to
subpart D of this part, for which neither an EA nor an EIS is normally required.

CEQ means the Council on Environmental Quality as defined at 40 CFR 1508.6.

CEQ Regulations means the regulations issued by CEQ (40 CFR parts 1500-1508) to implement the procedural provisions of NEPA.

CERCLA-excluded petroleum and natural gas products means petroleum, including crude oil or any fraction thereof, that is not otherwise specifically listed or designated as a hazardous substance under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601.101(14)) and natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or of pipeline quality (or mixtures of natural gas and such synthetic gas).

Contaminant means a substance identified within the definition of contaminant in section 101(33) of CERCLA (42 U.S.C. 9601.101(33)).

Day means a calendar day.

DOE means the U.S. Department of Energy.

DOE proposal (or proposal) means a proposal, as discussed at 40 CFR 1508.23 (whether initiated by DOE, another Federal agency, or an applicant), for an action, if the proposal requires a DOE decision.

EA means an environmental assessment as defined at 40 CFR 1508.9.

EIS means an environmental impact statement as defined at 40 CFR 1508.11, or, unless this part specifically provides otherwise, a Supplemental EIS.

EPA means the U.S. Environmental Protection Agency.

FONSI means a Finding of No Significant Impact as defined at 40 CFR 1508.13.

Hazardous substance means a substance identified within the definition of hazardous substances in section 101(14) of CERCLA (42 U.S.C. 9601.101(14)). Radionuclides are hazardous substances through their listing under section 112 of the Clean Air Act (42 U.S.C. 7412) (40 CFR part 61, subpart H).

Host state means a state within whose boundaries DOE proposes an action at an existing facility or construction or operation of a new facility.

Host tribe means an American Indian tribe within whose tribal lands DOE proposes an action at an existing facility or construction or operation of a new facility. For purposes of this definition, tribal lands means the area of “Indian country,” as defined in 18 U.S.C. 1151, that is under the tribe’s jurisdiction. That section defines Indian country as:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Interim action means an action concerning a proposal that is the subject of an ongoing EIS and that DOE proposes to take before the ROD is issued, and that is permissible under 40 CFR 1506.1: Limitations on actions during the NEPA process.

Mitigation Action Plan means a document that describes the plan for implementing commitments made in a DOE EIS and its associated ROD, or, when appropriate, an EA or FONSI, to mitigate adverse environmental impacts associated with an action.

NEPA means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

NEPA document means a DOE NOI, EIS, ROD, EA, FONSI, or any other document prepared pursuant to a requirement of NEPA or the CEQ Regulations.

NEPA review means the process used to comply with section 102(2) of NEPA.

NOI means a Notice of Intent to prepare an EIS as defined at 40 CFR 1508.22.

Notice of Availability means a formal notice, published in the Federal Register, that announces the issuance and public availability of a draft or final
§ 1021.105 Oversight of Agency NEPA activities.

The Assistant Secretary for Environment, Safety and Health, or his/her designee, is responsible for overall review of DOE NEPA compliance. Further information on DOE’s NEPA process and the status of individual NEPA reviews may be obtained upon request from the Office of NEPA Policy and Assistance, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0119.

[61 FR 36239, July 9, 1996]

Subpart B—DOE Decisionmaking

§ 1021.200 DOE planning.

(a) DOE shall provide for adequate and timely NEPA review of DOE proposals, including those for programs, policies, projects, regulations, orders, or legislation, in accordance with 40 CFR 1501.2 and this section. In its planning for each proposal, DOE shall include adequate time and funding for proper NEPA review and for preparation of anticipated NEPA documents.

(b) DOE shall begin its NEPA review as soon as possible after the time that DOE proposes an action or is presented with a proposal.

(c) DOE shall determine the level of NEPA review required for a proposal in accordance with §1021.300 and subpart D of this part.

(d) During the development and consideration of a DOE proposal, DOE shall review any relevant planning and decisionmaking documents, whether prepared by DOE or another agency, to determine if the proposal or any of its alternatives are considered in a prior NEPA document. If so, DOE shall consider adopting the existing document, or any pertinent part thereof, in accordance with 40 CFR 1506.3.

§ 1021.210 DOE decisionmaking.

(a) For each DOE proposal, DOE shall coordinate its NEPA review with its decisionmaking. Sections 1021.211 through 1021.214 of this part specify
how DOE will coordinate its NEPA review with decision points for certain types of proposals (40 CFR 1505.1(b)).

(b) DOE shall complete its NEPA review for each DOE proposal before making a decision on the proposal (e.g., normally in advance of, and for use in reaching a decision to proceed with detailed design), except as provided in 40 CFR 1506.1 and §§1021.211 and 1021.216 of this part.

(c) During the decisionmaking process for each DOE proposal, DOE shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of its consideration of the proposal (40 CFR 1505.1(d)) and shall include such documents, comments, and responses as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS or EA is prepared for a DOE proposal, DOE shall consider the alternatives analyzed in that EIS or EA before rendering a decision on that proposal; the decision on the proposal shall be within the range of alternatives analyzed in the EA or EIS (40 CFR 1505.1(e)).

(e) When DOE uses a broad decision (such as one on a policy or program) as a basis for a subsequent narrower decision (such as one on a project or other site-specific proposal), DOE may use tiering (40 CFR 1502.20) and incorporation of material by reference (40 CFR 1502.21) in the NEPA review for the subsequent narrower proposal.

§ 1021.211 Interim actions: Limitations on actions during the NEPA process.

While DOE is preparing an EIS that is required under §1021.300(a) of this part, DOE shall take no action concerning the proposal that is the subject of the EIS before issuing an ROD, except as provided at 40 CFR 1506.1. Actions that are covered by, or are a part of, a DOE proposal for which an EIS is being prepared shall not be categorically excluded under subpart D of these regulations unless they qualify as interim actions under 40 CFR 1506.1.

§ 1021.212 Research, development, demonstration, and testing.

(a) This section applies to the adoption and application of programs that involve research, development, demonstration, and testing for new technologies (40 CFR 1502.4(c)(3)). Adoption of such programs might also lead to commercialization or other broad-scale implementation by DOE or another entity.

(b) For any proposed program described in paragraph (a) of this section, DOE shall begin its NEPA review (if otherwise required by this part) as soon as environmental effects can be meaningfully evaluated, and before DOE has reached the level of investment or commitment likely to determine subsequent development or restrict later alternatives, as discussed at 40 CFR 1502.4(c)(3).

(c) For subsequent phases of development and application, DOE shall prepare one or more additional NEPA documents (if otherwise required by this part).

§ 1021.213 Rulemaking.

(a) This section applies to regulations promulgated by DOE.  

(b) DOE shall begin its NEPA review of a proposed rule (if otherwise required by this part) while drafting the proposed regulation, and as soon as environmental effects can be meaningfully evaluated.

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

(d) If an EIS is required, DOE will normally publish the draft EIS at the time it publishes the proposed rule (40 CFR 1502.5(d)). DOE will normally combine any public hearings required for a proposed rule with the public hearings required on the draft EIS under §1021.313 of this part. The draft EIS need not accompany notices of inquiry or advance notices of proposed rulemaking that DOE may use to gather information during early stages of regulation development. When engaged in
§ 1021.214 Adjudicatory proceedings.

(a) This section applies to DOE proposed actions that involve DOE adjudicatory proceedings, excluding judicial or administrative civil or criminal enforcement actions.

(b) DOE shall complete its NEPA review (if otherwise required by this part) before rendering any final adjudicatory decision. If an EIS is required, the final EIS will normally be completed at the time of or before final staff recommendation, in accordance with 40 CFR 1502.5(c).

(c) DOE shall include any relevant NEPA documents, public and agency comments (if any) on those documents, and DOE responses to those comments, as part of the administrative record (40 CFR 1505.1(c)).

§ 1021.215 Applicant process.

(a) This section applies to actions that involve application to DOE for a permit, license, exemption or allocation, or other similar actions, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.

(b) The applicant shall:

(1) Consult with DOE as early as possible in the planning process to obtain guidance with respect to the appropriate level and scope of any studies or environmental information that DOE may require to be submitted as part of, or in support of, the application;

(2) Conduct studies that DOE deems necessary and appropriate to determine the environmental impacts of the proposed action;

(3) Consult with appropriate Federal, state, regional and local agencies, American Indian tribes and other potentially interested parties during the preliminary planning stages of the proposed action to identify environmental factors and permitting requirements;

(4) Notify DOE as early as possible of other Federal, state, regional, local or American Indian tribal actions required for project completion to allow DOE to coordinate the Federal environmental review, and fulfill the requirements of 40 CFR 1506.2 regarding elimination of duplication with state and local procedures, as appropriate;

(5) Notify DOE of private entities and organizations interested in the proposed undertaking, in order that DOE can consult, as appropriate, with these parties in accordance with 40 CFR 1501.2(d)(2); and

(6) Notify DOE if, before DOE completes the environmental review, the applicant plans to take an action that is within DOE’s jurisdiction that may have an adverse environmental impact or limit the choice of alternatives. If DOE determines that the action would have an adverse environmental impact or would limit the choice of reasonable alternatives under 40 CFR 1506.1(a), DOE will promptly notify the applicant that DOE will take appropriate action to ensure that the objectives and procedures of NEPA are achieved in accordance with 40 CFR 1506.1(b).

(c) For major categories of DOE actions involving a large number of applicants, DOE may prepare and make available generic guidance describing the recommended level and scope of environmental information that applicants should provide.

(d) DOE shall begin its NEPA review (if otherwise required by this part) as soon as possible after receiving an application described in paragraph (a) of this section, and shall independently evaluate and verify the accuracy of information received from an applicant in accordance with 40 CFR 1506.5(a). At DOE’s option, an applicant may prepare an EA in accordance with 40 CFR 1506.5(b). If an EIS is prepared, the EIS shall be prepared by DOE or by a contractor that is selected by DOE and that may be funded by the applicant, in accordance with 40 CFR 1506.5(c). The contractor shall provide a disclosure statement in accordance with 40 CFR 1506.5(c), as discussed in §1021.312(b)(4).
§ 1021.216 Procurement, financial assistance, and joint ventures.

(a) This section applies to DOE competitive and limited-source procurements, to awards of financial assistance by a competitive process, and to joint ventures entered into as a result of competitive solicitations, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part. Paragraphs (b), (c), and (i) of this section apply as well to DOE sole-source procurements of sites, systems, or processes, to noncompetitive awards of financial assistance, and to sole-source joint ventures, unless the action is categorically excluded from preparation of an EA or EIS under subpart D of this part.

(b) When relevant in DOE’s judgment, DOE shall require that offeror's submit environmental data and analyses as a discrete part of the offeror’s proposal. DOE shall specify in its solicitation document the type of information and level of detail for environmental data and analyses so required. The data will be limited to those reasonably available to offerors.

(c) DOE shall independently evaluate and verify the accuracy of environmental data and analyses submitted by offerors.

(d) For offers in the competitive range, DOE shall prepare and consider an environmental critique before the selection.

(e) The environmental critique will be subject to the confidentiality requirements of the procurement process.

(f) The environmental critique will evaluate the environmental data and analyses submitted by offerors; it may also evaluate supplemental information developed by DOE as necessary for a reasoned decision.

(g) The environmental critique will focus on environmental issues that are pertinent to a decision on proposals and will include:

1. A brief discussion of the purpose of the procurement and each offer, including any site, system, or process variations among the offers having environmental implications;
2. A discussion of the salient characteristics of each offeror’s proposed site, system, or process as well as alternative sites, systems, or processes;
3. A brief comparative evaluation of the potential environmental impacts of the offers, which will address direct and indirect effects, short-term and long-term effects, proposed mitigation measures, adverse effects that cannot be avoided, areas where important environmental information is incomplete and unavailable, unresolved environmental issues and practicable mitigating measures not included in the offeror’s proposal; and
4. To the extent known for each offer, a list of Federal, Tribal, state, and local government permits, licenses, and approvals that must be obtained.

(b) DOE shall prepare a publicly available environmental synopsis, based on the environmental critique, to document the consideration given to environmental factors and to record that the relevant environmental consequences of reasonable alternatives have been evaluated in the selection process. The synopsis will not contain business, confidential, trade secret or other information that DOE otherwise would not disclose pursuant to 18 U.S.C. 1905, the confidentiality requirements of the competitive procurement process, 5 U.S.C. 552(b) and 41 U.S.C. 423. To assure compliance with this requirement, the synopsis will not contain data or other information that may in any way reveal the identity of offerors. After a selection has been made, the environmental synopsis shall be filed with EPA, shall be made publicly available, and shall be incorporated in any NEPA document prepared under paragraph (i) of this section.

(i) If an EA or EIS is required, DOE shall prepare, consider and publish the EA or EIS in conformance with the CEQ Regulations and other provisions of this part before taking any action pursuant to the contract or award of financial assistance (except as provided
Subpart C—Implementing Procedures

§ 1021.300 General requirements.

(a) DOE shall determine, under the procedures in the CEQ Regulations and this part, whether any DOE proposal:
(1) Requires preparation of an EIS;
(2) Requires preparation of an EA; or
(3) Is categorically excluded from preparation of either an EIS or an EA.

(b) Notwithstanding any other provision of these regulations, DOE may prepare a NEPA document for any DOE action at any time in order to further the purposes of NEPA. This may be done to analyze the consequences of ongoing activities, support DOE planning, assess the need for mitigation, fully disclose the potential environmental consequences of DOE actions, or for any other reason. Documents prepared under this paragraph shall be prepared in the same manner as DOE documents prepared under paragraph (a) of this section.

§ 1021.301 Agency review and public participation.

(a) DOE shall make its NEPA documents available to other Federal agencies, states, local governments, American Indian tribes, interested groups, and the general public, in accordance with 40 CFR 1506.6, except as provided in §1021.340 of this part.

(b) Wherever feasible, DOE NEPA documents shall explain technical, scientific, or military terms or measurements using terms familiar to the general public, in accordance with 40 CFR 1502.8.

(c) DOE shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal, and may notify any other state or American Indian tribe that, in DOE’s judgment, may be affected by the proposal.

(d) DOE shall provide the host state and host tribe with an opportunity to review and comment on any DOE EA prior to DOE’s approval of the EA. DOE may also provide any other state or American Indian tribe with the same opportunity if, in DOE’s judgment, the state or tribe may be affected by the proposed action. At DOE’s discretion, this review period shall be from 14 to 30 days. DOE shall consider all comments received from a state or tribe during the review period before approving or modifying the EA, as appropriate. If all states and tribes afforded this opportunity for preapproval review waive such opportunity, or provide a response before the end of the comment period, DOE may proceed to approve or take other appropriate action on the EA before the end of the review period.

(e) Paragraphs (c) and (d) of this section shall not apply to power marketing actions, such as rate-setting, in which a state or American Indian tribe is a customer, or to any other circumstances where DOE determines that such advance information could create a conflict of interest.

§ 1021.310 Environmental impact statements.

DOE shall prepare and circulate EISs and related RODs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart. DOE shall include in draft and final EISs a disclosure statement executed by any contractor (or subcontractor) under contract with DOE to prepare the EIS document, in accordance with 40 CFR 1506.5(c).

§ 1021.311 Notice of intent and scoping.

(a) DOE shall publish an NOI in the Federal Register in accordance with 40 CFR 1501.7 and containing the elements specified in 40 CFR 1508.22 as soon as practicable after a decision is made to prepare an EIS. However, if
there will be a lengthy period of time between its decision to prepare an EIS and the time of actual preparation, DOE may defer publication of the NOI until a reasonable time before preparing the EIS, provided that DOE allows a reasonable opportunity for interested parties to participate in the EIS process. Through the NOI, DOE shall invite comments and suggestions on the scope of the EIS. DOE shall disseminate the NOI in accordance with 40 CFR 1506.6.

(b) If there will be a lengthy delay between the time DOE has decided to prepare an EIS and the beginning of the public scoping process, DOE may publish an Advance NOI in the FEDERAL REGISTER to provide an early opportunity to inform interested parties of the pending EIS or to solicit early public comments. This Advance NOI does not serve as a substitute for the NOI provided for in paragraph (a) of this section.

(c) Publication of the NOI in the FEDERAL REGISTER shall begin the public scoping process. The public scoping process for a DOE EIS shall allow a minimum of 30 days for the receipt of public comments.

(d) Except as provided in paragraph (g) of this section, DOE shall hold at least one public scoping meeting as part of the public scoping process for a DOE EIS. DOE shall announce the location, date, and time of public scoping meetings in the NOI or by other appropriate means, such as additional notices in the FEDERAL REGISTER, news releases to the local media, or letters to affected parties. Public scoping meetings shall not be held until at least 15 days after public notification. Should DOE change the location, date, or time of a public scoping meeting, or schedule additional public scoping meetings, DOE shall publicize these changes in the FEDERAL REGISTER or in other ways as appropriate.

(e) In determining the scope of the EIS, DOE shall consider all comments received during the announced comment period held as part of the public scoping process. DOE may also consider comments received after the close of the announced comment period.

(f) A public scoping process is optional for DOE supplemental EISs (40 CFR 1502.9(c)(4)). If DOE initiates a public scoping process for a supplemental EIS, the provisions of paragraphs (a) through (f) of this section shall apply.

§1021.312 [Reserved]

§1021.313 Public review of environmental impact statements.

(a) The public review and comment period on a DOE draft EIS shall be no less than 45 days (40 CFR 1506.10(c)). The public comment period begins when EPA publishes a Notice of Availability of the document in the FEDERAL REGISTER.

(b) DOE shall hold at least one public hearing on DOE draft EISs. Such public hearings shall be announced at least 15 days in advance. The announcement shall identify the subject of the draft EIS and include the location, date, and time of the public hearings.

(c) DOE shall prepare a final EIS following the public comment period and hearings on the draft EIS. The final EIS shall respond to oral and written comments received during public review of the draft EIS, as provided at 40 CFR 1503.4. In addition to the requirements at 40 CFR 1502.9(b), a DOE final EIS shall include any Statement of Findings required by 10 CFR part 1022, "Compliance with Floodplain/Wetlands Environmental Review Requirements."

(d) DOE shall use appropriate means to publicize the availability of draft and final EISs and the time and place for public hearings on a draft EIS. The methods chosen should focus on reaching persons who may be interested in or affected by the proposal and may include the methods listed in 40 CFR 1506.6(b)(3).

§1021.314 Supplemental environmental impact statements.

(a) DOE shall prepare a supplemental EIS if there are substantial changes to the proposal or significant new circumstances or information relevant to environmental concerns, as discussed in 40 CFR 1502.9(c)(3).

(b) DOE may supplement a draft EIS or final EIS at any time, to further the
§ 1021.315  

purposes of NEPA, in accordance with 40 CFR 1502.9(c)(2).

(c) When it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis.

(1) The Supplement Analysis shall discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, pursuant to 40 CFR 1502.9(c).

(2) The Supplement Analysis shall contain sufficient information for DOE to determine whether:
   (i) An existing EIS should be supplemented;
   (ii) A new EIS should be prepared; or
   (iii) No further NEPA documentation is required.

(3) DOE shall make the determination and the related Supplement Analysis available to the public for information. Copies of the determination and Supplement Analysis shall be provided upon written request. DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall prepare, circulate, and file a supplement to a draft or final EIS in the same manner as any other draft and final EISs, except that scoping is optional for a supplement. If DOE decides to take action on a proposal covered by a supplemental EIS, DOE shall prepare a ROD in accordance with the provisions of §1021.315 of this part.

(c) DOE RODs shall be published in the Federal Register and made available to the public as specified in 40 CFR 1506.6, except as provided in 40 CFR 1507.3(c) and §1021.340 of this part.

(d) No action shall be taken until the decision has been made public. DOE may implement the decision before the ROD is published in the Federal Register if the ROD has been signed and the decision and the availability of the ROD have been made public by other means (e.g., press release, announcement in local media).

(e) DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS. A revised ROD is subject to the provisions of paragraphs (b), (c), and (d) of this section.

§ 1021.320 Environmental assessments.

DOE shall prepare and circulate EAs and related FONSIs in accordance with the requirements of the CEQ Regulations, as supplemented by this subpart.

§ 1021.321 Requirements for environmental assessments.

(a) When to prepare an EA. As required by 40 CFR 1501.4(b), DOE shall prepare an EA for a proposed DOE action that is described in the classes of actions listed in appendix C to subpart D of this part, and for a proposed DOE action that is not described in any of the classes of actions listed in appendices A, B, or D to subpart D, except that an EA is not required if DOE has decided to prepare an EIS. DOE may prepare an EA on any action at any time in order to assist agency planning and decisionmaking.

(b) Purposes. A DOE EA shall serve the purposes identified in 40 CFR 1508.9(a), which include providing sufficient evidence and analysis for determining whether to prepare an EIS or to issue a FONSI. If appropriate, a DOE EA shall also include any floodplain/wetlands assessment prepared under 10 CFR part 1022 and may include analyses needed for other environmental determinations.
(c) Content. A DOE EA shall comply with the requirements found at 40 CFR 1508.9. In addition to any other alternatives, DOE shall assess the no action alternative in an EA, even when the proposed action is specifically required by legislation or a court order.

§ 1021.322 Findings of no significant impact.

(a) DOE shall prepare a FONSI only if the related EA supports the finding that the proposed action will not have a significant effect on the human environment. If a required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue a ROD before taking action on the proposal addressed by the EA, except as permitted under 40 CFR 1506.1 and §1021.211 of this part.

(b) In addition to the requirements found at 40 CFR 1508.13, a DOE FONSI shall include the following:

(1) Any commitments to mitigations that are essential to render the impacts of the proposed action not significant, beyond those mitigations that are integral elements of the proposed action, and a reference to the Mitigation Action Plan prepared under §1021.331 of this part;

(2) Any “Statement of Findings” required by 10 CFR part 1022, “Compliance with Floodplain/Wetlands Environmental Review Requirements”;

(3) The date of issuance; and

(4) The signature of the DOE approving official.

(c) DOE shall make FONSIs available to the public as provided at 40 CFR 1501.4(e)(1) and 1506.6; DOE shall make copies available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time.

(d) DOE shall issue a proposed FONSI for public review and comment before making a final determination on the FONSI if required by 40 CFR 1501.4(e)(2); DOE may issue a proposed FONSI for public review and comment in other situations as well.

(e) Upon issuance of the FONSI, DOE may proceed with the proposed action subject to any mitigation commitments expressed in the FONSI that are essential to render the impacts of the proposed action not significant.

(f) DOE may revise a FONSI at any time, so long as the revision is supported by an existing EA. A revised FONSI is subject to all provisions of paragraph (d) of this section.

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996]

§ 1021.330 Programmatic (including site-wide) NEPA documents.

(a) When required to support a DOE programmatic decision (40 CFR 1508.18(b)(3)), DOE shall prepare a programmatic EIS or EA (40 CFR 1502.4). DOE may also prepare a programmatic EIS or EA at any time to further the purposes of NEPA.

(b) A DOE programmatic NEPA document shall be prepared, issued, and circulated in accordance with the requirements for any other NEPA document, as established by the CEQ Regulations and this part.

(c) As a matter of policy when not otherwise required, DOE shall prepare site-wide EISs for certain large, multiple-facility DOE sites; DOE may prepare EISs or EAs for other sites to assess the impacts of all or selected functions at those sites.

(d) DOE shall evaluate site wide NEPA documents prepared under §1021.330(c) at least every five years. DOE shall evaluate site-wide EISs by means of a Supplement Analysis, as provided in §1021.314. Based on the Supplement Analysis, DOE shall determine whether the existing EIS remains adequate or whether to prepare a new site-wide EIS or supplement the existing EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.

(e) DOE shall evaluate site-wide EAs by means of an analysis similar to the Supplement Analysis to determine whether the existing site-wide EA remains adequate, whether to prepare a new site-wide EA, revise the FONSI, or prepare a site wide EIS, as appropriate. The determination and supporting analysis shall be made available in the appropriate DOE public reading room(s) or in other appropriate location(s) for a reasonable time.
§ 1021.331 Mitigation action plans.

(a) Following completion of each EIS and its associated ROD, DOE shall prepare a Mitigation Action Plan that addresses mitigation commitments expressed in the ROD. The Mitigation Action Plan shall explain how the corresponding mitigation measures, designed to mitigate adverse environmental impacts associated with the course of action directed by the ROD, will be planned and implemented. The Mitigation Action Plan shall be prepared before DOE takes any action directed by the ROD that is the subject of a mitigation commitment.

(b) In certain circumstances, as specified in §1021.322(b)(2), DOE shall also prepare a Mitigation Action Plan for commitments to mitigations that are essential to render the impacts of the proposed action not significant. The Mitigation Action Plan shall address all commitments to such necessary mitigations and explain how mitigation will be planned and implemented. The Mitigation Action Plan shall be prepared before the FONSI is issued and shall be referenced therein.

(c) Each Mitigation Action Plan shall be as complete as possible, commensurate with the information available regarding the course of action either directed by the ROD or the action to be covered by the FONSI, as appropriate. DOE may revise the Plan as more specific and detailed information becomes available.

(d) DOE shall make copies of the Mitigation Action Plans available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable time. Copies of the Mitigation Action Plans shall also be available upon written request.

§ 1021.340 Classified, confidential, and otherwise exempt information.

(a) Notwithstanding other sections of this part, DOE shall not disclose classified, confidential, or other information that DOE otherwise would not disclose pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552) and 10 CFR 1004.10(b) of DOE’s regulations implementing the FOIA, except as provided by 40 CFR 1506.6(f).

(b) To the fullest extent possible, DOE shall segregate any information that is exempt from disclosure requirements into an appendix to allow public review of the remainder of a NEPA document.

(c) If exempt information cannot be segregated, or if segregation would leave essentially meaningless material, DOE shall withhold the entire NEPA document from the public; however, DOE shall prepare the NEPA document, in accordance with the CEQ Regulations and this part, and use it in DOE decisionmaking.

§ 1021.341 Coordination with other environmental review requirements.

(a) In accordance with 40 CFR 1500.4(k) and (o), 1502.25, and 1506.4, DOE shall integrate the NEPA process and coordinate NEPA compliance with other environmental review requirements to the fullest extent possible.

(b) To the extent possible, DOE shall determine the applicability of other environmental requirements early in the planning process, in consultation with other agencies when necessary or appropriate, to ensure compliance and to avoid delays, and shall incorporate any relevant requirements as early in the NEPA review process as possible.

§ 1021.342 Interagency cooperation.

For DOE programs that involve another Federal agency or agencies in related decisions subject to NEPA, DOE will comply with the requirements of 40 CFR 1501.5 and 1501.6. As part of this process, DOE shall cooperate with the other agencies in developing environmental information and in determining whether a proposal requires preparation of an EIS or EA, or can be categorically excluded from preparation of either. Further, where appropriate and acceptable to the other agencies, DOE shall develop or cooperate in the development of interagency agreements to facilitate coordination and to reduce delay and duplication.

§ 1021.343 Variances.

(a) Emergency actions. DOE may take an action without observing all provisions of this part or the CEQ Regulations, in accordance with 40 CFR 1506.11, in emergency situations that
demand immediate action. DOE shall consult with CEQ as soon as possible regarding alternative arrangements for emergency actions having significant environmental impacts. DOE shall document, including publishing a notice in the Federal Register, emergency actions covered by this paragraph within 30 days after such action occurs; this documentation shall identify any adverse impacts from the actions taken, further mitigation necessary, and any NEPA documents that may be required.

(b) Reduction of time periods. On a case-by-case basis, DOE may reduce time periods established in this part that are not required by the CEQ Regulations. If DOE determines that such reduction is necessary, DOE shall publish a notice in the Federal Register specifying the revised time periods and the rationale for the reduction.

(c) Other. Any variance from the requirements of this part, other than as provided by paragraphs (a) and (b) of this section, must be soundly based on the interests of national security or the public health, safety, or welfare and must have the advance written approval of the Secretary; however, the Secretary is not authorized to waive or grant a variance from any requirement of the CEQ Regulations (except as provided for in those regulations). If the Secretary determines that a variance from the requirements of this part is within his/her authority to grant and is necessary, DOE shall publish a notice in the Federal Register specifying the variance granted and the reasons.

Subpart D—Typical Classes of Actions

§ 1021.400 Level of NEPA review.

(a) This subpart identifies DOE actions that normally:

(1) Do not require preparation of either an EIS or an EA (are categorically excluded from preparation of either document) (appendices A and B to this subpart D);

(2) Require preparation of an EA, but not necessarily an EIS (appendix C to this subpart D); or

(3) Require preparation of an EIS (appendix D to this subpart D).

§ 1021.410 Application of categorical exclusions (classes of actions that normally do not require EAs or EISs).

(a) The actions listed in appendices A and B to this subpart D are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment (categorical exclusions).

(b) To find that a proposal is categorically excluded, DOE shall determine the following:

(1) The proposal fits within a class of actions that is listed in appendix A or B to this subpart D; and

(2) There are no extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal. Extraordinary circumstances are unique situations presented by specific proposals, such as scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; or unresolved conflicts concerning alternate uses of available resources within the meaning of section 102(2)(E) of NEPA; and
(3) The proposal is not “connected” (40 CFR 1508.25(a)(1)) to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts (40 CFR 1508.25(a)(2)), and is not precluded by 40 CFR 1506.1 or §1021.211 of this part.

(c) All categorical exclusions may be applied by any organizational element of DOE. The sectional divisions in appendix B to this subpart D are solely for purposes of organization of that appendix and are not intended to be limiting.

(d) A class of actions includes activities foreseeably necessary to proposals encompassed within the class of actions (such as associated transportation activities and award of implementing grants and contracts).

APPENDIX A TO SUBPART D TO PART 1021—CATEGORICAL EXCLUSIONS APPLICABLE TO GENERAL AGENCY ACTIONS

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A9. Information gathering/data analysis/document preparation/dissemination
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A11. Technical advice and assistance to organizations
A12. Emergency preparedness planning
A13. Procedural Orders, Notices, and guidelines
A14. Approval of technical exchange arrangements
A15. Umbrella agreements for cooperation in energy research and development
A16. Routine actions necessary to support the normal conduct of agency business, such as administrative, financial, and personnel actions.

A2. Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.
A3. Adjustments, exceptions, exemptions, appeals, and stays, modifications, or rescissions of orders issued by the Office of Hearings and Appeals.
A4. Interpretations and rulings with respect to existing regulations, or modifications or rescissions of such interpretations and rulings.
A5. Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.
A6. Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.
A7. Transfer, lease, disposition, or acquisition of interests in personal property (e.g., equipment and materials) or real property (e.g., permanent structures and land), if property use is to remain unchanged; i.e., the type and magnitude of impacts would remain essentially the same.
A8. Award of contracts for technical support services, management and operation of a government-owned facility, and personal services.
A9. Information gathering (including, but not limited to, literature surveys, inventories, audits), data analysis (including computer modelling), document preparation (such as conceptual design or feasibility studies, analytical energy supply and demand studies), and dissemination (including, but not limited to, document mailings, publication, and distribution; and classroom training and informational programs), but not including site characterization or environmental monitoring. (Also see B3.1.)
A10. Reports or recommendations on legislation or rulemaking that is not proposed by DOE.
A11. Technical advice and planning assistance to international, national, state, and local organizations.
A12. Emergency preparedness planning activities, including the designation of onsite evacuation routes.
A13. Administrative, organizational, or procedural Orders, Notices, and guidelines.
A14. Approval of technical exchange arrangements for information, data, or personnel with other countries or international organizations, including, but not limited to, assistance in identifying and analyzing another country’s energy resources, needs and options.
A15 Approval of DOE participation in international "umbrella" agreements for cooperation in energy research and development activities that would not commit the U.S. to any specific projects or activities.  

[57 FR 15144, Apr. 24, 1992, as amended at 61 FR 36239, July 9, 1996]

## APPENDIX B TO SUBPART D TO PART 1021—CATEGORICAL EXCLUSIONS APPLICABLE TO SPECIFIC AGENCY ACTIONS

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B5.7 Import/export natural gas, no new construction
B5.8 Import/export natural gas, new cogeneration powerplant
B5.9 Temporary exemption for any electric powerplant
B5.10 Certain permanent exemptions for any existing electric powerplant
B5.11 Permanent exemption for mixed natural gas and petroleum
B5.12 Workover of existing oil/gas/geo-thermal well
B6 Categorical exclusions applicable to environmental restoration and waste management activities
B6.1 Small-scale, short-term cleanup actions under RCRA, Atomic Energy Act, or other authorities
B6.2 Siting/construction/operation of pilot-scale waste collection/treatment/stabilization/containment facilities
B6.3 Improvements to environmental control systems
B6.4 Siting/construction/operation/decommissioning of facility for storing pack-aged hazardous waste for 90 days or less
B6.5 Siting/construction/operation/decommissioning of facility for characterizing/sorting packaged waste, overpacking waste
B6.6 Modification of facility for storing, packaging, repacking waste (not high-level, spent nuclear fuel)
B6.7 Granting/denying petitions for allocation of commercial disposal capacity
B6.8 Modifications for waste minimization/reuse of materials
B6.9 Small-scale temporary measures to reduce migration of contaminated groundwater
B6.10 Siting/construction/operation/decommissioning of small upgraded or replace-ment waste storage facilities
B7 Categorical exclusions applicable to international activities
B7.1 Emergency measures under the International Energy Program
B7.2 Import/export of special nuclear or isotopic materials
B. CONDITIONS THAT ARE INTEGRAL ELEMENTS OF THE CLASSES OF ACTIONS IN APPENDIX B
B. The classes of actions listed below include the following conditions as integral elements of the classes of actions. To fit within the classes of actions listed below, a proposal must be one that would not:
(1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, including requirements of DOE and/or Executive Orders.
(2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators), but the proposal may include categorically excluded waste storage, disposal, recovery, or treatment actions.
(3) Disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases; or
(d) Adversely affect environmentally sensitive resources. An action may be categorically excluded if, although sensitive resources are present on a site, the action would not adversely affect those resources (e.g., construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:

(i) Property (e.g., sites, buildings, structures, objects) of historic, archeological, or architectural significance designated by Federal, state, or local governments or property eligible for listing on the National Register of Historic Places;

(ii) Federally-listed threatened or endangered species or their habitat (including critical habitat), Federally- or state-designated endangered species or their habitat, or state-listed threatened or threatened species or their habitat;

(iii) Wetlands regulated under the Clean Water Act (33 U.S.C. 1344) and floodplains;

(iv) Areas having a special designation such as Federally- and state-designated wilderness areas, national parks, national natural landmarks, wild and scenic rivers, state and Federal wildlife refuges, and marine sanctuaries;

(v) Prime agricultural lands;

(vi) Special sources of water (such as sole-source aquifers, wellhead protection areas, and other water sources that are vital in a region); and

(vii) Tundra, coral reefs, or rain forests.

B1. Categorical Exclusions Applicable to Facility Operation

B1.1 Rate increases for products or services marketed by parts of DOE other than Power Marketing Administrations and approval of rate increases for non-DOE entities that do not exceed the change in the overall price level in the economy (inflation), as measured by the Gross National Product (GNP) fixed weight price index published by the Department of Commerce, during the period since the last rate increase. (Also see B4.3.)

B1.2 Training exercises and simulations (including, but not limited to, firing-range training, emergency response training, fire fighter and rescue training, and spill cleanup training).

B1.3 Routine maintenance activities and custodial services for buildings, structures, rights-of-way, infrastructures (e.g., pathways, roads, and railroads), vehicles and equipment, and localized vegetation and pest control, during which operations may be suspended and resumed. Custodial services are activities to preserve facility appearance, working conditions, and sanitation, such as cleaning, window washing, lawn mowing, trash collection, painting, and snow removal. Routine maintenance activities, corrective (that is, repair), preventive, and predictive, are required to maintain and preserve buildings, structures, infrastructures, and equipment in a condition suitable for a facility to be used for its designated purpose. Routine maintenance may result in replacement to the extent that replacement is in kind and is not a substantial upgrade or improvement. In kind replacement includes installation of new components to replace outmoded components if the replacement does not result in a significant change in the expected useful life, design capacity, or function of the facility. Routine maintenance does not include replacement of a major component that significantly extends the originally intended useful life of a facility (for example, it does not include the replacement of a reactor vessel near the end of its useful life). Routine maintenance activities include, but are not limited to:

(a) Repair of facility equipment, such as lathes, mills, pumps, and presses;

(b) Door and window repair or replacement;

(c) Wall, ceiling, or floor repair;

(d) Reroofing;

(e) Plumbing, electrical utility, and telephone service repair;

(f) Routine replacement of high-efficiency particulate air filters;

(g) Inspection and/or treatment of currently installed utility poles;

(h) Repair of road embankments;

(i) Repair or replacement of fire protection sprinkler systems;

(j) Road and parking area resurfacing, including construction of temporary access to facilitate resurfacing;

(k) Erosion control and soil stabilization measures (such as reseeding and revegetation);

(l) Surveillance and maintenance of surplus facilities in accordance with DOE Order 5820.2, “Radioactive Waste Management”;

(m) Repair and maintenance of transmission facilities, including replacement of conductors of the same nominal voltage, poles, circuit breakers, transformers, capacitors, monitoring wells, lysimeters, weather stations, and flumes; and

(o) Routine decontamination of the surfaces of equipment, rooms, hot cells, or other interior surfaces of buildings (by such activities as wiping with rags, using strippable latex, and minor vacuuming), including removal of contaminated intact equipment and
other materials (other than spent nuclear fuel or special nuclear material in nuclear reactors).

B1.4 Installation or modification of air conditioning systems required for temperature control for operation of existing equipment.

B1.5 Minor improvements to cooling water systems within an existing building or structure if the improvements would not: (1) Create new sources of water or involve new receiving waters; (2) adversely affect water withdrawals or the temperature of discharged water; or (3) increase introductions of or involve new introductions of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products.

B1.6 Installation or modification of retention tanks or small (normally under one acre) basins and associated piping and pumps for existing operations to control runoff or spills (such as under 40 CFR part 112). Modifications include, but are not limited to, installing liners or covers.

B1.7 Acquisition, installation, operation, and removal of communication systems, data processing equipment, and similar electronic equipment.

B1.8 Modifications to screened water intake and outflow structures such that intake velocities and volumes and water effluent quality and volumes are consistent with existing permit limits.

B1.9 Placement of airway safety markings and painting (but excluding lighting) of existing electrical transmission lines and antenna structures in accordance with Federal Aviation Administration standards.

B1.10 Routine, onsite storage at an existing facility of activated equipment and material (including lead) used at that facility, to allow reuse after decay of radioisotopes with short half-lives.

B1.11 Installation of fencing, including that for border marking, that will not adversely affect wildlife movements or surface water flow.

B1.12 Detonation or burning of explosives or propellants that failed in outdoor tests (i.e., duds) or were damaged in outdoor tests (e.g., by fracturing) in outdoor areas designated and routinely used for explosive detonation or burning under an existing permit issued by state or local authorities.

B1.13 Construction, acquisition, and relocation of onsite pathways and short onsite access roads and railroads.

B1.14 Refueling of an operating nuclear reactor, during which operations may be suspended and then resumed.

B1.15 Siting, construction (or modification), and operation of support buildings and support structures (including, but not limited to, trailers and prefabricated buildings) within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). Covered support buildings and structures include those for office purposes; parking; cafeteria services; education and training; visitor reception; computer and data processing services; employee health services or recreation activities; routine maintenance activities; storage of supplies and equipment for administrative services and routine maintenance activities; security (including security posts); fire protection; and similar support purposes, but excluding facilities for waste storage activities, except as provided in other parts of this appendix.

B1.16 Removal of asbestos-containing materials from buildings in accordance with 40 CFR part 61 (National Emission Standards for Hazardous Air Pollutants), subpart M (National Emission Standard for Asbestos); 40 CFR part 763 (Asbestos); subpart G (Asbestos Abatement Projects); 29 CFR part 1910, subpart I (Personal Protective Equipment), §1910.134 (Respiratory Protection); subpart Z (Toxic and Hazardous Substances), §1910.1001 (Asbestos, tremolite, anthophyllite and actinolite); and 29 CFR part 1926 (Safety and Health Regulations for Construction), subpart D (Occupational Health and Environmental Controls), §1926.58 (Asbestos, tremolite, anthophyllite, and actinolite), other appropriate Occupational Safety and Health Administration standards in title 29, chapter XVII of the CFR, and appropriate state and local requirements, including certification of removal contractors and technicians.

B1.17 Removal of polychlorinated biphenyl (PCB)-containing items, such as transformers or capacitors, PCB-containing oils flushed from transformers, PCB-flushing solutions, and PCB-containing spill materials from buildings or other aboveground locations in accordance with 40 CFR part 761 (Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions).

B1.18 Siting, construction, and operation of additional water supply wells (or replacement wells) within an existing well field, or modification of an existing water supply well to restore production, if there would be no drawdown other than in the immediate vicinity of the pumping well, no resulting long-term decline of the water table, and no degradation of the aquifer from the new or replacement well.

B1.19 Siting, construction, and operation of microwave and radio communication towers and associated facilities, if the towers and associated facilities would not be in an area of great visual value.

B1.20 Small-scale activities undertaken to protect, restore, or improve fish and wildlife habitat, fish passage facilities (such as fish ladders or minor diversion channels), or fisheries.
B1.21 Noise abatement measures, such as construction of noise barriers and installation of noise control materials.

B1.22 Relocation of buildings (including, but not limited to, smoke stacks and parking lot surfaces).

B1.23 Demolition and subsequent disposal of buildings, equipment, and support structures (including, but not limited to, smoke stacks and parking lot surfaces).

B1.24 Transfer, lease, disposition or acquisition of interests in uncontaminated permanent or temporary structures, equipment therein, and only land that is necessary for use of the transferred structures and equipment, for residential, commercial, or industrial uses (including, but not limited to, office space, warehouses, equipment storage facilities) where, under reasonably foreseeable uses, there would not be any lessening in quality, or increases in volumes, concentrations, or discharge rates of wastes, air emissions, or water effluents, and environmental impacts would generally be similar to those before the transfer, lease, disposition, or acquisition of interests. Uncontaminated means that there would be no potential for release of substances at a level, or in a form, that would pose a threat to public health or the environment.

B1.25 Transfer, lease, disposition or acquisition of interests in uncontaminated land for habitat preservation or wildlife management, and only associated buildings that support these purposes. Uncontaminated means that there would be no potential for release of substances at a level, or in a form, that would pose a threat to public health or the environment.

B1.26 Siting, construction (or expansion, modification, or replacement), operation, and decommissioning of small (total capacity less than approximately 250,000 gallons per day) wastewater and surface water treatment facilities whose liquid discharges are externally regulated, and small potable water and sewage treatment facilities.

B1.27 Activities that are required for the disconnection of utility services such as water, steam, telecommunications, and electrical power after it has been determined that the continued operation of these systems is not needed for safety.

B1.28 Minor activities that are required to place a facility in an environmentally safe condition where there is no proposed use of the facility. These activities would include, but are not limited to, reducing surface contamination, and removing materials, equipment or waste, such as final defueling of a reactor, where there are adequate existing facilities for the treatment, storage, or disposal of the materials, equipment or waste. These activities would not include conditioning, treatment, or processing of spent nuclear fuel, high-level waste, or special nuclear materials.

B1.29 Siting, construction, operation, and decommissioning of a small (less than approximately 10 acres) onsite disposal facility for construction and demolition waste which would not release substances at a level, or in a form, that would pose a threat to public health or the environment. These wastes, as defined in the Environmental Protection Agency’s regulations under the Resource Conservation and Recovery Act, specifically 40 CFR 261.101, include building materials, packaging, and rubble.

B1.30 Transfer actions, in which the predominant activity is transportation, and in which the amount and type of materials, equipment or waste to be moved is small and incidental to the amount of such materials, equipment, or waste that is already a part of ongoing operations at the receiving site. Such transfers are not regularly scheduled as part of ongoing routine operations.

B1.31 Relocation of machinery and equipment, such as analytical laboratory apparatus, electronic hardware, maintenance equipment, and health and safety equipment, including minor construction necessary for removal and installation, where uses of the relocated items will be similar to their former uses and consistent with the general missions of the receiving structure.

B1.32 Traffic flow adjustments to existing roads at DOE sites (including, but not limited to, stop sign or traffic light installation, adjusting direction of traffic flow, and adding turning lanes). Road adjustments such as widening or realignment are not included.

B2. Categorical Exclusions Applicable to Safety and Health

B2.1 Modifications of an existing structure to enhance workplace habitability (including, but not limited to: improvements to lighting, radiation shielding, or heating/ventilating/air conditioning and its instrumentation; and noise reduction).

B2.2 Installation of, or improvements to, building and equipment instrumentation (including, but not limited to, remote control panels, remote monitoring capability, alarm and surveillance systems, control systems to provide automatic shutdown, fire detection and protection systems, announcement and emergency warning systems, criticality and radiation monitors and alarms, and safeguards and security equipment).

B2.3 Installation of, or improvements to, equipment for personnel safety and health, including, but not limited to, eye washes, safety showers, radiation monitoring devices, and fumehoods and associated collection and exhaust systems, provided that emissions would not increase.

B2.4 Development and implementation of Equipment Qualification Programs (under...
DOE Order 5480.6, “Safety of DOE-owned Nuclear Reactors”) to augment information on safety-related system components or to improve systems reliability.

B2.5 Safety and environmental improvements of a facility, including replacement and upgrade of facility components, that do not result in a significant change in the expected useful life, design capacity, or function of the facility and during which operations may be suspended and then resumed. Improvements may include, but are not limited to: Replacement/upgrade of control valves, in-core monitoring devices, facility air filtration systems, or substation transformers or capacitors; addition of structural bracing to meet earthquake standards and/or sustain high wind loading; and replacement of aboveground or belowground tanks and related piping if there is no evidence of leakage, based on testing that meets performance requirements in 40 CFR part 280, subpart D (40 CFR part 280.40). This includes activities taken under RCRA, subtitle I; 40 CFR part 265, subpart J; 40 CFR part 280, subparts B, C, and D; and other applicable state, Federal and local requirements for underground storage tanks. These actions do not include rebuilding or modifying substantial portions of a facility, such as replacing a reactor vessel.

B2.6 Packaging, transportation, and storage of radioactive materials from the public domain, in accordance with the Atomic Energy Act upon a request by the Nuclear Regulatory Commission or other cognizant agency, which would include a State that regulates radioactive materials under an agreement with the Nuclear Regulatory Commission or other agencies that may, under unusual circumstances, have responsibilities regarding the materials that are included in the categorical exclusion. Covered materials are those for which possession and use by Nuclear Regulatory Commission licensees has been categorically excluded under 10 CFR 51.22(14) or its successors. Examples of these radioactive materials (which may contain source, byproduct or special nuclear materials) are density gauges, therapeutic medical devices, generators, reagent kits, irradiators, analytical instruments, well monitoring equipment, uranium shielding material, depleted uranium military munitions, and packaged radioactive waste not exceeding 50 curies.

B3. Categorical Exclusions Applicable to Site Characterization, Monitoring, and General Research

B3.1 Onsite and offsite site characterization and environmental monitoring, including siting, construction (or modification), operation, and dismantlement or closing (abandonment) of characterization and monitoring devices and siting, construction, and associated operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis. Activities covered include, but are not limited to, site characterization and environmental monitoring under CERCLA and RCRA. Specific activities include, but are not limited to:

(a) Geophysical, geophysical (such as gravity, magnetic, electrical, seismic, and radar), geochemical, and engineering surveys and mapping, including the establishment of survey marks;
(b) Installation and operation of field instruments, such as stream-gauging stations or flow-measuring devices, telemetry systems, geochemical monitoring tools, and geophysical exploration tools;
(c) Drilling of wells for sampling or monitoring of groundwater or the vadose (unsaturated) zone, well logging, and installation of water-level recording devices in wells;
(d) Aquifer response testing;
(e) Installation and operation of ambient air monitoring equipment;
(f) Sampling and characterization of water, soil, rock, or contaminants;
(g) Sampling and characterization of water effluents, air emissions, or solid waste streams;
(h) Installation and operation of meteorological towers and associated activities, including assessment of potential wind energy resources;
(i) Sampling of flora or fauna; and
(j) Archeological, historic, and cultural resource identification in compliance with 36 CFR part 800 and 43 CFR part 7.

B3.2 Aviation activities for survey, monitoring, or security purposes that comply with Federal Aviation Administration regulations.

B3.3 Field and laboratory research, inventory, and information collection activities that are directly related to the conservation of fish or wildlife resources and that involve only negligible habitat destruction or population reduction.

B3.4 Drop, puncture, water-immersion, thermal, and fire tests of transport packaging for radioactive or hazardous materials to certify that designs meet the requirements of 49 CFR §§173.411 and 173.412 and requirements of severe accident conditions as specified in 10 CFR §71.73.

B3.5 Tank car tests under 49 CFR part 179 (including, but not limited to, tests of safety relief devices, pressure regulators, and thermal protection systems).

B3.6 Siting, construction (or modification), operation, and decommissioning of facilities for indoor bench-scale research projects and conventional laboratory operations (for example, preparation of chemical standards and sample analysis); small-scale research and development projects; and small-scale pilot projects (generally less
than two years) conducted to verify a concept before demonstration actions. Construction (or modification) will be within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). See also C12.

B3.7 Siting, construction, and operation of new infill exploratory and experimental (test) oil, gas, and geothermal wells which are to be drilled in a geological formation that has existing operating wells.

B3.8 Outdoor ecological and other environmental research (including siting, construction, and operation of a small-scale laboratory building or renovation of a room in an existing building for sample analysis) in a small area (generally less than five acres) that would not result in any permanent change to the ecosystem.

B3.9 Demonstration actions proposed under the Clean Coal Technology Demonstration Program, if the actions would not increase the quantity or rate of air emissions. These demonstration actions include, but are not limited to:

(a) Test treatment of 20 percent or less of the throughput product (solid, liquid, or gas) generated at an existing and fully operational coal combustion or coal utilization facility;

(b) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that requires only minor modifications to the existing structures at an existing coal combustion or coal utilization facility for which the existing use remains unchanged; and

(c) Addition or replacement of equipment for reduction or control of sulfur dioxide, oxides of nitrogen, or other regulated substances that involves no permanent change in the quantity or quality of coal being burned or used and involves no permanent change to the ecosystem.

B3.10 Siting, construction, operation, and decommissioning of a particle accelerator, including electron beam accelerator with primary beam energy less than approximately 100 MeV, and associated beamlines, storage rings, colliders, and detectors for research and medical purposes, within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible), or internal modification of any accelerator facility regardless of energy that does not increase primary beam energy or current.

B3.11 Outdoor tests and experiments for the development, quality assurance, or reliability of materials and equipment (including, but not limited to, weapon system components), under controlled conditions that would not involve source, special nuclear, or byproduct materials. Covered activities may include, but are not limited to, burn tests (such as tests of electric cable fire resistance or the combustion characteristics of fuels), impact tests (such as pneumatic ejector tests using earthen embankments or concrete slabs designated and routinely used for that purpose), or drop, puncture, water-immersion, or thermal tests.

B3.12 Siting, construction (or modification), operation, and decommissioning of microbiological and biomedical diagnostic, treatment and research facilities (excluding Biosafety Level-3 and Biosafety Level-4; reference: Biosafety in Microbiological and Biomedical Laboratories, 3rd Edition, May 1993, U.S. Department of Health and Human Services Public Health Service, Centers for Disease Control and Prevention, and the National Institutes of Health (HHS Publication No. (CDC) 93-8395)) including, but not limited to, laboratories, treatment areas, offices, and storage areas, within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible). Operation may include the purchase, installation, and operation of biomedical equipment, such as commercially available cyclotrons that are used to generate radioisotopes and radiopharmaceuticals, and commercially available biomedical imaging and spectroscopy instrumentation.

B3.13 Performing magnetic fusion experiments that do not use tritium as fuel, with existing facilities (including necessary modifications).

B4. Categorical Exclusions Applicable to Power Marketing Administrations and to All of DOE with Regard to Power Resources

B4.1 Establishment and implementation of contracts, marketing plans, policies, allocation plans, or acquisition of excess electric power that does not involve: (1) the integration of a new generation resource, (2) physical changes in the transmission system beyond the previously developed facility area, unless the changes are themselves categorically excluded, or (3) changes in the normal operating limits of generation resources.

B4.2 Export of electric energy as provided by Section 202(e) of the Federal Power Act over existing transmission systems or using transmission system changes that are themselves categorically excluded.

B4.3 Rate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits.

B4.4 Power marketing services, including storage, load shaping, seasonal exchanges, or other similar activities if the operations of
generating projects would remain within normal operating limits.

B4.5 Temporary adjustments to river operations to accommodate day-to-day river fluctuations, power demand changes, fish and wildlife conservation program requirements, and other external events if the adjustments would occur within the existing operating constraints of the particular hydrosystem operation.

B4.6 Additions or modifications to electric power transmission facilities that would not affect the environment beyond the previously developed facility area including, but not limited to, switchyard rock grounding upgrades, secondary containment projects, paving projects, seismic upgrading, tower modifications, changing insulators, and replacement of poles, circuit breakers, conductors, transformers, and crossarms.

B4.7 Adding fiber optic cable to transmission structures or burying fiber optic cable in existing transmission line rights-of-way.

B4.8 New electricity transmission agreements, and modifications to existing transmission arrangements, to use a transmission facility of one system to transfer power of and for another system, if no new generation projects would be involved and no physical changes in the transmission system would be made beyond the previously developed facility area.

B4.9 Grant or denial of requests for multiple use of a transmission facility rights-of-way, such as grazing permits and crossing agreements, including electric lines, water lines, and drainage culverts.

B4.10 Deactivation, dismantling, and removal of electric powerlines, substations, switching stations, and other transmission facilities, and right-of-way abandonment.

B4.11 Construction of electric power sub-stations (including switching stations and support facilities) with power delivery at 230 kV or below, or modification (other than design process flow rates or affect other instrumentation that would not change design process flow rates or affect permitted air emissions.

B5.1 Actions to conserve energy, demonstrate potential energy conservation, and promote energy-efficiency that do not increase the indoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, designers), organizations (such as utilities), and state and local governments. Covered actions include, but are not limited to: programmed lowering of thermostatic settings, placement of timers on hot water heaters, installation of solar hot water systems, installation of efficient lighting, improvements in generator efficiency and appliance efficiency ratings, development of energy-efficient manufacturing or industrial practices, and small-scale conservation and renewable energy research and development and pilot projects. The actions could involve building renovations or new structures in commercial, residential, agricultural, or industrial sectors. These actions do not include rulemakings, standard-settings, or proposed DOE legislation.

B5.2 Modifications to oil, gas, and geothermal facility pump and piping configurations, manifolds, metering systems, and other instrumentation that would not affect the environment beyond the previously developed facility area.

B5.3 Modification (but not expansion) or abandonment (including plugging), which is not part of site closure, of crude oil storage access wells, brine injection wells, geothermal wells, and gas wells.

B5.4 Repair or replacement of sections of a crude oil, produced water, brine, or geothermal pipeline, if the actions are determined by the Army Corps of Engineers to be within the maintenance provisions of a DOE permit under section 404 of the Clean Water Act.

B5.5 Construction and subsequent operation of short crude oil, steam, geothermal, or natural gas pipeline segments between DOE facilities and existing transportation, storage, or refining facilities within a single industrial complex, if the pipeline segments are within existing rights-of-way.

B5.6 Removal of oil and contaminated materials recovered in oil spill cleanup operations in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and disposed of in accordance with local contingency plans in accordance with the NCP.

B5.7 Approval of new authorization or amendment of existing authorization to import/export natural gas under section 3 of the...
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Natural Gas Act that does not involve new construction and only requires operational changes, such as an increase in natural gas throughput, change in transportation, or change in storage operations.

B5.8 Approval of new authorization or amendment of existing authorization to import/export natural gas under section 3 of the Natural Gas Act involving a new cogeneration powerplant (as defined in the Powerplant and Industrial Fuel Use Act) within or adjacent to an existing industrial complex and requiring less than 10 miles of new gas pipeline.

B5.9 The grant or denial of any temporary exemption under the Powerplant and Industrial Fuel Use Act of 1978 for any electric powerplant.

B5.10 The grant or denial of any permanent exemption under the Powerplant and Industrial Fuel Use Act of 1978 of any existing electric powerplant other than an exemption under (1) section 312(c) relating to cogeneration, (2) section 312(l) relating to scheduled equipment outages, (3) section 312(b) relating to certain state or local requirements, and (4) section 312(g) relating to certain intermediate load powerplants.

B5.11 The grant or denial of a permanent exemption from the prohibitions of Title II of the Powerplant and Industrial Fuel Use Act of 1978 for any new electric powerplant to permit the use of certain fuel mixtures containing natural gas or petroleum.

B5.12 Workover (operations to restore production, such as deepening, plugging back, pulling and resetting lines, and squeeze cementing) of an existing oil, gas, or geothermal well to restore production when cementing) of an existing oil, gas, or geothermal well to restore production when face impoundments if needed to maintain the integrity of the structures; and involving a new cogeneration powerplant (as defined in the Powerplant and Industrial Fuel Use Act) within or adjacent to an existing industrial complex and requiring less than 10 miles of new gas pipeline.

B6. Categorical Exclusions Applicable to Environmental Restoration and Waste Management Activities

B6.1 Small-scale, short-term cleanup actions, under RCRA, Atomic Energy Act, or other authorities, less than approximately 5 million dollars in cost and 5 years duration, to reduce risk to human health or the environment from the release or threat of release of a hazardous substance other than high-level radioactive waste and spent nuclear fuel, including treatment (e.g., incineration), recovery, storage, or disposal of wastes at existing facilities currently handling the type of waste involved in the action. These actions include, but are not limited to:

(a) Excavation or consolidation of contaminated soils or materials from drainage channels, retention basins, ponds, and spill areas that are not receiving contaminated surface water or wastewater, if surface water or groundwater would not collect and if such actions would reduce the spread of, or direct contact with, the contamination;

(b) Removal of bulk containers (for example, drums, barrels) that contain or may contain hazardous substances, pollutants, contaminants, CERCLA-excluded petroleum or natural gas products, or hazardous wastes (designated in 40 CFR part 261 or applicable state requirements), if such actions would reduce the likelihood of spillage, leakage, fire, explosion, or exposure to humans, animals, or the food chain;

(c) Removal of an underground storage tank including its associated piping and underlying containment systems in compliance with RCRA, subtitle I; 40 CFR part 265, subpart J; and 40 CFR part 280, subparts F and G if such action would reduce the likelihood of spillage, leakage, or the spread of, or direct contact with, contamination;

(d) Repair or replacement of leaking containers;

(e) Capping or other containment of contaminated soils or sludges if the capping or containment would not affect future groundwater remediation and if needed to reduce migration of hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products into soil, groundwater, surface water, or air;

(f) Drainage or closing of man-made surface impoundments if needed to maintain the integrity of the structures;

(g) Confinement or perimeter protection using dikes, trenches, ditches, diversions, or installing underground barriers, if needed to reduce the spread of, or direct contact with, the contamination;

(h) Stabilization, but not expansion, of berms, dikes, impoundments, or caps if needed to maintain integrity of the structures;

(i) Segregation of wastes that may react with one another or form a mixture that could result in adverse environmental impacts;

(k) Use of chemicals and other materials to neutralize the pH of wastes;

(l) Use of chemicals and other materials to retard the spread of the release or to mitigate its effects if the use of such chemicals would reduce the spread of, or direct contact with, the contamination;

(m) Installation and operation of gas ventilation systems in soil to remove methane or petroleum vapors without any toxic or radioactive co-contaminants if appropriate filtration or gas treatment is in place;

(n) Installation of fences, warning signs, or other security or site control precautions if
B6.4 Siting, construction (or modification or expansion), operation, and decommissioning of an onsite facility for storing packaged hazardous waste (as designated in 40 CFR part 261) for 90 days or less or for longer periods as provided in 40 CFR 262.34 (d), (e), or (f) (e.g., accumulation or satellite areas).

B6.5 Siting, construction (or modification or expansion), operation, and decommissioning of an onsite facility for characterizing and sorting previously packaged waste or for overpackaging waste, other than high-level radioactive waste, if operations do not involve unpacking waste. These actions do not include waste storage (covered under B6.4, B6.6, B6.10, and C16) or the handling of spent nuclear fuel.

B6.6 Modification (excluding increases in capacity) of an existing structure used for storing, packaging, or repacking waste other than high-level radioactive waste or spent nuclear fuel, to handle the same class of waste as currently handled at that structure.

B6.7 Under the Low-Level Radioactive Waste Policy Amendments Act of 1985 (5(c)(5)), granting of a petition qualified under 10 CFR 730.6 for allocation of commercial disposal capacity for an unusual or unexpected volume of commercial low-level radioactive waste or denying such a petition when adequate storage capacity exists at the petitioner’s facility.

B6.8 Minor operational changes at an existing facility to minimize waste generation and for reuse of materials. These changes include, but are not limited to, adding filtration and recycle piping to allow reuse of machining oil, setting up a sorting area to improve process efficiency, and segregating two waste streams previously mingled and assigning new identification codes to the two resulting wastes.

B6.9 Small-scale temporary measures to reduce migration of contaminated groundwater, including the siting, construction, operation, and decommissioning of necessary facilities. These measures include, but are not limited to, pumping, treating, storing, and reinjecting water, by mobile units or facilities that are built and then removed at the end of the action.

B6.10 Site, construction (or modification), operation, and decommissioning of a small upgraded or replacement facility (less than approximately 50,000 square feet in area) at a DOE site within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible) for storage of waste that is already at the site at the time the storage capacity is to be provided. These actions do not include the storage of high-level radioactive waste, spent nuclear fuel or any waste that requires special precautions to prevent nuclear criticality. See also B6.4, B6.5, B6.6, and C16.

B7. Categorical Exclusions Applicable to International Activities

B7.1 Planning and implementation of emergency measures pursuant to the International Energy Program. B7.2 Approval of import or export of small quantities of special nuclear materials or isotopic materials in accordance with the Nuclear Non-Proliferation Act of 1978 and the “Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978” (33 FR 23326, June 9, 1978).

Appendix C to Subpart D to Part 1021—Classes of Actions That Normally Require EAs But Not Necessarily EISs

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C1. [Reserved]
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C3. Electric power marketing rate changes, not within normal operating limits.
C4. Reconstructing and constructing electric powerlines.
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C7. Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving minor new construction (other than a cogeneration powerplant), such as adding new connections, looping, or compression to an existing natural gas pipeline or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way.
C8. Protection, restoration, or improvement of fish and wildlife habitat, fish passage facilities, and fish hatcheries if the proposed action may adversely affect an environmentally sensitive resource.
C10. [Reserved]
C11. Siting, construction, and operation of water treatment facilities greater than approximately 250,000 gallons per day capacity.
C12. Siting, construction, and operation of energy system prototypes.
C13. Import/export natural gas, minor new construction (other than a cogeneration powerplant).
C14. Siting, construction, and operation of water treatment facilities greater than approximately 250,000 gallons per day capacity.
C15. Siting, construction, and operation of research and development incinerators/nonhazardous waste incinerators.
C16. Siting, construction, and operation of decommissioning of large waste storage facilities.
C17. Siting/construction/operation/decommissioning of a low- or medium-energy particle acceleration facility including electron beam acceleration facilities, and associated beamlines, storage rings, colliders, and detectors for research and medical purposes, within or contiguous to an already developed area (where active utilities and currently used roads are readily accessible).
C18. Siting, construction, and operation of energy system prototypes including, but not limited to, wind resource, hydropower, geothermal, fossil fuel, biomass, and solar energy pilot projects.
C20. Implementation of a Power Marketing Administration system-wide erosion control program.
C21. Siting, construction, and operation of generation resources greater than 50 average megawatts, or (3) service to discrete new loads of 10 average megawatts or more over a 12 month period. This applies to power marketing operations and to siting, construction, and operation of power generating facilities at DOE sites.
C22. Reconstructing (upgrading or rebuilding) existing electric powerlines more than approximately 20 miles in length or constructing new electric powerlines more than approximately 10 miles in length.
C24. Implementation of a Power Marketing Administration system-wide erosion control program.
C25. Establishment and implementation of contracts, policies, marketing plans, or allocation plans for the allocation of electric power that do not involve (1) the addition of new generation resources greater than 50 average megawatts, (2) major changes in the operating limits of generation resources greater than 50 average megawatts, or (3) service to discrete new loads of 10 average megawatts or more over a 12 month period.
C26. Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving minor new construction (other than a cogeneration powerplant), such as adding new connections, looping, or compression to an existing natural gas pipeline or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way.
C27. Establishment and implementation of contracts, policies, marketing plans, or allocation plans for the allocation of electric power that do not involve (1) the addition of new generation resources greater than 50 average megawatts, (2) major changes in the operating limits of generation resources greater than 50 average megawatts, or (3) service to discrete new loads of 10 average megawatts or more over a 12 month period.
whose liquid discharges are not subject to external regulation.

C15 Siting, construction (or expansion), and operation of research and development incinerators for any type of waste and of any other incinerators that would treat nonhazardous solid waste (as designated in 40 CFR Part 261.4(b)).

C16 Siting, construction (or modification to increase capacity), operation, and decommissioning of packaging and unpacking facilities (that may include characterization operations) and large storage facilities (greater than approximately 50,000 square feet in area) for waste, except high-level radioactive waste, generated onsite or resulting from activities connected to site operations. These actions do not include storage, packaging, or unpacking of spent nuclear fuel. See also B6.4, B6.5, B6.6, and B6.10.


APPENDIX D TO SUBPART D TO PART 1021—CLASSES OF ACTIONS THAT NORMALLY REQUIRE EISs

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D13 Strategic Systems, as defined in DOE Order 430.1, “Life-Cycle Asset Management,” and designated by the Secretary.
D2 Siting, construction, operation, and decommissioning of nuclear fuel reprocessing facilities.
D3 Siting, construction, operation, and decommissioning of uranium enrichment facilities.

D4 Siting, construction, operation, and decommissioning of power reactors, nuclear material production reactors, and test and research reactors.

D5 Main transmission system additions (that is, additions of new transmission lines) to a Power Marketing Administration’s main transmission grid.

D6 Integrating transmission facilities (that is, transmission system additions for integrating major new sources of generation into a Power Marketing Administration’s main grid).

D7 Establishment and implementation of contracts, policies, marketing plans or allocation plans for the allocation of electric power that involve (1) the addition of new generation resources greater than 50 average megawatts, (2) major changes in the operating limits of generation resources greater than 50 average megawatts, or (3) service to discrete new loads of 10 average megawatts or more over a 12 month period. This applies to power marketing operations and to siting construction, and operation of power generating facilities at DOE sites.

D8 Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving major new natural gas pipeline construction or related facilities, such as construction of new liquid natural gas (LNG) terminals, regasification or storage facilities, or a significant expansion of an existing pipeline or related facility or LNG terminal, regasification, or storage facility.

D9 Approval or disapproval of an application to import/export natural gas under section 3 of the Natural Gas Act involving a significant operational change, such as a major increase in the quantity of liquid natural gas imported or exported.

D10 Siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel, including geologic repositories, but not including onsite replacement or upgrades of storage facilities for spent nuclear fuel at DOE sites where such replacement or upgrade will not result in increased storage capacity.

D11 Siting, construction (or expansion), and operation of a disposal facility for transuranic (TRU) waste and TRU mixed waste (TRU waste also containing hazardous waste as designated in 40 CFR part 261).

D12 Siting, construction, and operation of incinerators, other than research and development incinerators or incinerators for nonhazardous solid waste (as designated in 40 CFR part 261.4(b)).

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

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1022.18 Timing of floodplain/wetlands actions.
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1022.20 Public inquiries.
1022.21 Updating regulations.

Authority: E.O. 11988 (May 24, 1977); and E.O. 11990 (May 24, 1977).

Source: 44 FR 12596, Mar. 7, 1979, unless otherwise noted.

Subpart A—General

§ 1022.3 Policy.

DOE shall exercise leadership and take action to:

(a) Avoid to the extent possible the long- and short-term adverse impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

(b) Incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

(1) Reduce the hazard and risk of flood loss;

(2) Minimize the impact of floods on human safety, health, and welfare;

(3) Restore and preserve natural and beneficial values served by floodplains;
§ 1022.4 Definitions.

For purposes of this part:
(a) Action means any DOE activity, including, but not limited to:
   (1) Acquiring, managing, and disposing of Federal lands and facilities;
   (2) DOE-undertaken, financed, or assisted construction and improvements; and
   (3) The conduct of DOE activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities.
(b) Base Flood means that flood which has a 1 percent chance of occurrence in any given year (also known as a 100-year flood).

(c) Critical Action means any activity for which even a slight chance of flooding would be too great. Such actions may include the storage of highly volatile, toxic, or water reactive materials.
(d) Environmental Assessment (EA) means a document for which DOE is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact, (2) aid DOE compliance with NEPA when no EIS is necessary, and (3) facilitate preparation of an EIS when one is necessary. The EA shall include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.
(e) Environmental Impact Statement means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA.
(f) Facility means any man-placed item other than a structure.
(g) Finding of No Significant Impact (FONSI) means a document prepared by DOE which briefly presents the reasons why an action will not significantly effect on the human environment and for which an EIS therefore will not be prepared.
(h) Flood or Flooding means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source.
(i) Floodplain means the lowlands adjoining inland and coastal waters and relatively flat areas and flood prone areas of offshore islands including, at a minimum, that area inundated by a 1 percent or greater chance flood in any given year. The base floodplain is defined as the 100-year (1.0 percent) floodplain. The critical action floodplain is defined as the 500-year (0.2 percent) floodplain.
(j) Floodplain Action means any DOE action which takes place in a floodplain.
(k) Floodplain/Wetlands Assessment means an evaluation consisting of a description of a proposed action, a discussion of its effects on the floodplain/wetlands, and consideration of alternatives.

(l) Floodproofing means the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out, or to reduce the effects of water entry.

(m) High Hazard Areas means those portions of riverine and coastal floodplains nearest the source of flooding which are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

(n) Minimize means to reduce to the smallest degree practicable.

(o) New Construction for the purpose of compliance with E.O. 11990 includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after October 1, 1977.

(p) Practicable means capable of being accomplished within existing constraints. The test of what is practicable depends on the situation and includes consideration of many factors, such as environment, cost, technology, and implementation time.

(q) Public Notice means a brief notice published in the Federal Register, and circulated to affected and interested persons and agencies, which describes a proposed floodplain/wetlands action and affords the opportunity for public review.

(r) Preserve means to prevent modification to the natural floodplain/wetlands environment or to maintain it as closely as possible to its natural state.

(s) Restore means to reestablish a setting or environment in which the natural functions of the floodplain can again operate.

(t) Statement of Findings means a statement issued pursuant to E.O. 11988 which explains why a DOE action is proposed in a floodplain, lists alternatives considered, indicates whether the action conforms to State and local floodplain standards, and describes steps to be taken to minimize harm to or within the floodplain.

(u) Structure means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

(v) Wetlands means those areas that are inundated by surface or groundwater with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflow, mudflats, and natural ponds.

(w) Wetlands Action means an action undertaken by DOE in a wetlands not located in a floodplain, subject to the exclusions specified at §1022.5(c).

§ 1022.5 Applicability.

(a) This part shall apply to all organizational units of DOE, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part shall apply to all proposed floodplain/wetlands actions, including those sponsored jointly with other agencies, where practicable alternatives to the proposed action are still available. With respect to programs and projects for which the appropriate environmental review has been completed or a final EIS filed prior to the effective date of these regulations, DOE shall, in lieu of the procedures set forth in this part, review the alternatives identified in the environmental review or in the final EIS to determine whether an alternative action may avoid or minimize impacts on the floodplain/wetlands. If project or program implementation has progressed to the point where review of alternatives is no longer practicable, or if DOE determines after a review of alternatives to take action in a floodplain, DOE shall design or modify the selected alternative in order to minimize potential harm to or within the floodplain and to restore and preserve floodplain values. DOE shall publish in the Federal Register, a brief description of measures to be employed and shall endeavor to notify appropriate Federal, State, and local agencies and
§ 1022.11
persons or groups known to be interested in the action.
(c) This part shall not apply to wetlands projects under construction prior to October 1, 1977; wetlands projects for which all of the funds have been appropriated through fiscal year 1977; or wetlands projects and programs for which a draft or final EIS was filed prior to October 1, 1977. With respect to proposed actions located in wetlands (not located in a floodplain), this part shall not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving wetlands which are located on non-Federal property.
(d) This part applies to activities in furtherance of DOE responsibilities for acquiring, managing, and disposing of Federal lands and facilities. When property in a floodplain or wetlands is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, DOE shall: (1) Identify those uses that are restricted under Federal, State, or local floodplains or wetlands regulations; (2) attach other appropriate restrictions to the uses of the property; or (3) withhold the property from conveyance.
(e) This part applies to activities in furtherance of DOE responsibilities for providing federally undertaken, financed, or assisted construction and improvements. Applicants for assistance shall provide DOE with an analysis of the impacts which would result from any proposed wetland or floodplain activity.
(f) This part applies to activities in furtherance of DOE responsibilities for conducting Federal activities and programs affecting land use, including but not limited to, water and related resource planning, regulating and licensing activity.
(g) This part ordinarily shall not apply to routine maintenance of existing facilities and structures on DOE property within a floodplain/wetlands since such actions normally have minimal or no adverse impact on a floodplain/wetlands. However, where unusual circumstances indicate the possibility of impact on a floodplain/wetlands, DOE shall consider the need for a floodplain/wetlands assessment for such actions.
(h) The policies and procedures of this part which are applicable to floodplain actions shall apply to all proposed actions which occur in a wetlands located in a floodplain.

Subpart B—Procedures for Floodplain/Wetlands Review
§ 1022.11 Floodplain/wetlands determination.
(a) Concurrent with its review of a proposed action to determine appropriate NEPA requirements, DOE shall determine the applicability of the floodplain management and wetlands protection requirements of this part.
(b) In making the floodplain determination, DOE shall utilize the Flood Insurance Rate Maps (FIRM’s) or the Flood Hazard Boundary Maps (FHBM’s) prepared by the Federal Insurance Administration of the Department of Housing and Urban Development to determine if a proposed action is located in the base or critical action floodplain, as appropriate. For a proposed action in an area of predominantly Federal or State land holdings where FIRM or FHBM maps are not available, information shall be sought from the land administering agency (e.g., Bureau of Land Management, Soil Conservation Service, etc.) or from agencies with floodplain analysis expertise.
(c) In making the wetlands determination, DOE shall utilize information available from the following sources, as appropriate:

(1) U.S. Fish and Wildlife Service National Wetlands Inventory;
(2) U.S. Department of Agriculture Soil Conservation Service Local Identification Maps;
(3) U.S. Geological Survey Topographic Maps;
(4) State wetlands inventories; and
(5) Regional or local government-sponsored wetland or land use inventories.

§ 1022.12 Floodplain/wetlands assessment.
(a) If DOE determines, pursuant to §§1022.5 and 1022.11, that this part is applicable to the proposed action, DOE shall prepare a floodplain/wetlands assessment, which shall contain the following information:
§ 1022.13 Applicant responsibilities.

DOE may require applicants for a DOE permit, license, certificate, financial assistance, contract award, allocation or other entitlement to submit a report on a proposed floodplain/wetlands action. The report shall contain the information specified at §1022.12 and shall be prepared in accordance with the guidance contained in this part.

§ 1022.14 Public review.

(a) For proposed floodplain/wetlands actions for which an EIS is required, the opportunity for early public review will be provided through applicable NEPA procedures. A Notice of Intent to prepare an EIS may be used to satisfy this requirement.

(b) For proposed floodplain/wetlands actions for which neither an EA nor EIS is prepared, a separate document shall be issued as the floodplain/wetlands assessment.

(c) Following publication of the Public Notice, DOE shall allow 15 days for public comment prior to making its decision on the proposed action, except as specified in §1022.18(c). At the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed floodplain/wetlands action and the mitigating measures, taking into account all substantive comments received.

§ 1022.15 Notification of decision.

(a) If DOE finds that no practicable alternative to locating in the floodplain/wetlands is available, consistent with the policy set forth in E.O. 11988, DOE shall, prior to taking action, design or modify its action in order to minimize potential harm to or within the floodplain/wetlands.

(b) For actions which will be located in a floodplain, DOE shall publish a brief (not to exceed three pages) statement of findings which shall contain:

(1) A brief description of the proposed action, including a location map;

(2) An explanation indicating why the action is proposed to be located in the floodplain;
§ 1022.16 Requests for authorizations or appropriations.

DOE shall indicate in any requests for new authorizations or appropriations transmitted to OMB, if a proposed action will be located in a floodplain or wetlands, whether the proposed action is in accord with the requirements of E.O. 11990, E.O. 11988, and these regulations.

§ 1022.17 Follow-up.

For those DOE actions taken in floodplain/wetlands, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigating measures, is proceeding as described in the floodplain/wetlands assessment and statement of findings.

§ 1022.18 Timing of floodplain/wetlands actions.

(a) Prior to implementing a proposed floodplain action, DOE shall endeavor to allow at least 15 days of public review after publication of the statement of findings.

(b) With respect to wetlands actions (not located in a floodplain), DOE shall take no action prior to 15 days after publication of the Public Notice in the FEDERAL REGISTER.

§ 1022.19 Selection of a lead agency and consultation among participating agencies.

When DOE and one or more other Federal agencies are directly involved in a floodplain/wetlands action, DOE shall consult with such other agencies to determine if a floodplain/wetlands assessment is required, to identify the appropriate lead or joint agency responsibilities, to identify the applicable regulations, and to establish procedures for interagency coordination during the environmental review process.

§ 1022.20 Public inquiries.

Inquiries regarding DOE’s floodplain/wetlands activities may be directed to the Assistant Secretary for Environment, Department of Energy, Washington, DC 20545.

§ 1022.21 Updating regulations.

DOE shall periodically review these regulations, evaluate their effectiveness, and make appropriate revisions.

PART 1023—CONTRACT APPEALS

OVERVIEW: ORGANIZATION, FUNCTIONS AND AUTHORITIES

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Subpart A—Rules of the Board of Contract Appeals

1023.101 Scope and purpose.
1023.102 Effective date.
1023.120 Rules of practice.

Subpart B [Reserved]
§ 1023.1 Introductory material on the Board and its functions.

(a) The Energy Board of Contract Appeals ("EBCA" or "Board") functions as a separate quasi-judicial entity within the Department of Energy (DOE). The Secretary has delegated to the Board’s Chair the appropriate authorities necessary for the Board to maintain its separate operations and decisional independence.

(b) The Board’s primary function is to hear and decide appeals from final decisions of DOE contracting officers on claims pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 et seq. The Board’s Rules of Practice for these appeals are set forth in subpart A of this part. Rules relating to recovery of attorney fees and other expenses under the Equal Access to Justice Act are set forth in subpart C of this part.

(c) In addition to its functions under the CDA, the Secretary in Delegation Order 0204–162 has authorized the Board to:

(1) Adjudicate appeals from agency contracting officers’ decisions not taken pursuant to the CDA (non-CDA disputes) under the Rules of Practice set forth in subpart A of this part;

(2) Perform other quasi-judicial functions that are consistent with the Board members’ duties under the CDA as directed by the Secretary;

(3) Serve as the Energy Financial Assistance Appeals Board to hear and decide certain appeals by the Department’s financial assistance recipients as provided in 10 CFR 600.22, under Rules of Procedure set forth in 10 CFR part 1024;

(4) Serve as the Energy Invention Licensing Appeals Board to hear and decide appeals from license terminations, denials of license applications and petitions by third-parties for license terminations, as provided in 10 CFR part 781, under Rules of Practice set forth in subpart A of this part, modified by the Board as determined to be necessary and appropriate with advance notice to the parties; and

(5) Serve as the Energy Patent Compensation Board to hear and decide, as provided in 10 CFR part 780, certain applications and petitions filed under authority provided by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (1954), and the Invention Secrecy Act, 35 U.S.C. 181–188, including:

(i) Whether a patent is affected with the public interest;

(ii) Whether a license to a patent affected by the public interest should be granted and equitable terms therefor; and

(iii) Whether there should be allotment of royalties, award, or compensation to a party contributing to the making of certain categories of inventions or discoveries, or an owner of a patent within certain categories, under Rules of Practice set forth in subpart A of this part, modified by the Board as determined to be necessary and appropriate, with advance notice to the parties.
§ 1023.2 Organization and location of the Board.

(a) Location of the Board. (1) The Board’s offices are located at, and hand and commercial parcel deliveries should be made to: Board of Contract Appeals, U.S. Department of Energy, 950 L’Enfant Plaza, SW., Suite 810, Washington, DC 20024.

(2) The Board’s mailing address is as follows. The entire nine digit ZIP code should be used to avoid delay: Board of Contract Appeals, U.S. Department of Energy, HG-56, Building 950, Washington, DC 20585-0116.

(3) The Board’s telephone numbers are (202) 426-9316 (voice) and (202) 426-0215 (facsimile).

(b) Organization of the Board. As required by the CDA, the Board consists of a Chair, a Vice Chair, and at least one other member. Members are designated Administrative Judges. The Chair is designated Chief Administrative Judge and the Vice Chair, Deputy Chief Administrative Judge.

§ 1023.3 Principles of general applicability.

(a) Adjudicatory functions. The following principles shall apply to all adjudicatory activities whether pursuant to the authority of the CDA, authority delegated under this part, or authority of other laws, rules, or directives.

(1) The Board shall hear and decide each case independently, fairly, and impartially.

(2) Decisions shall be based exclusively upon the record established in each case. Written or oral communication with the Board by or for one party is not permitted without participation or notice to other parties. Except as provided by law, no person or agency, directly or indirectly involved in a matter before the Board, may submit off the record to the Board or the Board’s staff any evidence, explanation, analysis, or advice (whether written or oral) regarding any matter at issue in an appeal, nor shall any member of the Board or of the Board’s staff accept or consider ex parte communications from any person. This provision does not apply to consultation among Board members or staff or to other persons acting under authority expressly granted by the Board with notice to parties. Nor does it apply to communications concerning the Board’s administrative functions or procedures, including ADR.

(3) Decisions of the Board shall be final agency decisions and shall not be subject to administrative appeal or administrative review.

(b) Alternative Dispute Resolution (ADR) Functions. (1) Board judges and personnel shall perform ADR related functions impartially, with procedural fairness, and with integrity and diligence.

(2) Ex parte communications with Board staff and judges limited to the nature, procedures, and availability of ADR through the Board are permitted and encouraged. Once parties have agreed to engage in ADR and have entered into an ADR agreement accepted by the Board, ex parte communications by Board neutrals, support staff and parties shall be as specified by any applicable agreements or protocols and as
§ 1023.5 Duties and responsibilities of the Chair.

The Chair shall be responsible for the following:

(a) The proper administration of the Board;
(b) Assignment and reassignment of cases, including alternative dispute resolution (ADR) proceedings, to administrative judges, hearing officers, and decision panels;
(c) Arranging for the services of settlement judges, third-party neutrals, masters and similar capacities; authorizing the use of Board-provided personnel and facilities in ADR capacities, for matters before the Board.
(d) Issuing delegations of Board authority to individual administrative judges, panels of judges, commissioners, masters, and hearing officers within such limits, if any, which a majority of the members of the Board shall establish;
(e) Designating an acting chair during the absence of both the Chair and the Vice Chair;
(f) Designating a member of another Federal board of contract appeals to serve as the third member of a decision panel if the Board is reduced to less than three members because of vacant positions, protracted absences, disabilities or disqualifications;
(g) Authorizing and approving ADR arrangements for Board cases; obtaining non-Board personnel to serve as settlement judges, third-party neutrals, masters and similar capacities; authorizing the use of Board-provided personnel and facilities in ADR capacities, for matters before the Board.

The CDA imposes upon the Board the duty, and grants it the powers necessary, to hear and decide, or to otherwise resolve through agreed procedures, appeals from decisions made by agency contracting officers on contractor claims relating to contracts entered into by the DOE or relating to contracts of another agency, as provided in Section 8(d) of the CDA, 41 U.S.C. 607(d). The Board may issue rules of practice or procedure for proceedings pursuant to the CDA. The CDA also imposes upon the Board the duty, and grants it powers necessary, to act upon petitions for orders directing contracting officers to issue decisions on claims relating to such contracts, 41 U.S.C. 605(c)(4). The Board may apply through the Attorney General to an appropriate United States District Court for an order requiring a person, who has failed to obey a subpoena issued by the Board, to produce evidence or to give testimony, or both, 41 U.S.C. 610.

§ 1023.4 Authorities.

(a) Contract Disputes Act Authorities. The CDA imposes upon the Board the duty, and grants it the powers necessary, to hear and decide, or to otherwise resolve through agreed procedures, appeals from decisions made by agency contracting officers on contractor claims relating to contracts entered into by the DOE or relating to contracts of another agency, as provided in Section 8(d) of the CDA, 41 U.S.C. 607(d). The Board may issue rules of practice or procedure for proceedings pursuant to the CDA. The CDA also imposes upon the Board the duty, and grants it powers necessary, to act upon petitions for orders directing contracting officers to issue decisions on claims relating to such contracts, 41 U.S.C. 605(c)(4). The Board may apply through the Attorney General to an appropriate United States District Court for an order requiring a person, who has failed to obey a subpoena issued by the Board, to produce evidence or to give testimony, or both, 41 U.S.C. 610.

(b) General Powers and Authorities. The Board's general powers include, but are not limited to, the powers to:

(1) Manage its cases and docket; issue procedural orders; conduct conferences and hearings; administer oaths; authorize and manage discovery, including depositions and the production of documents or other evidence; take official notice of facts within general knowledge; call witnesses on its own motion; engage experts; dismiss actions with or without prejudice; decide all questions of fact or law raised in an action; and make and publish rules of practice and procedure;

(2) Exercise, in proceedings to which it applies, all powers granted to arbitrators by the Federal Arbitration Act, 9 U.S.C. 1-14, including the power to issue summonses.

(c) In addition to its authorities under the CDA, the Board has been delegated by Delegation Order 0204-162 issued by the Secretary of Energy, the following authorities:

(1) Issue rules, including rules of procedure, not inconsistent with this section and departmental regulations;

(2) Issue subpoenas under the authority of §161.2 of the Atomic Energy Act of 1954, 42 U.S.C. 2201(c), as applicable;

(3) Such other authorities as the Secretary may delegate.
§ 1023.6 Duties and responsibilities of Board members and staff.

(a) As is consistent with the Board’s functions, Board members and staff shall perform their duties with the highest integrity and consistent with the principles set forth in §1023.3.

(b) Members of the Board and Board attorneys may serve as commissioners, magistrates, masters, hearing officers, arbitrators, mediators, and neutrals and in other similar capacities.

(c) Except as may be ordered by a court of competent jurisdiction, members of the Board and its staff are permanently barred from ex parte disclosure of information concerning any Board deliberations.

§ 1023.7 Board decisions; assignment of judges.

(a) In each case, the Chair shall assign an administrative judge as the Presiding Administrative Judge to hear a case and develop the record upon which the decision will be made. A Presiding Judge has authority to act for the Board in all non-dispositive matters, except as otherwise provided in this Part. This subparagraph shall not preclude the Presiding Administrative Judge from taking dispositive actions as provided in this Part or by agreement of the parties. Other persons acting as commissioners, magistrates, masters, or hearing officers shall have such powers as the Board shall delegate.

(b) Except as provided by law, rule, or agreement of the parties, contract appeals and other cases are assigned to a deciding panel established by the Board Chair consisting of two or more administrative judges.

(c) The concurring votes of a majority of a deciding panel shall be sufficient to decide an appeal. All members assigned to a panel shall vote unless unavailable. The Chair will assign an additional member if necessary to resolve tie votes.

§ 1023.8 Alternative dispute resolution (ADR).

(a) Statement of Policy. It is the policy of the DOE and of the Board to facilitate consensual resolution of disputes and to employ ADR in all of the Board’s functions when agreed to by the parties. ADR is a core judicial function performed by the Board and its judges.

(b) ADR for Docketed Cases. Pursuant to the agreement of the parties, the Board, in an exercise of discretion, may approve either the use of Board-annexed ADR (ADR which is conducted under Board auspices and pursuant to Board order) or the suspension of the Board’s procedural schedule to permit the parties to engage in ADR outside of the Board’s purview. While any form of ADR may be employed, the forms of ADR commonly employed using Board judges as neutrals are: case evaluation by a settlement judge (with or without mediation by the judge); arbitration; mini-trial; summary (time and procedurally limited) trial with one-judge; summary binding (non-appealable) bench decision; and fact-finding.

(c) ADR for Non-Docketed Disputes. As a general matter the earlier a dispute is identified and resolved, the less the financial and other costs incurred by the parties. When a contract is not yet complete there may be opportunities to eliminate tensions through ADR and to confine and resolve problems in a way that the remaining performance is eased and improved. For these reasons, the Board is available to provide a full range of ADR services and facilities before, as well as after, a case is filed with the Board. A contracting officer’s decision is not a prerequisite for the Board to provide ADR services and such services may be furnished whenever they are warranted by the overall best interests of the parties. The forms
of ADR most suitable for mid-performance disputes are often the non-dispositive forms such as mediation, facilitation and fact-finding, mini-trials, or non-binding arbitration, although binding arbitration is also available.

(d) Availability of Information on ADR. Parties are encouraged to consult with the Board regarding the Board's ADR services at the earliest possible time. A handbook describing Board ADR is available from the Board upon request.

§ 1023.9 General guidelines.

(a) The principles of this Overview shall apply to all Board functions unless a specific provision of the relevant rules of practice applies. It is, however, impractical to articulate a rule to fit every circumstance. Accordingly, this part, and the other Board Rules referenced in it, will be interpreted and applied consistent with the Board's responsibility to provide just, expeditious, and inexpensive resolution of cases before it. When Board rules of procedure do not cover a specific situation, a party may contend that the Board should apply pertinent provisions from the Federal Rules of Civil Procedure. However, while the Board may refer to the Federal Rules of Civil Procedure for guidance, such Rules are not binding on the Board absent a ruling or order to the contrary.

(b) The Board is responsible to the parties, the public, and the Secretary for the expeditious resolution of cases before it. Accordingly, subject to the objection of a party, the procedures and time limitations set forth in rules of procedure may be modified, consistent with law and fairness. Presiding judges and hearing officers may issue prehearing orders varying procedures and time limitations if they determine that purposes of the CDA or the interests of justice would be advanced thereby and provided both parties consent. Parties should not consume an entire period authorized for an action if the action can be sooner completed. Informal communication between parties is encouraged to reduce time periods whenever possible.

(c) The Board shall conduct proceedings in compliance with the security regulations and requirements of the Department or other agency involved.

Subpart A—Rules of the Board of Contract Appeals


SOURCE: 44 FR 64270, Nov. 6, 1979, unless otherwise noted.

§ 1023.101 Scope and purpose.

The rules of the Board of Contract Appeals are intended to govern all appeal procedures before the Department of Energy Board of Contract Appeals (Board) which are within the scope of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). The rules, with modifications determined by the Board to be appropriate to the nature of the dispute, also apply to all other contract and subcontract related appeals which are properly before the Board.


§ 1023.102 Effective date.

The rules of the Board of Contract Appeals shall apply to all proceedings filed on or after June 6, 1997, except that Rule 1 (a) and (b) of § 1023.120 shall apply only to appeals filed on or after October 1, 1995.


§ 1023.120 Rules of practice.

The following rules of practice shall govern the procedure as to all contract disputes appealed to this Board in accordance with this subpart:

Preliminary Procedures

Rule
1 Appeals, how taken.
2 Notice of appeal, contents.
3 Docketing of appeals.
4 Contracting officer appeal file.
5 Motions.
6 Appellants election of procedure.
7 Pleadings.
8 Amendments of pleadings or record.
9 Hearing election.
10 Submission of appeal without a hearing.
11 Prehearing briefs.
12 Prehearing conference.
13 Optional Small Claims (Expedited) procedure.
14 Optional Accelerated procedure.
15 Setting the record.

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16 Discovery—General.
17 Discovery—Depositions, interrogatories, admissions, production and inspection.
18 Subpoenas.
19 Time and service of papers.

Hearings
20 Hearings—Time and place.
21 Hearings—Furnish notice.
22 Hearings—Unexcused absence of a party.
23 Hearings—Rules of evidence and examination of witnesses.

Representation
24 Appellant.
25 Respondent.

Decisions
26 Decisions.
27 Motion for reconsideration.
28 Remand from court.

Dismissals
29 Dismissals without prejudice.
30 Dismissal for failure to prosecute.

Sanctions
31 Failure to obey Board order.

Preliminary Procedures

Rule 1 Appeals, How Taken. (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 30 days from the date of receipt of a contracting officer's decision. A copy of the notice shall be furnished at the same time to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of $100,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and where the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of $100,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) of this Rule, the Board, at its option, may stay further proceedings pending issuance of a final decision by the contracting officer within the time fixed by the Board, or order the appeal to proceed without the contracting officer's decision.

Rule 2 Notice of Appeal, Contents. A notice of appeal must indicate that an appeal is being taken and must identify the contract (by number), and the department, administration, agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant’s duly authorized representative or attorney. The complaint referred to in Rule 7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

Rule 3 Docketing of Appeals. When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice of docketing shall be mailed promptly to all parties (with a copy of these rules to appellant).

Rule 4 Contracting Officer Appeal File. (a) Composition: Within 30 days after receipt of notice that an appeal has been docketed, the contracting officer shall assemble and transmit to the Board one copy of the appeal file with an additional copy each to appellant (except that items 1 and 2, below, need not be retransmitted to the appellant) and to attorney for respondent. The appeal file shall consist of all documents pertinent to the appeal, including:

1. The contracting officer's decision and findings of fact from which the appeal is taken;
2. The contract, including pertinent specifications, modifications, plans, and drawings;
3. All correspondence between the parties pertinent to the appeal, including the letters of claim in response to which the decision was issued;
4. Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
5. Any additional information considered pertinent.

(b) Organization: Documents in the appeal file may be originals, legible facsimiles, or authenticated copies. They shall be arranged in chronological order, where practicable, and indexed to identify readily the contents of the file. The contracting officer's final decision and the contract shall be conveniently placed in the file for ready reference.

(c) Supplements: Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant may supplement the file by transmitting to the Board any additional documents which it considers pertinent to the appeal and shall furnish two copies of such documents to attorney for respondent.

(d) Burdensome documents. The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files
with the Board a document as to which such a waiver has been granted, the other party shall be notified that the document or a copy is available for inspection at the offices of the Board or of the party filing the document.

(e) Status of Documents: Documents in the appeal file or supplements thereto shall be considered part of the historical record but shall not be included in the record upon which the Board’s decision will be rendered unless each individual document has been offered and admitted into evidence.

Rule 5 Motions. (a) Any timely motion may be considered by the Board. Motions shall be in writing (unless made during a conference or a hearing), shall indicate the relief or order sought, and shall state with particularity the grounds therefore. Those motions which would dispose of a case shall be filed promptly and shall be supported by a brief. The Board may, on its own motion initiate any motion by notice to the parties.

(b) Parties may respond to a dispositive motion within 20 days of receipt, or as otherwise ordered by the Board. Answering material to all other motions may be file within 10 days after receipt. Replies to responses ordinarily will not be allowed.

(c) Board rules relating to pleadings, service and number of copies shall apply to all motions. In its discretion, the Board may permit a hearing on a motion, and may require presentation of briefs, or it may defer a decision pending hearing on both the motion and the merits.

Rule 6 Appellants election of procedures. (a) The election to use Small Claims (Expeditied) (Rule 13) or Accelerated (Rule 14) procedures is available only to appellant. The election shall be filed with the Board in writing no later than 30 days after receipt of notice that the appeal has been docketed, unless otherwise allowed by the Board.

(b) Where the amount in dispute is $100,000 or less, appellant may elect to use the Accelerated procedures. Where the amount is $50,000 or less, appellant may elect to use the Small Claims (Expeditied) or the Accelerated procedures. Any question regarding the amount in dispute shall be determined by the Board.

Rule 7 Pleadings. (a) Complaint. Within 30 days after receipt of notice that the appeal has been docketed, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. A copy of the complaint shall be served upon the attorney for the respondent or, if the identity of the latter is not known, upon the General Counsel, Department of Energy, Forrestal Building, Washington, D.C. 20585. If the complaint is not filed within 30 days and in the opinion of the Board the issues before the Board are sufficiently defined, appellant’s claim and Notice of Appeal may be deemed to set forth its complaint and the respondent shall be so notified.

(b) Answer. Within 30 days after receipt of complaint, or a Rule 7(a) notice from the Board, the respondent shall file with the Board an original and two copies of an Answer, setting forth simple, concise and direct statements of respondent’s defense to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an Answer, and shall set forth any affirmative defenses or counter-claims as appropriate. Should the answer not be filed within 30 days, the Board may, in its discretion, enter a general denial on behalf of the respondent and the parties shall be so notified.

Rule 8 Amendments of Pleadings or Record. (a) The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The application for such an order suspends the time for responsive pleadings. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions fair to both parties.

(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised in the pleadings. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. Similarly, if evidence is objected to at a hearing on the ground that it is not relevant to an issue raised by the pleadings, it may be admitted but the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

Rule 9 Hearing Election. Except as may be required under Rules 13 or 14, each party shall advise the Board following service upon appellant of respondent’s Answer, or a Rule 7(b) Notice from the Board, whether it desires a hearing as prescribed in Rules 20 through 23.

Rule 10 Submission of Appeal without a Hearing. Either party may elect to waive a hearing and to submit its case upon the record as settled pursuant to Rule 15. Waiver by one party shall not deprive the other party of an opportunity for a hearing. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement
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other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument and by briefs.

Rule 11 Prehearing Briefs. The Board may, in its discretion, require the parties to submit prehearing briefs in any case or motion. If the Board does not require briefs, either party may, upon timely notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

Rule 12 Prehearing Conference. (a) Whether the case is to be submitted under Rule 10, or heard pursuant to Rules 20 through 23, the Board may, upon its own initiative or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge for a conference to consider:

(1) Simplification, clarification, or severing of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements and rulings on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate discovery;

(4) Limitation of the number of expert witnesses, or avoidance with similar cumulative evidence;

(5) The possibility for settlement of any or all of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal including the filing of proposed Findings of Fact and Conclusions of Law, briefs, and other such papers.

(b) Any conference results not reflected in a transcript shall be reduced to writing by a single Administrative Judge. If there is a hearing, the presiding Administrative Judge may, exercising discretion, hear closing oral arguments of the parties and then render an oral decision on the record. Whenever such an oral decision is rendered, the Board subsequently will furnish the parties with a written transcript of the decision for record and payment purposes and to establish the date for commencement of the time period for filing a motion for reconsideration under Rule 27.

(g) Decisions of the Board under the Small Claims (Expedited) procedure shall have no value as precedent for future cases and, in the absence of fraud, cannot be appealed.

Rule 14 Optional Accelerated Procedure. (a) This option makes available an Accelerated procedure, for disputes involving $100,000 or less, whereby the appeal is resolved, whenever possible, within 120 days from board notice of the election. If there is a hearing, the presiding Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:

(1) Identify and simplify the issues in dispute;

(2) Establish a simplified procedure appropriate to the particular appeal;

(3) Determine whether a hearing is desired and, if so, fix a time and place;
(4) Establish a schedule for the accelerated resolution of the appeal; and
(5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.

(c) Failure by either party to request an oral hearing within 15 days of receipt of notice of the election under Rule 6 shall be deemed a waiver and an election to submit on the record under Rule 18.

(d) The subpoena power set forth in Rule 18 is available for use under the Accelerated procedure.

(e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement for conducting the hearing at the scheduled time and place or, if no hearing is scheduled, the closing of the record at an early time so as to permit decision of the appeal within the target limit of 180 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date, allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(f) Decisions in appeals considered under the Accelerated procedure will be rendered by a single Administrative Judge or an additional member in the event of disagreement.

Rule 15 Setting the Record. (a) The record upon which the Board’s decision will be rendered consists of the documents, papers and exhibits admitted in evidence, and the pleadings, prehearing conference memoranda or orders, prehearing briefs, admissions, stipulations, transcripts of conferences and hearings, and posthearing briefs. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board. In cases submitted pursuant to Rule 10 the evidentiary records shall be comprised of those documents, papers and exhibits submitted by the parties and admitted by the Board.

(b) Except as the Board, in its discretion, may otherwise order, no proof shall be received in evidence after completion of the evidentiary hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

Rule 16 Discovery—General. (a) General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting trade secrets or other confidential information or documents.

(b) Expenses—Each party bears its own expenses associated with discovery, unless in the discretion of the Board, the expenses are apportioned otherwise.

(c) Subpoenas—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 18.

Rule 17 Discovery—Depositions, Interrogatories, Admissions, Production and Inspection.

(a) When Depositions Permitted—If the parties are unable to agree upon the taking of a deposition, the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination.

(b) Orders on Depositions—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, as governed by order of the Board.

(c) Depositions as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received as evidence at such hearing. It will not ordinarily be received as evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(d) Interrogatories, etc.—After an appeal has been filed with the Board, a party may serve on the other party: (1) Written interrogatories to be addressed separately in writing, signed under oath and answered within 30 days unless objections are filed within 10 days of receipt; (2) a request for the admission of specified facts or the authenticity of any documents, to be answered or objected to within 30 days after service. The factual statements and the authenticity of the documents shall be deemed admitted upon failure of a party, to timely respond; and (3) a request for the production, inspection and copying of any documents or objects not privileged, which are relevant to the appeal.

(e) Any discovery engaged in under this Rule shall be subject to the provisions of Rule 18.
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Rule 18 Subpoenas. (a) Voluntary Cooperation—Each party is expected to cooperate and make available witnesses and evidence under its control without issuance of a subpoena. Whenever possible, parties will assist the Board in the voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things wherever present.

(b) Procedure

(1) Upon request of a party and after a showing of relevancy a subpoena may be issued requiring the attendance of a witness for the purpose of taking testimony at a deposition or hearing and, if appropriate, the production by the witness, at the deposition or hearing, of documentary evidence, including inspection and copying, as designated in the subpoena.

(2) The request shall identify the name, title, and address of the person to whom the subpoena is addressed, the specific documentary evidence sought, the time and place proposed and a showing of relevancy to the appeal.

(3) Every subpoena shall state the name of the Board, the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified documentary evidence at a time and place therein specified. The presiding Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness, or the documentary evidence sought, or may leave it blank. The party requesting the subpoena shall complete the subpoena before service.

(4) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781–1784.

(c) Requests to Quash or Modify—Upon motion made promptly but in any event not later than the time specified in the subpoena for compliance, the Board may: (i) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; (ii) condition denial of the motion upon payment by the person in whose behalf the subpoena was issued of the reasonable cost of producing the subpoenaed documentary evidence; or (iii) apply protective provisions under Rule 16(a).

(d) Service—

(1) The party requesting the subpoena shall arrange for service.

(2) A subpoena may be served at any place by a United States Marshal or Deputy Marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena shall be made by personally delivering a copy to the person named there-in and tendering the fees for one day’s attendance and the mileage that would be allowed in the courts of the United States. When the subpoena is issued on behalf of the United States or an officer or agency of the United States, money payments need not be tendered in advance of attendance.

(3) The party requesting a subpoena shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and any documentary evidence the witness has produced.

(e) Contumacy or Refusal to Obey a Subpoena. In case of a contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

Rule 19 Time and Service of Papers. (a) All pleadings, briefs or other papers submitted to the Board shall be filed in triplicate and a copy shall be sent to other parties. Such communications shall be sent by delivering in person or by mailing, properly addressed with postage prepaid, to the opposing party or, where the party is represented by counsel, to its counsel. Pleadings, briefs or other papers filed with the Board shall be accompanied by a statement, signed by the originating party, saying when, how, and to whom a copy was sent.

(b) The Board may extend any time limitation for good cause and in accordance with legal precedent. All requests for time extensions shall be in writing except when raised during a recorded hearing.

(c) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day. Unless otherwise stated in a Rule or Board Order, dates will be met and papers considered filed when deposited in the mail system of the U.S. Postal Service, or hand-delivery is acknowledged at the Board offices.

Hearings

Rule 20 Hearings: Time and Place. Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, the requirements for expedited or accelerated procedures and other pertinent factors. On request by either party and for good
cause, the Board may, in its discretion, change the time and place of a hearing.

Rule 21 Hearings: Notice. The parties shall be given at least 15 days notice of time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties. Failure to promptly acknowledge shall be deemed consent to the time and place.

Rule 22 Hearings: Unexcused Absence of a Party. The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the presiding Administrative Judge may order the hearing to proceed and the case will be regarded as submitted by the absent party as under Rule 19.

Rule 23 Hearings: Rules of Evidence and Examination of Witnesses. (a) Nature of Hearings—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the respondent may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding judge. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge shall otherwise order.

REPRESENTATION

Rule 24 Appellant. An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

Rule 25 Respondent. Counsel may, in accordance with their authority, represent the interest of the Government or other client before the Board. They shall file notices of appearance with the Board, and serve notice on appellant or appellant’s attorney.

BOARD DECISION

Rule 26 Decisions. Except as allowed under Rule 13, decisions of the Board shall be in writing upon the record as described in Rule 15 and will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be available for public inspection at the offices of the Board.

Rule 27 Motion for Reconsideration. (a) Motion for reconsideration shall set forth specifically the grounds relied upon to sustain the motion and shall be filed within 30 days after receipt of a copy of the Board’s decision.

(b) Motions for reconsideration of cases decided under either the Small Claims (Expedited) procedure or the Accelerated procedure need not be decided within the original 120-day or 180-day limit, but shall be processed and decided rapidly.

Rule 28 Remand from Court. Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court’s order. The Board shall consider the reports and enter special orders.

DISMISSALS

Rule 29 Dismissal Without Prejudice. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 30 Dismissal for Failure to Prosecute. Whenever a record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate. If no cause, the Board may take such action as it deems reasonable and proper.

SANCTIONS

Rule 31 Failure to Obey Board Order. If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to the just and expeditious conduct of the appeal, including dismissal with prejudice.

(44 FR 64270, Nov. 6, 1979. Redesignated at 62 FR 24808, May 7, 1997)
Subpart C—Procedures Relating to Awards Under the Equal Access to Justice Act

§ 1023.300 Definitions.

For purposes of these procedures:

Agency Counsel means the attorney representing the Department or other agency in a proceeding under this subpart.

Board means the Department of Energy Board of Contract Appeals.

Covered Proceeding means an underlying proceeding as specified by paragraph (a) of § 1023.303.

Days means calendar days.

§ 1023.301 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to covered proceedings. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. These procedures describe the parties eligible for awards and covered Board proceedings. They also explain how to apply for awards and the procedures and standards that the Board will use to make them.

§ 1023.302 When the Act applies.

The Act applies to any covered proceeding pending or commenced before the Board on or after August 5, 1985. It also applies to any such proceeding commenced before the Board on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in § 1023.310 of this subpart, has been filed with the Board within 30 days after August 5, 1985, and to any such proceeding pending on or commenced on or after October 1, 1983, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 1023.303 Proceedings covered.

(a) The Act applies to appeals from decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) to the Board as provided in section 8 of that Act (41 U.S.C. 607).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 1023.304 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the covered proceeding for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

1. An individual with a net worth of not more than $2 million;
2. The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;
3. A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;
4. A cooperative association as defined in 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and
5. Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees.

(c) The purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant...
prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Board determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Board may determine that financial relationships of the applicant, other than those described in this paragraph, constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 1023.305 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the covered proceeding, the action or failure to act by the agency upon which the covered proceeding is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the agency's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award unjust.

§ 1023.306 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys or expert witnesses even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney under these rules may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the respondent agency or agencies pay expert witnesses. However, an award may also include the reasonable expenses of the attorney or witness as a separate item, if the attorney or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney or expert witness, the Board shall consider the following:

(1) If the attorney or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.
§ 1023.307 [Reserved]

§ 1023.308 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States Government that participates in a proceeding before the Board and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

INFORMATION REQUIRED FROM APPLICANTS

§ 1023.310 Contents of application—overview.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant’s net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). The applicant shall attach a net worth exhibit that satisfies the requirements of section 1023.311. However, an applicant may omit this statement and forego the attachment of the net worth exhibit if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant’s belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought. The applicant must document fees and expenses as required in §1023.312.

(d) The application may also include any other matters that the applicant wishes the Board to consider in determining whether, and in what amount, an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

§ 1023.311 Net worth exhibit.

(a) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §1023.304(f) of this subpart) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant’s and its affiliates’ assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The presiding administrative judge may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit may submit that portion directly to the presiding administrative judge in a sealed envelope labeled “Confidential Financial Information,” accompanied by a motion for a protective order setting forth the ground therefor. A protective order may be granted for good cause shown.

§ 1023.312 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for
which an award is sought. A separate, itemized statement shall be submitted for each professional firm or individual whose services are covered by the application. The statement should show the hours spent in connection with the Contract Disputes Act appeal by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding administrative judge may require the applicant to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed pursuant to §1023.306 of this subpart.

§ 1023.313 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding, or, with permission of the Board for good cause shown, when the applicant has prevailed in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Board’s final disposition of the proceeding.

(b) For purposes of paragraph (a) of this section, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable.

(c) If reconsideration of a decision is sought as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of a covered proceeding to a court, no decision on an application for fees and other expenses in connection with that proceeding shall be made until a final and unreviewable decision is rendered by the court on that appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

§ 1023.322 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the reply either supporting affidavits or a request for further proceedings under §1023.325.

§ 1023.321 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days. Further extensions may be granted by the presiding administrative judge upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel’s position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under §1023.325.

§ 1023.320 Filing and service of documents.

Any application for an award, or other pleading or document relating to an application, shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the underlying proceeding, except as provided in §1023.311(b) for confidential financial information.
§ 1023.323  Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Board determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1023.324  Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the agency’s standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 1023.325  Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or, on his or her own initiative, the presiding administrative judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant’s eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole, including the contracting officer Appeal File and supplements filed pursuant to Rule 4 of the Board’s Rules of Practice, 10 CFR part 1023, which is made in the covered proceeding for which fees and other expenses are sought.

(b) A request that the presiding administrative judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 1023.326  Board decision.

The Board shall issue its decision on the application as expeditiously as is practicable after completion of proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings and conclusions on the applicant’s eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency’s position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make the award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 1023.327  Reconsideration.

Either party may seek reconsideration of the decision on the fee application in accordance with 10 CFR 1023.120, Rule 27.

§ 1023.328  Judicial review.

Judicial review of a final Board decision on an application for an award may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1023.329  Payment of award.

An applicant seeking payment of an award shall submit to agency counsel a copy of the Board’s final decision granting the award, accompanied by a certification that the applicant will
not seek review of the decision in the United States courts. Agency counsel will forward the submission to the appropriate disbursing official. The agency will pay the amount awarded to the applicant within 60 days.

PART 1024—PROCEDURES FOR FINANCIAL ASSISTANCE APPEALS

Sec. 1024.1 Scope and purpose.
1024.2 Authority.
1024.3 General.
1024.4 Rules of procedure.


SOURCE: 45 FR 29764, May 5, 1980, unless otherwise noted.

§ 1024.1 Scope and purpose.

These procedures establish a process permitting recipients of financial assistance to appeal adverse final decisions made by financial assistance officers or contracting officers. The objective is to provide a timely, just, and inexpensive resolution of disputes involving grants, cooperative agreements, loan guarantees, loan agreements, or other financial assistance instruments.

§ 1024.2 Authority.

The authority of the Board derives from direct delegation of the Secretary to hear and decide finally for the Department appeals from any decision brought before it on disputes arising under financial assistance agreements.

§ 1024.3 General.

(a) A recipient or party to a grant, cooperative agreement, loan guarantee or agreement, or other such financial assistance may have a right to appeal disputes with the Department. Such a right may be set forth in statutes, in Departmental regulations dealing with the type of financial assistance involved, or in the agreement itself.

(b) Appeals are decided by the Financial Assistance Appeals Board in accordance with the procedures set forth in these regulations. Decisions will be by majority vote and will be the final disposition of the matter within the Department.

(1) The Board is located in the Washington, DC metropolitan area and its address is: Webb Building, room 1006, 4040 North Fairfax Drive, Arlington, Virginia 22203.

(2) The Administrative Judge assigned to hear and develop the record on an appeal has authority to act for the Board with respect to such appeal within the limits assigned and as set forth in these rules.

(c) In order that a right to appeal may be exercised in a timely manner, a financial assistance recipient must appeal, in writing, within 60 days after receipt of a “final decision” on the matter by a financial assistance or contracting officer.

(d) The appeal may take one of the following three alternative courses, depending on the amount of the claim and degree of formality desired or needed:

(1) The first method is to proceed on the basis of a written record, without any oral presentations. It is the quickest and simplest process available to an appellant. All appeals involving less than $10,000 will be decided on this basis, unless, on application made by the appellant, or the respondent, the Board rules otherwise. This method is also available for appeals where the amount in dispute is more than $10,000 if an election is made in accordance with Rule 2. (See § 1024.4)

(2) A second method is to use a conference-type hearing in which the written record is supplemented with an informal oral presentation. It is the second fastest process available to an appellant and is conducted in a relatively informal manner which may require little, if any, testimony, and may even be conducted by a telephone conference call where deemed appropriate.

(3) The third method, and the most time consuming is the use of an adversary evidentiary hearing. Because of the procedural and logistical aspects involved, this method is more expensive and time consuming than the other two methods for both the appellant and respondent. Generally, this method is used only if there are complex facts in dispute.

(e) All three methods are designed to be as informal as possible; nevertheless, it should be recognized that the
§ 1024.4

Board must have an adequate record on which to base a sound decision. While an orderly presentation of evidence is required, the Board attempts to be as flexible as possible in the interests of arriving at an impartial, inexpensive and expeditious resolution of the matter.

(f) The services of an attorney are not necessarily required, especially as to the first method. The appellant should note, however, that the respondent is represented by an attorney. Hearings, if held, are transcribed, and witnesses are required to present information or evidence at such hearings under oath. In each case, the Board shall issue a written decision unless otherwise requested by a party and the request is approved.

(45 FR 29764, May 5, 1980, as amended at 57 FR 56441, Nov. 30, 1992)

§ 1024.4 Rules of procedure.

The following rules of procedure shall govern all financial assistance disputes appealed to the Board in accordance with this subpart:

RULE 1. FILING OF AN APPEAL; ACKNOWLEDGMENT

1. Filing of an appeal; acknowledgment.
2. Selection of an appeal method.
3. Development of the record.
4. Objections to evidence submitted.
5. Alternative methods of appeal.
6. Parties to the appeal.
7. Representation before the Board.
8. Dismissal for failure to meet deadlines and other requirements.
9. The Board’s powers, functions, and responsibilities.
10. Ex parte communications (communications outside the record).
11. Notice and location of hearings.
12. Calculation of time periods.

RULE 2. SELECTION OF AN APPEAL METHOD

(a) Appellant; complaint. (1) Within 30 days after receiving the docketing notice from the Board, the appellant shall:
   (i) Submit a complaint, or
   (ii) Submit a specific request (for approval by the Board), that the final decision as issued by the financial assistance officer or contracting officer, together with the notice of appeal, adequately describe the matter in dispute and will serve as the complaint.

(b) The complaint shall include: A copy of the decision appealed from; relevant portions of the applicable assistance agreements; a statement of the amount, if any, in dispute; and, if the appellant is proceeding under method 1 or 2, a copy of any documents supporting its claim. The documents must be organized chronologically and accompanied by an indexed list identifying each document by date, originator and addressee.

(c) To reduce the burden on the appellant, the Board may specify, in an appropriate index, those relevant documents already in the possession of the respondent which the respondent will then add to those documents submitted in its answer.

(d) Respondent; answer. (1) Respondent shall submit an answer within 30 days after receipt of a complaint, or after receipt of a notice from the Board that the decision and notice of appeal shall serve as the complaint. The Board may enter a general denial on behalf of the respondent upon its failure to submit an answer within the time limitation.

(2) In its answer the respondent shall submit to the Board, with copy to appellant,
two copies of any documents, other than those submitted by appellant in its complaint—which the respondent considers to be material. These should be organized and indexed as required under paragraph (a) of this rule and shall include those documents already in the possession of the Department and identified and requested by the appellant in accordance with paragraph (a) of this rule.

(c) The Board, on its own initiative, or in response to an appropriate request from a party to the dispute, may order a party to submit additional material whenever the Board considers it useful in resolving the dispute.

RULE 4. OBJECTIONS TO EVIDENCE SUBMITTED

(a) Any objection to a document or other evidence submitted in the complaint or answer shall be raised as early as possible. The parties shall attempt to resolve such objections informally between themselves before asking the Board to intercede.

(b) For those appeals that are to be resolved on the basis of a written record under method 1, either party may object to inclusion of materials or documents at any point prior to conclusion of the briefing schedule.

(c) For those appeals that are submitted for resolution using method 2, either party may object to inclusion of materials or documents at any time prior to the conclusion of the hearing.

(d) For those appeals processed under method 3, any materials or documents submitted shall not be included in the record upon which the Board’s decision will be based unless they are specifically offered and admitted into evidence.

(e) The Board will use the Federal Rules of Evidence as a guide in determining admissibility of evidence but may exercise its sound discretion where appropriate.

RULE 5. ALTERNATIVE METHODS OF APPEAL

(a) Method 1. Proceeding on the written record. (1) Within 20 days after the appellant receives the respondent’s answer, the appellant may submit to the Board (with a copy to respondent) a brief or statement containing the appellant’s argument in support of its claim. Within 20 days after receipt of the appellant’s brief or statement, the respondent may submit to the Board (with a copy to the appellant) a brief or statement containing the agency’s response. Appellant may submit a further reply, but must do so within 10 days after appellant’s receipt of respondent’s submission.

(2) Accelerating the procedure. The appellant may choose one or more of the following mechanisms to speed the process.

(i) The appellant may choose to submit a single brief or statement with, or as part of, its election letter, and may consolidate the election letter with its notice of appeal.

(ii) Where the appeal involves an amount in dispute of less than $10,000, the appellant may, upon specific request, have the Board issue a brief final order affirming or reversing the agency’s decision, without a written decision.

(3) Inadequate record. (i) If the Board decides that the written record presented is inadequate, the Board may present written questions to the parties; require further briefing on specified issues; require that oral testimony be presented; or take any other action that it considers necessary to develop a record upon which to base a sound decision.

(ii) One or both parties may sometimes believe that an issue on appeal requires more development than has been achieved on the written record. Therefore, on request of either or both parties, and if the Board agrees that it is appropriate to further develop the record, the Board may require the use of further appropriate procedures as applicable to hearings conducted pursuant to paragraphs (b) or (c) of this rule.

(4) Record for decision. The record upon which the decision will be based will consist of the complaint and answer (after disposition of all objections), the briefs or statements of the parties, and any other documents or material specifically allowed by the Board. A decision will be issued as soon as practicable (whenever possible within 30 days) after all submissions are filed or after the time for filing has expired.

(b) Method 2: Conference hearing—(1) Witness statement. Within 20 days after the filing and receipt of respondent’s answer, each party shall submit a witness statement to the Board, with a copy to the other party. The witness statement must contain a list of anticipated witnesses, with a brief summary of the expected testimony of each, and a description of the testimony’s relevance to the specific issues and to the matter in dispute. The statement may also contain a list of questions which the presiding Board member may ask of the other party’s witness, or an identification of issue areas in which inquiry by the presiding Board member would be appropriate. The Board may on its own initiative reject unduly repetitious, lengthy or otherwise burdensome questions, and may order a party to include additional witnesses, or to exclude multiple witnesses who would testify on the same matter.

(2) Response to the witness statement. Within 15 days after each party receives the other’s witness statement, each party may respond by submitting a supplemental statement to the Board, with a copy to the other party. The supplemental statement may add to earlier information, or may present any written objections to the proposed questions or issue areas, or to the proposed witnesses.
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(3) The conference hearing. (i) As soon as preparations are concluded, the Board will set a date for a hearing, to be held at a time and place determined by the Board to best serve the interests of all concerned. On request by either party, and for good cause, the Board may, in its discretion, change the time and place of the hearing. The parties are responsible for producing witnesses specified in the witness statements at the time and place set for the hearing conference. A transcript or other recording will be made.

(ii) At the conference hearing, each party may make a brief opening statement. The witnesses will be questioned based on their statements; and the Board may inquire further of each witness for information which may or may not be included in the witness’ statement. At the end of each witness’ testimony, either party may suggest additional questions, which the Board may ask, if no objections thereto have been sustained. The Board may permit or require the parties or their representatives to comment further on issues of fact or law. Brief closing statements will be permitted.

(iii) Except for opening and closing statements, and any questions asked during direct testimony, or as otherwise specifically allowed by the Board, the only oral communications in the record will be those of the Board member and the witnesses. Generally, no documentary evidence will be received at a conference hearing. Although the conference hearing is informal, witnesses will be required to testify under oath.

(4) Procedures after the hearing. Upon request, post hearing briefs may be allowed to be submitted within an appropriate time as may be set by the Board. No rebuttal briefs shall be permitted.

(5) Record for decision. The record upon which the decision will be based will consist of the complaint and answer (after disposition of the objections), the hearing transcript, briefs of the parties, and any other such documents specifically admitted by the Board into the record. The Board will issue a decision as soon as practicable (whenever possible within 120 days) after all briefs are filed or after the time for filing briefs has expired.

RULE 6. PARTIES TO THE APPEAL

Generally, the only parties to the appeal are the financial assistance recipient which received the final agency decision on which the appeal is based, and the Department. However, upon request the Board may allow a third party to present the case on appeal or appear with a party in the case, when the Board determines that the third party is a real party in interest.

RULE 7. REPRESENTATION BEFORE THE BOARD

(a) The appellant. An appellant may appear before the Board in person or through a representative. The appellant’s notice of appeal, or the appellant’s election letter submitted pursuant to Rule 2 must specify the name, address and telephone number of the appellant’s representative. An attorney representing appellant shall file a written notice of appearance. If represented by someone other than an attorney, appellant shall submit a declaration, signed by a responsible official of the appellant, that the person is authorized to act for the appellant.

(b) The respondent. As soon as practicable, and no more than 20 days after receiving the notice of appeal under Rule 1, the attorney representing the interest of the respondent shall file a notice of appearance and shall serve the notice on the appellant, or the appellant’s attorney.
RULE 8. DISMISSAL FOR FAILURE TO MEET DEADLINES AND OTHER REQUIREMENTS

(a) Whenever an appeal record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board, or otherwise indicates an intention by that party not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed, or granted, as appropriate. If the offending party does not, or is not able to respond adequately, the Board may take such action as it deems reasonable and proper.

(b) If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to permit the just and expeditious conduct of the appeal, including dismissal.

RULE 9. THE BOARD’S POWERS, FUNCTIONS, AND RESPONSIBILITIES

The Board has been delegated all powers necessary for the performance of its duties, including but not limited to the authority to conduct hearings, call witnesses, dismiss appeals with or without prejudice, order the production of documents and other evidence, administer oaths and affirmations, issue subpoenas, order depositions to be taken, take official notice of facts within general knowledge, and decide all questions of fact and law. In discharging its functions, the Board shall provide an expeditious, just, and relatively inexpensive forum for resolving the dispute.

RULE 10. EX PARTE COMMUNICATIONS (COMMUNICATIONS OUTSIDE THE RECORD)

(a) Written or oral communications with a Board member by one party without the participation or notice to the other about the merits of the appeal is not permitted. No member of the Board, or the Board’s staff, shall consider, nor shall any person directly or indirectly involved in an appeal, submit any off the record information, whether written or oral, relating to any matter at issue in an appeal.

(b) This rule does not apply to communications among members and staff, nor to communications concerning the Board’s administrative functions or procedures.

RULE 11. NOTICE AND LOCATION OF HEARINGS

Hearings will be held at such places and at such times determined by the Board to best serve the interests of the parties and the Board. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. The parties shall be given at least 15 days notice of time and place set for hearings.

RULE 12. CALCULATION OF TIME PERIODS

If a due date for the filing of any paper under these procedures falls on a Sunday, Saturday, or Federal holiday, then it shall be extended to the next calendar working day.

PART 1036—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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§ 1036.100  Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

1. Prescribing the programs and activities that are covered by the governmentwide system;
2. Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;
3. Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in §1036.105), and participants who have voluntarily excluded themselves from participation in covered transactions;
4. Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and
5. Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103–355, sec. 2455, 108 Stat. 3327) by—

1. Providing for the inclusion in the List of Parties Excluded from Federal Procurement and Nonprocurement Programs all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and
2. Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

[60 FR 33030, 33043, June 26, 1995]
§ 1036.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Awardee. Any organization or individual that:

(1) Submits proposals for, or is awarded, or reasonably may be expected to submit proposals for, or be awarded a DOE agreement; or

(2) Conducts business with DOE as an agent or representative of an awardee.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is “debarred.”

Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The DOE debarring official is the Deputy Assistant Secretary for Procurement and Assistance Management or designee.

DOE. The Department of Energy, including the Federal Energy Regulatory Commission.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person’s eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its
equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

1. Principal investigators.
2. [Reserved]

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:
1. The agency head, or
2. An official designated by the agency head.
3. The DOE suspending official is the Deputy Assistant Secretary for Procurement and Assistance Management or designee.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is “suspended.”

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§ 1036.110 Coverage.
(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as “covered transactions.”

(1) Covered transaction. For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.
(i) **Primary covered transaction.** Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency’s regulations governing debarment and suspension.

(ii) **Lower tier covered transaction.** A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(2) **Exceptions.** The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) **Relationship to other sections.** This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, “Effect of Action,” §1036.200, “Debarment or suspension,” sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in §1036.110(a). Sections 1036.325, “Scope of debarment,” and 1036.420, “Scope of suspension,” govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) **Relationship to Federal procurement activities.** In accordance with E.O. 12689 and section 2455 of Public Law 103–355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

(1) Debarment and suspension of DOE procurement contractors is covered by 48 CFR (DEAR) 909.4.
§ 1036.115 Policy.
(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.
(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government’s protection and not for purposes of punishment. Agencies may impose debarment or suspension as either for the causes and in accordance with the procedures set forth in these regulations.
(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Action
§ 1036.200 Debarment or suspension.
(a) Primary covered transactions. Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to §1036.215.
(b) Lower tier covered transactions. Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see §1036.110(a)(1)(ii)) for the period of their exclusion.

(c) Exceptions. Debarment or suspension does not affect a person’s eligibility for—
(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;
(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;
(3) Benefits to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted);
(4) Federal employment;
(5) Transactions pursuant to national or agency-recognized emergencies or disasters;
(6) Incidental benefits derived from ordinary governmental operations; and
(7) Other transactions where the application of these regulations would be prohibited by law.

§ 1036.205 Ineligible persons.
Persons who are ineligible, as defined in §1036.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 1036.210 Voluntary exclusion.
Persons who accept voluntary exclusions under §1036.315 are excluded in accordance with the terms of their settlements. DOE shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 1036.215 Exception provision.
DOE may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a
written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and §1036.200. However, in accordance with the President’s stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with §1036.505(a).

(a) The DOE authorized designee is the Deputy Assistant Secretary for Procurement and Assistance Management or designee.

(b) [Reserved]

[60 FR 33041, 33044, June 26, 1995, as amended at 61 FR 39856, July 31, 1996]

§1036.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded, except as provided in §1036.215.

[60 FR 33041, 33044, June 26, 1995]

§1036.225 Failure to adhere to restrictions.

(a) Except as permitted under §1036.215 or §1036.220, a participant shall not knowingly do business under a covered transaction with a person who is:

1. Debarred or suspended;
2. Proposed for debarment under 48 CFR part 9, subpart 9.4; or
3. Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[60 FR 33041, 33044, June 26, 1995]

Subpart C—Debarment

§1036.300 General.

The debarring official may debar a person for any of the causes in §§1036.300 through 1036.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person’s acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§1036.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§1036.300 through 1036.314 for:

(a) Conviction of or civil judgment for:

1. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
2. Violation of Federal or State antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
3. Commission of embezzlement, theft, forgery, bribery, falsification or
§ 1036.310

The following causes:

(d) Any other cause of so serious or compelling a nature that it affects

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destruction of records, making false

statements, receiving stolen property,

making false claims, or obstruction of

justice; or

(4) Commission of any other offense

indicating a lack of business integrity

or business honesty that seriously and
directly affects the present responsi-
bility of a person.

(b) Violation of the terms of a public

agreement or transaction so serious as
to affect the integrity of an agency

program, such as:

(1) A willful failure to perform in ac-
cordance with the terms of one or more

public agreements or transactions;

(2) A history of failure to perform or

of unsatisfactory performance of one or

more public agreements or trans-
actions; or

(3) A willful violation of a statutory

or regulatory provision or requirement

applicable to a public agreement or

transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by

any Federal agency taken before Octo-
ber 1, 1988, the effective date of these

regulations, or a procurement debar-
ment by any Federal agency taken pur-
suant to 48 CFR subpart 9.4:

(2) Knowingly doing business with a
debared, suspended, ineligible, or vol-
untarily excluded person, in connection

with a covered transaction, except as
permitted in §1036.215 or §1036.220;

(3) Failure to pay a single substantial
debt, or a number of outstanding debts
(including disallowed costs and over-
payments, but not including sums owed
the Federal Government under the In-
ternal Revenue Code) owed to any Fed-
eral agency or instrumentality, pro-
vided the debt is uncontested by the
debtor or, if contested, provided that
the debtor’s legal and administrative
remedies have been exhausted;

(4) Violation of a material provision
of a voluntary exclusion agreement en-
tered into under §1036.315 or of any set-
tlement of a debarment or suspension
action; or

(5) Violation of any requirement of
subpart F of this part, relating to pro-
viding a drug-free workplace, as set
forth in §1036.615 of this part.

§ 1036.310 Proce

DOE shall process debarment actions

as informally as practicable, consistent

with the principles of fundamental

fairness, using the procedures in

§§1036.311 through 1036.314.

§ 1036.311 Investigation

and referral.

Information concerning the existence

of a cause for debarment from any

source shall be promptly reported, in-
vestigated, and referred, when appro-
priate, to the debarring official for con-
sideration. After consideration, the de-
barring official may issue a notice of
proposed debarment.

§ 1036.312 Notice of pro-
posed debar-
ment.

A debarment proceeding shall be ini-
tiated by notice to the respondent ad-
vising:

(a) That debarment is being consid-
ered;

(b) Of the reasons for the proposed
debarment in terms sufficient to put
the respondent on notice of the con-
duct or transaction(s) upon which it is
based;

(c) Of the cause(s) relied upon under
§1036.305 for proposing debarment;

(d) Of the provisions of §1036.311
through §1036.314, and any other DOE
procedures, if applicable, governing de-
barment decisionmaking; and

(e) Of the potential effect of a debar-
ment.

(f) That within 30 days after receipt
of the notice, the respondent may sub-
mit, or make a written request for an
opportunity to submit, to the debar-
ring official or designee, information
and argument in opposition to the pro-
posed debarment, including any addi-
tional specific information that may
raise a genuine dispute over the mate-
rial facts. The submission in opposition
may be made in person, in writing or
through a representative; and
§ 1036.314 Debarring official’s decision.

(a) No additional proceedings necessary. In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) Additional proceedings necessary. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official’s decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(4) Standard of proof. In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(b) Burden of proof. The burden of proof is on the agency proposing debarment.

(c) Notice of debarring official’s decision. (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment notice was sent to GSA and that the respondent’s name and address will be added to the Nonprocurement List; and
§ 1036.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, DOE may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

§ 1036.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (see §1036.305(c)(5)), the period of debarment shall not exceed five years.

(3) The debarred participant or any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§1036.311 through 1036.314) shall be subject to debarment for an additional period determined to be necessary. The procedures of §§1036.311 through 1036.314 shall be followed to extend the debarment.

(c) The respondent may request the debarred official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarred official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarred official deems appropriate.

§ 1036.325 Scope of debarment.

(a) Scope in general. (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§1036.311 through 1036.314).

(b) Imputing conduct. For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) Conduct imputed to participant. The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual’s performance of duties for or on behalf of the participant, or with the participant’s knowledge, approval, or acquiescence. The participant’s acceptance of the benefits derived from the conduct shall
be evidence of such knowledge, approval, or acquiescence.

(2) Conduct imputed to individuals associated with participant. The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant’s conduct.

(3) Conduct of one participant imputed to other participants in a joint venture. The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§ 1036.400 General.

(a) The suspending official may suspend a person for any of the causes in §1036.405 using procedures established in §§1036.410 through 1036.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §1036.405; and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 1036.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§1036.400 through 1036.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §1036.305(a); or

(2) That a cause for debarment under §1036.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 1036.410 Procedures.

(a) Investigation and referral. Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) Decisionmaking process. DOE shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§1036.411 through 1036.413.

§ 1036.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government’s evidence;

(d) Of the cause(s) relied upon under §1036.405 for imposing suspension;

(e) Of the provisions of §1036.410 through §1036.413 and any other DOE procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.
§ 1036.412 Opportunity to contest suspension.

(a) Submission in opposition. Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) Additional proceedings as to disputed material facts. (1) If the suspending official finds that the respondent’s submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.


§ 1036.413 Suspending official’s decision.

The suspending official may modify or terminate the suspension (for example, see §1036.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) No additional proceedings necessary. In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) Additional proceedings necessary. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) Notice of suspending official’s decision. Prompt written notice of the suspending official’s decision shall be sent to the respondent.

§ 1036.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion
of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§1036.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see §1036.325), except that the procedures of §§1036.410 through 1036.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§1036.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

1. The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;
2. The type of action;
3. The cause for the action;
4. The scope of the action;
5. Any termination date for each listing; and
6. The agency and name and telephone number of the agency point of contact for the action.

§1036.505 DOE responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which DOE has granted exceptions under §1036.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §1036.500(b) and of the exceptions granted under §36.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded.

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§1036.510 Participants’ responsibilities.

(a) Certification by participants in primary covered transactions. Each participant shall submit the certification in appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is
§ 1036.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 1036.605 Definitions.

(a) Except as amended in this section, the definitions of §1036.105 apply to this subpart.

(b) For purposes of this subpart—

(1) Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) Drug-free workplace means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) Employee means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All “direct charge” employees;

(ii) All “indirect charge” employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee’s payroll.

Subpart F—Drug-Free Workplace Requirements (Grants)
§ 1036.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under §1036.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.), (a)–(g), and/or (B.) of the certification (Alternate I to appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.
§ 1036.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in §1036.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;
(2) Suspension or termination of the grant; and
(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (see §1036.320(a)(2) of this part).

§ 1036.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 1036.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor’s office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.
(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 1036.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee’s position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency’s affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency’s affected grants.

(Approved by the Office of Management and Budget under control number 0991–0002.)

Subpart G—Additional DOE Procedures for Debarment and Suspension


§ 1036.700 Procedures.

(a) Decisionmaking process for debarments. (1) In actions based upon a conviction or civil judgment, and other actions in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submissions made by the awardee. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the awardee, unless the debarring official extends this period for good cause. The debarring official shall consider information and argument in opposition to the proposed debarment including identification of disputed material facts. If the respondent fails to submit a timely written response to a notice of proposed debarment, the debarring official shall notify the respondent in accordance with 10 CFR 1036.312 that the awardee is debarred.

(2) In actions not based upon a conviction or civil judgment, if it is found that the awardee’s submission in opposition raises a genuine dispute over facts material to the proposed debarment, at the request of the awardee, the debarring official shall refer the matter to the Energy Board of Contract Appeals for a fact-finding conference, in accordance with rules consistent with this section promulgated by the Energy Board of Contract Appeals. The Energy Board of Contract Appeals shall report to the Debarring Official findings of fact, not conclusions of law. The findings shall resolve any disputes over material facts based on a preponderance of evidence.
(b) Decisionmaking process for suspensions. (1) In actions based on an indictment, the suspending official shall make a decision based upon the administrative record, which shall include submissions made by the awardee.

(2) In actions not based on an indictment, if it is found that the awardee's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interest of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, the suspending official shall, at the request of the awardee, refer the matter to the Energy Board of Contract Appeals for a fact-finding conference, in accordance with rules promulgated by the Energy Board of Contract Appeals. The Energy Board of Contract Appeals shall report to the Suspending Official findings of fact, not conclusions of law. The findings shall resolve any disputes over material facts based on a preponderance of evidence if the case involves a proposal to debar, or on adequate evidence if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that warrants a fact-finding conference for those proposed debarments based on convictions or civil judgments.

[61 FR 39856, July 31, 1996]

§ 1036.705 Coordination with Department of Justice.

Whenever a meeting or fact-finding conference is requested, under §1036.700(c), the debarring/suspending official's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such official requests in writing that evidence needed to establish the existence of a cause for suspension or proposed debarment not be disclosed to the respondent, the debarring/suspending official shall:

(a) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(b) Deny additional proceedings and base the decision on all information in the administrative recording, including any submissions made by the respondent.

§ 1036.715 Effects of being listed on the GSA list.

The Deputy Assistant Secretary for Procurement and Assistance Management or designee may grant an exception to the prohibitions of paragraphs (a) through (e) of this section by issuing a written determination setting forth the compelling reasons justifying the waiver in accordance with § 1036.215.

(a) DOE shall not solicit, or consider, and shall return any proposal submitted by a contractor, awardee, or person on the GSA List or a person on the Nonprocurement List, to the extent that the solicitation activity or proposal falls within the scope of the suspension, proposed debarment, debarment, ineligibility of voluntary exclusion, as indicated on the GSA List or Nonprocurement List.

(b) DOE shall not award, extend, renew any agreement or lower tier covered transaction with an awardee or person on the GSA List or on the Nonprocurement List, to the extent that the activity falls within the scope of the suspension, proposed debarment, debarment, ineligibility of voluntary exclusion, as indicated on the GSA List or Nonprocurement List.

(c) DOE shall not approve or consent to any new, continuation, renewal award or extension of a subagreement or lower tier covered transaction with a contractor, awardee, or person on the GSA List and shall not approve or consent to any new, continuation, renewal award or extension of a subagreement or lower tier covered transaction with a person on the Nonprocurement List, to the extent that the award falls within the scope of the suspension proposed debarment, debarment, ineligibility or voluntary exclusion.

(d) DOE shall disapprove or not consent to the selection (by an awardee or participant) or a individual or principal to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is on the GSA List or the Nonprocurement List.

(e) DOE shall not conduct business with an agent or representative whose name appears on the GSA List or the Nonprocurement List.

(f) DOE shall review existing agreements and may initiate a review of any subagreements with a contractor, awardee or person on the GSA List or on the Nonprocurement List for the purpose of determining whether termination or other remedial action, available under the terms of the agreement, subagreement, or applicable law, is necessary to protect the Government’s interest.

(g) DOE shall review the GSA List and the Nonprocurement List before conducting a preaward survey or soliciting proposals, making new, continuation, or renewal awards or otherwise extending the duration of existing agreements, or approving or consenting to the award, extension, or renewal of subagreements.

(h) DOE participants shall not award, extend, renew any agreement or lower tier covered transaction with an awardee or person that fails to complete the certification required by § 1036.510(b), or that the participant knows that the certification is false.


APPENDIX A TO PART 1036—CERTIFICATION REGARDING DEBARTMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency’s determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or
agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction,” provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]
APPENDIX B TO PART 1036—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions,” without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]

APPENDIX C TO PART 1036—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may
take action authorized under the Drug-Free Workplace Act.
3. For grantees other than individuals, Alternate I applies.
4. For grantees who are individuals, Alternate II applies.
5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee’s drug-free workplace requirements.
6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).
7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).
8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees’ attention is called, in particular, to the following definitions from these rules:
    Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15).
    Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;
    Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;
    Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All “direct charge” employees; (ii) all “indirect charge” employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants or independent contractors not on the grantee’s payroll; or employees of subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)
A. The grantee certifies that it will or will continue to provide a drug-free workplace by:
(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee’s workplace and specifying the actions that will be taken against employees for violation of such prohibition;
(b) Establishing an ongoing drug-free awareness program to inform employees about—
    (1) The dangers of drug abuse in the workplace;
    (2) The grantee’s policy of maintaining a drug-free workplace;
    (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
    (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);
(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—
    (1) Abide by the terms of the statement; and
    (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction; and
(e) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;
(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—
(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:
Place of Performance (Street address, city, county, state, zip code)

[55 FR 21690, 21691, May 25, 1990]

PART 1039—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

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**Source:** 45 FR 40515, June 13, 1980, unless otherwise noted.
§ 1040.2 Application.

(a) The application of this part is to any program or activity for which Federal financial assistance is authorized under laws administered by DOE. Programs to which this part applies are listed in Appendix A of this part. Appendix A is to be revised from time to time by notice published in the Federal Register. This part applies to money paid, property transferred, or other Federal financial assistance including cooperative agreements extended under any program or activity, by way of grant, loan, or contract by DOE, or grants awarded in the performance of a contract with DOE by an authorized contractor or subcontractor, the terms of which require compliance with this part. If any statutes implemented by this part are otherwise applicable, the failure to list a program in Appendix A does not mean the program is not covered by this part.

(b) This part does not apply to:

(1) Contracts of insurance or guaranty;
(2) Employment practices under any program or activity except as provided in §§1040.12, 1040.14, 1040.41, 1040.47 and 1040.66; or
(3) Procurement contracts under Title 41 CFR part 1 or part 9.

§ 1040.3 Definitions—General.

(a) Academic institution includes any school, academy, college, university, institute, or other association, organization, or agency conducting or administering any program, project, or facility designed to educate or train individuals.

(b) Administrative law judge means a person appointed by the reviewing authority to preside over a hearing held under this part.

(c) Agency or Federal agency refers to any Federal department or agency which extends Federal financial assistance.

(d) Applicant for assistance means one who submits an application, request, or plan required to be approved by a Department official or by a primary recipient as a condition to becoming eligible for Federal financial assistance.

(e) Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(f) Director, FAPD refers to the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE.

(g) Compliance Review means an analysis of a recipient’s selected employment practices or delivery of services for adherence to provisions of any of the subparts of this part.

(h) Department means the Department of Energy (DOE).

(i) FERC means the Federal Energy Regulatory Commission, DOE.

(j) Where designation of persons by race, color, or national origin is required, the following designations are to be used:

(1) Black, not of Hispanic origin. A person having origins in any of the black racial groups of Africa.

(2) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.
§ 1040.3

(3) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This includes, for example, China, India, Japan, Korea, the Philippine Islands, Hawaiian Islands, and Samoa.

(4) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition.

(5) White, not of Hispanic origin. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Paragraphs (j) (1) through (5), inclusive, set forth in this section are in conformity with Directive No. 15 of the Office of Federal Statistical Policy and Standards. To the extent that these designations are modified, paragraphs (j) (1) through (5), inclusive, set forth in this section are to be interpreted to conform with those modifications.

(k) Director means the Director, Office of Equal Opportunity, DOE.

(l) Disposition means any treatment, handling, decision, sentencing, confinement, or other proscription of conduct.

(m) Employment practices, see individual section headings.

(n) Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration, or acquisition of facilities.

(o) Federal financial assistance includes:

(1) Grants and loans of Federal funds,

(2) The grant or donation of Federal property and interest in property,

(3) The detail of or provision of services by Federal personnel,

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property, the furnishing of services or personal services, the purchase of services or personal services, the furnishing of facilities or personal facilities, or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale, lease, or furnishing of services to the recipient, and

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(p) General Counsel means the Office of the General Counsel Department of Energy.

(q) Government organization means the political subdivision for a prescribed geographical area.

(r) Investigations include fact-finding efforts and attempts to secure voluntary resolution of complaints.

(s) Noncompliance means the failure of a recipient or subrecipient to comply with any subpart of this part.

(t) Primary recipient means any person, group, organization, state, or local unit of government which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(u) Program includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through an employee of the grantee or provided by others through contracts or other arrangements with the grantee, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal resources or such non-Federal resources.
§ 1040.4 Assurances required and preaward review.

(a) Assurances. An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance on a form specified by the Director that the program or activity will be operated in compliance with applicable subparts. Such assurances are to include provisions which give the United States a right to seek judicial enforcement.

(b) Duration of obligation. (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structure on the property, the assurance obligates the recipient or, in the case of a subsequent transferee, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits:

(2) In the case of Federal financial assistance extended to provide personal property, the assurance obligates the recipient for the period during which it retains ownership or possession of the property. (3) In all other cases, the assurance obligates the recipient to all terms and conditions contained in the certificate of assurance for the period during which Federal financial assistance is extended.

(c) Covenants. Where Federal financial assistance is provided in the form of real property, structures, improvements on or interests in the property, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest in the property from the Department:

(1) The instrument effecting or recording this transfer is to contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits; or

(2) Where no transfer of property is involved or imposed with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant is to also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a material breach of the covenant. If a transferee of real property manages to mortgage or otherwise encumber the real property as security for financing construction of new or improvement of existing facilities on the property for the purpose for which the property was transferred, the Director may, upon request of the transferee and, if necessary to accomplish such financing and upon such conditions, as he or she deems appropriate, agree to forbear the exercise of the right to revert title for so long as the lien of the mortgage or other encumbrance remains effective.

(d) Assurances from government agencies. In the case of any application from any department, agency or office of any State or local government for Federal financial assistance for any specified purpose, the assurance required by this section is to extend to any other
§ 1040.5  Designation of responsible employee.

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to carry out its responsibilities under this part. The recipient shall publish the name, office address and
telephone number of the employee or employees appointed under this paragraph.

(b) A recipient shall display prominently, in reasonable numbers and places, posters which state that the recipient operates a program or programs subject to the nondiscrimination provisions of applicable subparts, summarize those requirements, note availability of information regarding this part from the recipient and DOE, and explain briefly the procedures for filing a complaint. Information on requirements of this part, complaint procedures and the rights of beneficiaries are to be included in handbooks, manuals, pamphlets, and other materials which are ordinarily distributed to the public to describe the federally assisted programs and the requirements for participation by recipients and beneficiaries. To the extent that recipients are required by law or regulation to publish or broadcast program information in the news media, the recipient shall insure that such publications and broadcasts state that the program in question is an equal opportunity program or otherwise indicate that discrimination in the program is prohibited by Federal law.

(c) Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program requires service or information in a language other than English in order to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and size and concentration of such population, to provide information in appropriate languages (including braille) to such persons. This requirement applies to written material of the type which is ordinarily distributed to the public. The Department may require a recipient to take additional steps to carry out the intent of this subsection.

§ 1040.6 Notice.

(a) A recipient shall take appropriate, initial and continuing steps to notify participants, beneficiaries, applicants and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of race, color, national origin, sex (where sec. 16 or sec. 401 apply), handicap, or age. The notification is to state, where appropriate, that the recipient does not discriminate in admission or access to, and treatment of, or employment in its programs and activities and inform employees of their rights under this part. The notification is to include an identification of the responsible employee designated under §1040.5. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients’ publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(c) The provisions of §1040.5(c) to provide information in appropriate languages (including braille), apply to this section.

§ 1040.7 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the Director finds that a recipient has discriminated against persons on the basis of race, color, national origin, sex, handicap, or age in any program or activity receiving Federal financial assistance, the recipient shall take remedial action as the Director considers necessary to overcome the effects of the discrimination.

(b) Affirmative action. In the absence of a finding of discrimination on the basis of race, color, national origin, sex, handicap, or age in any program or
§ 1040.8

Effect of employment opportunity.

Due to limited opportunities in the past, certain protected groups may be underrepresented in some occupations or professions. A recipient’s obligation to comply with this part is not alleviated by use of statistical information which reflects limited opportunities in those occupations or professions.

§ 1040.11

Purpose and application.

(a) The purpose of this subpart is to implement title VI of the Civil Rights Act of 1964 (title VI) and the pertinent regulations of DOE so that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance of the type subject to title VI. This subpart also implements section 16 of the Federal Energy Administration Act of 1974, as amended (section 16) and section 401 of the Energy Reorganization Act of 1974 (section 401) so that no person shall be excluded on the ground of sex from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance subject to section 16 or 401. The coverage of employment practices is explained in §1040.14.

(b) The application of this subpart is to delivery of services by and the covered employment practices of recipients and subrecipients administering, participating in, or substantially benefiting from any program or activity receiving Federal financial assistance under laws administered by DOE covered by title VI. In addition to services and employment practices, this subpart applies to any activities of recipients or subrecipients receiving Federal financial assistance subject to section 16 and section 401.
§1040.12 Definitions. 

(a) Covered employment means employment practices covered by title VI, section 16 and section 401.

(1) Under title VI, such practices are those which:

(i) Exist in a program where a primary objective of the Federal financial assistance is to provide employment; or

(ii) Cause discrimination on the basis of race, color, or national origin with respect to beneficiaries or potential beneficiaries of the assisted program.

(2) Under section 16 and section 401, such practices include, but are not limited to, employment practices covered by title VI when alleging discrimination on the basis of sex. All employment practices of a recipient or subrecipient of Federal financial assistance subject to section 16 and section 401 are covered employment practices.

(b) Title VI refers to title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. which prohibits discrimination on the ground of race, color or national origin in programs and activities receiving Federal financial assistance. The definitions set forth in §1040.3 of subpart A to the extent not inconsistent with this subpart, are applicable to and incorporated into this subpart.

§1040.13 Discrimination prohibited.

(a) General. No person in the United States shall be excluded on the ground of race, color, national origin, or sex (when covered by section 16 or section 401), from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory action prohibited. A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, national origin or sex (when covered by section 16 or section 401):

(1) Deny any individual any disposition, service, financial aid, or benefit provided under the program;

(2) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(3) Subject an individual to segregation or separate treatment in any matter related to his/her receipt of any disposition, service, financial aid, or benefit under the program;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(5) Treat an individual differently from others in determining whether such individual satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program;

(6) Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford such individual an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in §1040.14 of this subpart); or

(7) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(c) A recipient, in determining the type of Federal financial assistance (i.e., disposition, services, financial aid, benefits, or facilities) which will be provided under any program, or the class of individuals to whom, or the situations in which the assistance will be provided, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex (when covered by section 16 and section 401) or have the effect of defeating or substantially impairing accomplishment of the program objectives with respect to individuals of a particular race, color, national origin, or sex (when covered by section 16 or section 401).

(d) In determining the site or location of facilities, a recipient or applicant may not make selections with the
§ 1040.14 Covered employment.

(a) Employment practices. (1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies is to provide employment, a recipient of the assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the grounds of race, color, national origin, or sex (when covered by section 16 or 401) in its employment practices under the program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion or transfer, training, participation in upward mobility programs, rates of pay or other forms of compensation, and use of facilities). This prohibition also applies to programs where the primary objective of the Federal financial assistance is:

(i) To assist individuals through employment to meet expenses incident to the commencement or continuation of their education or training;

(ii) To provide work experience which contributes to the education or training of the individuals involved;

(iii) To reduce the unemployment of individuals or to help them through employment to meet subsistence needs; or

(iv) To provide employment to individuals who, because of handicaps, cannot be readily absorbed in the competitive labor market. The requirements applicable to construction under any such program are to be those specified in or under part III of Executive Order 11246, as amended, or any Executive Order which supersedes it.

(2) In regard to Federal financial assistance which does not have provision of employment as a primary objective, the provisions of paragraph (a)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, national origin, or sex (when covered by section 16 or section 401) in such employment practices tends to exclude persons from participation in, deny them the benefits of, or subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (a)(1) of this section apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

(3) Paragraph (a)(1) also applies to covered employment as defined in §1040.12(a)(2).

(b) Enforcement of title VI compliance with respect to covered employment practices is not to be superseded by State or local merit systems relating to the employment practices of the same recipient.

Subpart C [Reserved]
Subpart D—Nondiscrimination on the Basis of Handicap—Section 504 of the Rehabilitation Act of 1973, as Amended

GENERAL PROVISIONS

§ 1040.61 Purpose and application.

(a) The purpose of this subpart is to implement sec. 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

(b) This subpart applies to each recipient or subrecipient of Federal financial assistance from DOE and to each program or activity that receives or benefits from assistance.

§ 1040.62 Definitions.

(a) Executive Order means Executive Order 11914, titled “Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs” issued on April 28, 1976.


(c) Handicapped person means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.

(d) As used in paragraph (c) of this section, the phrase:

(1) Physical or mental impairment means—

(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, genito-urinary; 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 and drug addiction and alcoholism, when current use of drugs and/or alcohol is not detrimental to or interferes with the employee’s performance, nor constitutes a direct threat to property or safety of others.

(2) Major life activities means 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.

(4) Is regarded as having an impairment means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient 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 such impairment; or

(iii) Has none of the impairments defined in paragraphs (d)(1) (i) and (ii) of this section, but is treated by a recipient as having such an impairment.

(e) Qualified handicapped person means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult education services, a handicapped person:

(i) Of an age during which non-handicapped persons are provided such services;

(ii) Of any age during which it is mandatory under state law to provide such services to handicapped persons; or

(iii) To whom a state is required to provide a free appropriate public education under sec. 612 of the Education for All Handicapped Children Act of 1975, Pub. L. 94–142.
§ 1040.63 Discrimination prohibited.

(a) General. No qualified handicapped person 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 that receives or benefits from Federal financial assistance from DOE.

(b) Discriminatory actions prohibited. (1) A recipient, 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 person the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified handicapped person 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 handicapped person 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 handicapped persons or to any class of handicapped persons than is provided to others unless the action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or services to beneficiaries of the recipient’s program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the person’s needs.

(3) Despite the existence of permissible separate or different programs or activities, a recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different.
§ 1040.64 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for non-handicapped persons.

(c) Effect of other regulations. All regulations, orders, or similar directions issued by any officer of DOE which impose requirements designed to prohibit discrimination against individuals on the grounds of race, color, national origin, sex, age or handicap under any program to which this part applies, and which authorize the suspension, termination or refusal to grant or to continue Federal financial assistance under any program for failure to comply with these requirements, are superseded to the extent that discrimination is prohibited by this part. Nothing in this part is to relieve any person of the obligation assumed or imposed under any superseded regulation, order, instruction, or similar direction prior to the effective date of this part. Nothing in this part is to supersede the effective date of this part. Nothing in this part is to supersede Executive Orders 10925, 11114, 11063, 11246, and regulations issued under these authorities, or supersede any other regulations or instructions which prohibit discrimination on the ground of race, color, national origin, sex, age, or handicap in any program or activity to which this part does not apply.

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§ 1040.65 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated in this section by reference. These procedures may be found in subparts G and H of this part.

EMPLOYMENT PRACTICES

§ 1040.66 Discrimination prohibited.

(a) General. (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination employment under any program or activity to which this subpart applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(b) Specific activities. The provisions of this subpart apply to:

(1) Recruitment, advertising, and processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick or otherwise;

(6) Fringe benefits available by virtue of employment, whether administered by the recipient or not;

(7) Selection and provision of financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient’s obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 1040.67 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining, under paragraph (a) of this section, whether an accommodation would impose an undue hardship on the operation of a recipient’s program, factors to be considered include:

(1) The overall size of the recipient’s program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to
make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 1040.68 Employment criteria.
(a) A recipient may not use any employment test or other selection criterion that screens out or tends to screen out handicapped persons unless the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question.
(b) A recipient shall select and administer tests concerning employment to best ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant’s or employee’s job skills, aptitude or other factors the test purports to measure except where those skills are the factors that the test purports to measure.

§ 1040.69 Preemployment inquiries.
(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a pre-employment medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make pre-employment inquiry into an applicant’s ability to perform job-related functions.
(b) When a recipient is taking remedial action to correct the effects of past discrimination, under §1040.7 of this part, or is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity under §1040.7 of subpart A of this part, or when a recipient is taking affirmative action under Sec. 503 of the Rehabilitation Act of 1973, as amended, the recipient may invite applicants for employment to indicate whether, and to what extent, they are handicapped Provided that:
(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and
(2) The recipient states clearly that the information is requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this subpart.
(c) Nothing in this section is to prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee’s entrance on duty provided that all entering employees are subjected to the examination regardless of handicap or absence of handicap and results of the examination are used only in accordance with the requirements of this subpart.
(d) Information obtained in accordance with this section concerning the medical condition or history of the applicant is to be collected and maintained on separate forms that are to be accorded confidentiality as medical records, except that:
(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;
(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and
(3) Government officials investigating compliance with Sec. 504 of the Rehabilitation Act of 1973, as amended, shall be provided relevant information upon request.

PROGRAM ACCESSIBILITY
§ 1040.71 Discrimination prohibited.
No handicapped person shall, because a recipient’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance from DOE.
§ 1040.72 Existing facilities.

(a) Program accessibility. A recipient shall operate any program or activity to which this subpart applies so that the program or activity, when viewed in its entirety, is readily accessible and useable by handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and useable by handicapped persons.

(b) Methods. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 1040.73 or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) Time period. A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this subpart except that where structural changes in facilities are necessary, the changes are to be made as expeditiously as possible, but in no event later than three years after the effective date of this subpart.

(d) Transition plan. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within 6 months of the effective date of this subpart, a transition plan setting forth the steps necessary to complete the changes. The plan is to be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and the plan is to meet with the approval of the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE. A copy of the transition plan is to be made available for public inspection. At a minimum, the plan is to:

1. Identify physical obstacles in the recipient’s facilities that limit the accessibility to and usability by handicapped persons of its program or activity.

2. Describe in detail the methods that will be used to make the facilities accessible;

3. Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period or the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

4. Indicate the person responsible for implementation of the plan.

(e) Notice. The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information concerning the existence and location of services, activities, and facilities that are accessible to, and useable by, handicapped persons.

§ 1040.73 New construction.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient is to be designed and constructed in a manner that the facility or part of the facility is readily accessible to, and useable by, handicapped persons, if the construction was commenced after the effective date of this subpart.

(b) Alteration. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this subpart in a manner that affects or could affect the usability of the facility or part of the facility is, to the maximum extent feasible, to be altered in a manner that the altered portion of the facility is readily accessible to and useable by handicapped persons.

(c) Conformance with Uniform Federal Accessibility Standards. (1) Effective as
§ 1040.74 Program accessibility in historic properties.

(a) Methods to accomplish program accessibility. In the case of historic properties, program accessibility shall mean that when programs are viewed in their entirety, they are accessible to and usable by handicapped persons. The recipient shall exhaust subsection (b)(2) (methods to accomplish program accessibility without building alterations or structural changes) before proceeding to subsection (b)(3) (methods to accomplish program accessibility resulting in building alterations). The recipient shall exhaust subsection (b)(2) (methods to accomplish program accessibility resulting in structural changes) before proceeding to subsection (b)(3) (methods to accomplish program accessibility resulting in structural changes).

(1) Methods to accomplish program accessibility without building alterations or structural changes. The recipient shall investigate compliance methods which do not alter the historic character or architectural integrity of the property and shall utilize such methods unless such methods are ineffective in achieving accessibility. Such methods may include, but are not limited to:

(i) Reassigning programs to accessible locations within the facility.

(ii) Assigning persons to aid handicapped persons into or through an otherwise inaccessible facility.

(iii) Delivering programs or activities at alternative accessible sites operated by or available for such use by the recipient.

(iv) Adopting other innovative methods which make programs accessible to the handicapped.

(2) Methods to accomplish program accessibility resulting in building alterations. The recipient shall determine that program accessibility cannot feasibly be accomplished by Methods to Accomplish Program Accessibility without Building Alterations or Structural Changes, subsection (b)(1) prior to utilizing building alteration as a method of accomplishing program accessibility. Alterations must comply with the accessibility standards adopted in these regulations. Building alterations shall be undertaken so as not to alter or destroy historically, architecturally, or culturally significant elements or features.

(3) Methods to accomplish program accessibility resulting in structural changes. The recipient shall determine that program accessibility cannot feasibly be accomplished by Methods to Accomplish Program Accessibility without Building Alterations or Structural Changes, subsection (b)(2) before considering structural changes as a method of accomplishing program accessibility. Structural changes must comply with the accessibility standards adopted in these regulations. Structural changes shall be undertaken so as not to alter or destroy historically, architecturally, or culturally significant elements or features.

(b) Modification or waiver of accessibility standards. The applicability of the accessibility standards set forth in these regulations may be modified or waived on a case-by-case basis, upon application to the Director, FAPD, where the recipient can demonstrate...
§ 1040.81 Purpose.

The purpose of these regulations is to implement the Age Discrimination Act of 1975, as Amended, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. In accordance with the Age Discrimination Act, federally assisted programs and activities and recipients of Federal funds may continue to use age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 1040.82 Application.

(a) These regulations apply to each program or activity which receives or benefits from Federal financial assistance provided by DOE.

(b) These regulations do not apply to—

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body which:
   (i) Provides any benefits or assistance to persons based on age; or
   (ii) Establishes criteria for participation in age-related terms; or
   (iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program.

§ 1040.83 Definitions.


(b) Action means any act, activity, policy, rule, standard or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) Age means how old a person is or the number of years from the date of a person’s birth.

(d) Age distinction means any action using age or an age-related term (for example, “18 or over”).

(e) Age-related term means a word or words which necessarily imply a particular age or range of ages (for example, “children”, “adult”, “older persons”, but not “student”).

(f) Days mean calendar days.

(g) Discrimination means unlawful treatment based on age.

(h) FERC means the Federal Energy Regulatory Commission.

(i) Field Civil Rights Officer means the official in each DOE field office with responsibility for administering DOE’s Civil Rights Program related to nondiscrimination in Federally assisted programs and activities.

(j) Recipient means any State or its political subdivision, instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes an individual who is the ultimate beneficiary of the assistance.

(k) Secretary means the Secretary, Department of Energy.

STANDARDS FOR DETERMINING AGE DISCRIMINATION

§ 1040.84 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in §1040.86 and of these regulations.

(a) General rule. No person in the United States shall, on the basis of age,
be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) Specific rules. A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(3) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 1040.85 Definitions of “Normal Operation” and “Statutory Objective”.

For purpose of §§ 1040.86 and 1040.87, the terms normal operation and statutory objective shall have the following meanings:

(a) Normal operation means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) Statutory objective means any purpose of a program or activity expressly stated in any Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 1040.86 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by §1040.84, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation of a program or activity if:

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 1040.87 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by §1040.84 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 1040.88 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take such remedial action as the Director, Office of Equal Opportunity (OEO), considers necessary to overcome the effects of the discrimination.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient’s program or activity on the basis of age.

(c) If a recipient operating a program which serves the elderly or children, in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.
§ 1040.89 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§1040.86 and 1040.87 is on the recipient of Federal financial assistance.

RESPONSIBILITIES OF DOE RECIPIENTS

§ 1040.89–1 General responsibilities.

Each DOE recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act and these regulations. A recipient also has responsibility to maintain records, provide information, and afford access to its records to DOE, to the extent required to determine whether it is in compliance with the Act and these regulations.

§ 1040.89–2 Notice to subrecipients.

Where a recipient awards Federal financial assistance from DOE to its subrecipients, the recipient shall provide the subrecipients written notice of their obligations under these regulations.

§ 1040.89–3 Information requirements.

Each recipient shall: (a) Upon request make available to DOE information necessary to determine whether the recipient is complying with the Act and these regulations.

(b) Permit reasonable access by DOE, upon request, to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether the recipient is in compliance with the Act and these regulations.

INVESTIGATION, CONCILIATION AND ENFORCEMENT PROCEDURES

§ 1040.89–4 Compliance reviews.

(a) DOE may conduct preaward and postaward compliance reviews of recipients as prescribed in this part or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. DOE may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review indicates a violation of the Act or these regulations, DOE will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, DOE will arrange for enforcement as described in §1040.89–10.

§ 1040.89–5 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a written complaint with DOE alleging discrimination prohibited by the Act or these regulations. A complainant must file a complaint within 180 days from the date he/she first had knowledge of the alleged act of discrimination. For good cause shown, however, the Director, Office of Equal Opportunity (OEO), may extend the time limit for filing a complaint. Complaints may be submitted to Field Civil Rights Officers located in DOE’s field offices or to the Director, OEO, Forestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585.

(b) The Director, OEO, will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact DOE for information and assistance regarding the complaint resolution process.

(c) The Director, OEO, will refer any complaint outside the jurisdiction of DOE to the proper Federal department.
or agency and will also notify the complainant and the recipient of the referral. The notification will contain an explanation for the referral and the name, telephone number, and address of the Federal department or agency office having jurisdiction over the matter complained.

§ 1040.89–6 Mediation.

(a) Referral of complaints for mediation. DOE will refer to the Federal Mediation and Conciliation Service, in accordance with 45 CFR 90.43(c)(3), all complaints that:

(1) Fall within the jurisdiction of the Act and these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator before the Director, OEO, will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to the Director, OEO, DOE. DOE will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) DOE will use the mediation process for a maximum of 60 days after referring a complaint to mediation. Mediation ends if:

(1) 60 days elapse from the time the mediation agency receives the complaint; or

(2) Prior to the end of the 60 day mediation period, an agreement is reached; or

(3) Prior to the end of that 60 day mediation period, the mediator determines that an agreement cannot be reached.

(e) The mediator shall return unresolved complaints to the Director, OEO, DOE.

§ 1040.89–7 Investigation.

(a) Informal Investigation. (1) The Director, OEO, will review complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of this review, Field Civil Rights Officers will use informal fact finding methods, including joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, settle the complaint on terms that are mutually agreeable to the parties.

(3) If the complaint is resolved during the informal investigation, DOE will put the agreement in writing and have it signed by the parties and the Director, OEO.

(4) The settlement shall not affect the operation of any other enforcement effort of DOE, including compliance reviews and investigation of other complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) Formal Investigation. If Field Civil Rights Officers cannot resolve the complaint through informal inquiry, the Director, OEO, will assign an Investigator to conduct a formal investigation of the complaint. If the investigation indicates a violation of the Act or these regulations, DOE will attempt to obtain voluntary compliance. If DOE cannot obtain voluntary compliance, it will begin enforcement as described in §1040.89–10 and 10 CFR part 1040, subpart H, §1040.111.

§ 1040.89–8 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of DOE’s investigation, conciliation, and enforcement process.

§ 1040.89–9 Compliance procedure.

(a) DOE may enforce the Act and these regulations through procedures
§ 1040.89–10

prescribed in subpart H of DOE regulation 10 CFR part 1040—Nondiscrimination in Federally Assisted Programs, which calls for—

(1) Termination of a recipient’s Federal financial assistance from DOE under the program or activity involved where the recipient has violated the Act or these regulations. The determination of the recipient’s violation may be made only after a recipient has had an opportunity for a hearing on the record before the Federal Energy Regulatory Commission (FERC). Therefore, cases which are settled in mediation, or prior to a hearing, will not involve termination of a recipient’s Federal financial assistance from DOE under this section.

(2) Any other means authorized by law including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations, or under the terms of the Federal financial assistance.

(ii) Use of any requirement of, or referral to, any Federal, State, or local government agency that will have the effect of correcting a violation of the Act of these regulations.

(b) DOE will limit any termination under §1040.89-9(a)(1) to the particular recipient and particular program or activity DOE finds in violation of these regulations. DOE will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from DOE.

(c) DOE will take no action under paragraph (a) until:

(1) The Director, OEO, has advised the recipient of its failure to comply with the Act, these regulations, or the terms of the Federal financial assistance and has determined that voluntary compliance cannot be obtained.

(2) Thirty (30) days have elapsed after the Secretary or the Secretary’s designee has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the Federal program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a) of this section.

(d) DOE also may defer granting new Federal financial assistance to a recipient when a hearing under §1040.89-10 is initiated.

(1) New Federal financial assistance from DOE includes all assistance for which DOE requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities during the deferral period. New Federal financial assistance from DOE does not include increases in funding as a result of changes, computation of formula awards, or assistance awarded prior to the beginning of a hearing under §1040.89-10.

(2) DOE will not defer new assistance until the recipient has received a notice of an opportunity for a hearing under §1040.89-10. DOE will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and FERC. DOE will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing resulted in a finding against the recipient.

§ 1040.89–11 Remedial action by recipients.

Where the Director, OEO, finds a recipient has discriminated on the basis of age, the recipient shall take such remedial action as the Director, OEO, may require to end the discriminatory practice or policy and/or to overcome the effects of the discrimination.

§ 1040.89–12 Alternate funds disbursal procedure.

(a) When DOE withholds funds from a recipient under these regulations, the Secretary or designee may disburse the withheld funds directly to an alternate
recipient(s), any public or private organization or agency, or State or political subdivision of the State.

(b) The Secretary or designee will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or activity.

§ 1040.89–13 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) One hundred eighty (180) days have elapsed since the complainant filed the complaint and DOE has made no findings with regard to the complainant; or

(2) DOE issues any findings in favor of the recipient.

(b) If DOE fails to make a finding within 180 days or issues a finding in favor of the recipient, the Director, OEO, will:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(i) That the complainant may bring a civil action only in a United States District Court for the district in which the recipient is located or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney fees, but that the complainant must demand these costs in the complaint;

(iii) That, before commencing the action, the complainant shall give 30 days notice, by registered mail, to the Secretary of DOE, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) That the notice must state: the alleged violation of the Act and these regulations; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

APPENDIX A TO SUBPART E TO PART 1040—DOE FEDERALLY ASSISTED PROGRAMS CONTAINING AGE DISTINCTIONS
<table>
<thead>
<tr>
<th>Statute, Name, Public Law, and U.S. Code</th>
<th>Section and age distinction</th>
<th>Use of age/age related team</th>
<th>Popular name or program</th>
<th>CFDA No.</th>
</tr>
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<tbody>
<tr>
<td>Energy Conservation and Production Act, Title IV, Part A; Public Law 94–385, 42 U.S.C. 6861–6870.</td>
<td>Section 413(a). The Administrator shall develop and conduct, in accordance with the purpose and provisions of this part, a weatherization program. In developing and conducting such program, the Administrator may, in accordance with this part and regulations promulgated under this part, make grants (1) to States, and (2) in accordance with the provisions of subsection (d), to Indian tribal organizations to serve Native Americans. Such grants shall be made for the purpose of providing financial assistance with regard to projects designed to provide for the weatherization of dwelling units, particularly those where elderly or handicapped low-income persons reside, in which the head of the household is a low-income person.</td>
<td>X</td>
<td>Weatherization Assistance Program for Low-Income Persons.</td>
<td>81.042</td>
</tr>
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<td>Interagency Agreement between the United States Department of Energy and the United States Department of Labor, Interagency Agreement No. 99–9–1656–07–11; Authority: Comprehensive Employment and Training Act of 1978 (CETA) (Pub. L. 95–524, October 27, 1978; 92 Stat. 1909; 29 U.S.C. 801), the Energy Reorganization Act of 1974, as amended (Pub. L. 93–438, October 11, 1974; 88 Stat. 1233), and the Department of Energy Organization Act (DOE Act) (Pub. L. 95–91, August 4, 1977); 91 Stat. 585; 42 U.S.C. 7101).</td>
<td>Interagency Agreement, Section 1, Purpose: “The purpose of this agreement is to provide for a transfer of funds from the Department of Labor, Employment and Training Administration (ETA), Office of Youth Programs (OYP) to the Department of Energy, Directorate of Administration (AD), Office of Industrial Relations (OIR), to fund the Summer Science Student Program (SSSP). The SSSP will grant monies from DOL through DOE/OIR to DOE contractors to fund 480 participant slots for economically disadvantaged youths in an integrated program of career motivation and basic academic skill enrichment. The program is designed to motivate economically disadvantaged and academically talented youths to continue their education and to pursue energy-related careers upon graduation from high school.</td>
<td>X</td>
<td>Summer Science Student Program.</td>
<td>N/A</td>
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<td>Quotation from October 23, 1979 memorandum, paragraph 2. “The objectives are to stimulate broader interest in the minority communities in careers in science and engineering and to establish individual working relationships of high school students with active researchers who may become helpful mentors when students need advice on college and careers and need letters of recommendation”.</td>
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X: Establishes criteria for participation

Y: Describes beneficiaries or target groups
§ 1040.101 Compliance reviews.

(a) The Director shall periodically conduct compliance reviews of selected recipients of DOE Federal financial assistance.

(b) The Director shall seek to review those recipients which have the most serious equal opportunity problems which cause the greatest disparity in delivery of services on a nondiscriminatory basis. Selection for review is to be made on the basis of the following criteria, among others:

(1) The relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor market, and the percentage of minorities, women, or handicapped persons, employed by the recipient if employment practices are covered by this part;

(2) The percentage of individuals covered by the Age Discrimination Act of 1975, minorities, women and handicapped persons in the population receiving program benefits;

(3) The number and nature of discrimination complaints filed against a recipient with DOE or other Federal agencies;

(4) The scope of the problems revealed by an investigation commenced on the basis of a complaint filed with DOE against a recipient; and

(5) The amount of assistance provided to the recipient.

(c) After selection of a recipient for review, the Director Federally Assisted Programs Division or the Director’s designee, shall inform the recipient of the selection. The notice shall be in writing and posted thirty days prior to the scheduled review. The letter will ordinarily request data pertinent to the review and advise the recipient of:

(1) The practices to be reviewed;

(2) The programs or activities affected by the review;

(3) The opportunity to make, at any time prior to receipt of DOE’s finding, a written submission responding to DOE which explains, validates, or otherwise addresses the practices under review; and

(4) The schedule under which the review will be conducted and a determination of compliance or noncompliance made.

(d) Within 90 days of arriving on-site to conduct the review, the Director, FAPD, shall advise the recipient, in writing, of:

(1) Preliminary findings;

(2) Where appropriate, recommendations for achieving voluntary compliance; and

(3) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director’s final determination of compliance or noncompliance. The Director or the Director’s designee shall notify the Assistant Attorney General at the same time the recipient is notified of any matter where recommendations for achieving voluntary compliance are made.

(e) If, within 45 days of the recipient’s notification under paragraph (d) of this section, the Director’s (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in subparts G and H.

(f) Where the Director makes a formal determination of noncompliance, the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under subpart H.

(g) All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.
§ 1040.102 Compliance information.

(a) Cooperation and assistance. Each responsible Departmental official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) Compliance reports. Each recipient shall keep reports and submit to the responsible Department official or his/her designee, timely, complete, and accurate compliance reports at the times, in such form, and containing information as the responsible Department official or the designee may determine to be necessary to enable him/her to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for DOE data on program participants, identified by race, color, national origin, sex, age and handicap status. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient or subcontracts with any other person or group, such other recipient shall also submit compliance reports to the primary recipient which will enable the primary recipient to carry out its obligations under this part.

(c) Access to sources of information. Each recipient shall permit access by the responsible Department official or his/her designee during normal business hours to books, records, personnel records, accounts, other sources of information, and its facilities, which are pertinent to ascertain compliance with this part. The requirement for access to sources of information shall be contained in the certificate of assurance and agreed to by the recipient as a condition to award. Whenever any information required of a recipient is in the exclusive possession of any other agency, institution, or person and that agency, institution, or person fails or refuses to furnish that information, the recipient shall certify this in its report and set forth the efforts which it has made to obtain the information. The sub-recipient in such case shall be subject to proceedings described under subpart H of this part.

(d) Information to beneficiaries and participants. Each recipient shall make available to participants, beneficiaries, and other interested persons information regarding the provisions of this section and its applicability to the program under which the recipient receives Federal financial assistance. Information is to be made available to beneficiaries, participants, and other interested persons in a manner which the responsible Department officials find necessary to inform such persons of the protections against discrimination assured them by this part and the statutes to which this part applies.

§ 1040.103 [Reserved]

§ 1040.104 Complaint investigation.

(a) The Director, FAPD, shall investigate complaints of discrimination that allege a violation of—

1. Title VI of the Civil Rights Act of 1964, Sec. 16 of the Federal Energy Administration Act of 1974, as amended, or Sec. 401 of the Energy Reorganization Act of 1974;

2. Title IX of the Education Amendments of 1972, as amended;

3. Section 504 of the Rehabilitation Act of 1973, as amended;

4. Age Discrimination Act of 1975, as amended, (reserved in this part);

5. Title VIII of the Civil Rights Act of 1968, as amended, (reserved in this part);

6. This part; and


(b) No complaint will be investigated if it is received by an appropriate Departmental official more than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Director, FAPD, for good cause shown. Where a complaint is accepted for investigation, the Director, FAPD, will initiate a DOE investigation. The Director, FAPD, who is responsible for the investigation, shall notify the complainant, in writing, if the complaint has been accepted or rejected.

(c) The Director, FAPD, or his/her designee shall conduct investigations of complaints as follows:
§ 1040.104

(1) Within 35 days of receipt of a complaint, the Director, FAPD, shall:
   (i) determine whether DOE has jurisdiction under paragraphs (a) and (b) of this section;
   (ii) If jurisdiction is not found, wherever possible, refer the complaint to the Federal agency with such jurisdiction and advise the complainant;
   (iii) If jurisdiction is found, notify the recipient alleged to be discriminating of receipt of the complaint; and
   (iv) Initiate the investigation.

(2) The investigation will ordinarily be initiated by a letter requesting data pertinent to the complaint and advising the recipient of:
   (i) The nature of the complaint and, with the written consent of the complainant, the identity of the complainant. The identity of the complainant may be revealed by the Director, FAPD, OEO, without the complainant’s written consent if the Director, FAPD, OEO, determines that such action is necessary for resolution of the complaint;
   (ii) The program or activities affected by the complaint;
   (iii) The opportunity to make, at any time prior to receipt of DOE’s findings, a documentary submission responding to, rebutting, or denying the allegations made in the complaint; and
   (iv) The schedule under which the complaint will be investigated and a determination of compliance made.

(3) Within 90 days of initiating the investigation, the Director, FAPD, shall advise the recipient, in writing of:
   (i) Preliminary findings;
   (ii) Where appropriate, recommendations for achieving voluntary compliance; and
   (iii) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director’s final determination of compliance or noncompliance. The Director or the Director’s designee shall notify the Assistant Attorney General and the recipient of any matter where recommendations for achieving voluntary compliance are made.

(4) If, within 45 days of the recipient’s notification under paragraph (c)(3) of this section, the Director’s (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director, OEO, for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in subpart H.

(5) Where the Director makes a formal determination of noncompliance, the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under subpart H. All agreements to come into voluntary compliance shall be in writing and signed by the Director, OEO, and an official who has authority to legally bind the recipient. The complainant shall also be notified of any action taken including the closing of the complaint or achievement of voluntary compliance.

(6) If the complainant or party other than the Attorney General has filed suit in Federal or State court alleging the same discrimination alleged in a complaint to DOE, and if during DOE’s investigation, the trial of that suit would be in progress, DOE will consult with the Assistant Attorney General and court records to determine the need to continue or suspend the investigation and will monitor the litigation through the court docket and contacts with the complainant. Upon receipt of notice that the court has made a finding of discrimination against a recipient that would constitute a violation of this part, the DOE may institute administrative proceedings as specified in subpart H after DOE has advised the recipient, in writing, of an opportunity to request voluntary compliance under this section. All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.
§ 1040.111 Means available.

If there appears to be a failure or threatened failure to comply with any of the provisions of this part, and if the noncompliance or threatened noncompliance cannot be corrected by voluntary means, compliance with this part may be effected by the suspension, termination of, or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law. Such other means may include, but are not limited to:

(a) Referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law including the Civil Rights Act of 1964, other statutes to which this part applies, or any assurance or other contractual undertaking; and

(b) Any applicable proceeding under State or local law.

§ 1040.112 Noncompliance with assurances.

If an applicant fails or refuses to furnish an assurance required under §1040.4 of subpart A of this part, or otherwise fails or refuses to comply with a requirement imposed by this part, such as §1040.102(c), subpart G of this part, action to refuse Federal financial assistance shall be taken in accordance with procedures of §1040.114 of this subpart.

§ 1040.113 Deferral.

DOE may defer action on pending applications for assistance in such a case during pendency of administrative proceedings under §1040.114 of this subpart.

§ 1040.114 Termination of or refusal to grant or to continue Federal financial assistance.

No order suspending, terminating, or refusing to grant or continue Federal financial assistance is to become effective until:

(a) Informational notice of the proposed order is given to the Executive Assistant to the Secretary, if the action is contemplated against a State or local government;

(b) The Director has advised the applicant or recipient of his/her failure to comply and has determined that compliance cannot be secured by voluntary means. (It will be determined by the Director that compliance cannot be secured by voluntary means if it has not been secured within the time periods specifically set forth by this part.)

(c) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with the requirement imposed by or under this part;

(d) The FERC has notified the Secretary of its finding of noncompliance; and

(e) The expiration of 30 days after the Secretary or a designee has filed with the committee of the House of Representatives and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend, terminate, or to refuse to grant or to continue Federal financial assistance is to become effective only if an order suspending, terminating, or refusing to grant or to continue Federal financial assistance is to become effective only if an order suspending, terminating, or refusing to grant or to continue Federal financial assistance.
assistance is to be limited to the particular political entity or part of that entity or other applicant or recipient to whom the finding has been made and shall be limited in its effect to the particular program or part of the program in which the noncompliance has been found.

§ 1040.115 Other means authorized by law.

No action to effect compliance by any other means authorized by law is to be taken until—

(a) The Director has determined that compliance cannot be secured by voluntary means;

(b) The recipient or other person has been notified by the Director, in writing, that it has been found in formal noncompliance and that it has 10 days before formal enforcement proceedings begin in which to enter into a written voluntary compliance agreement.

(c) The expiration of at least ten (10) days from the mailing of the notice to the recipient or other person.

OPPORTUNITY FOR HEARING

§ 1040.121 Notice of opportunity for hearing.

(a) Whenever an opportunity for hearing is required by §1040.113, the Director, OEO, or his/her designee shall serve on the applicant or recipient, by registered, certified mail, or return receipt requested, a notice of opportunity for hearing which will:

(1) Inform the applicant or recipient of the action proposed to be taken and of his/her right within twenty (20) days of the date of the notice of opportunity for hearing, or another period which may be specified in the notice, to request a hearing;

(2) Set forth the alleged item or items of noncompliance with this part;

(3) Specify the issues;

(4) State that compliance with this part may be effected by an order providing for the termination of or refusal to grant or to continue assistance, as appropriate, under the program involved; and

(5) Provide that the applicant or recipient may file a written answer with the Director, OEO, to the notice of opportunity for hearing under oath or affirmation within twenty (20) days of its date, or another period which may be specified in the notice.

(b) An applicant or recipient may file an answer, and waive or fail to request a hearing, without waiving the requirement for findings of fact and conclusions of law or the right to seek review by the FERC in accordance with the provisions established by the FERC. At the time an answer is filed, the applicant or recipient may also submit written information or argument for the record if he/she does not request a hearing.

(c) An answer or stipulation may consent to the entry of an order in substantially the form set forth in the notice of opportunity for hearing. The order may be entered by the General Counsel or his/her designee. The consent of the applicant or recipient to the entry of an order shall constitute a waiver by him/her of a right to:

(1) A hearing under Sec. 902 of title IX of the Education Amendments of 1972, Section 602 of title VI of the Civil Rights Act of 1964, Section 16, Section 401 and §1040.113;

(2) Findings of fact and conclusions of law; and

(3) Seek review by the FERC.

(d) The failure of an applicant or recipient to file an answer within the period prescribed or, if the applicant or recipient requests a hearing, his failure to appear at the hearing shall constitute a waiver by him/her of a right to:

(1) A hearing under Section 902 of title IX of the Education Amendments of 1972, Section 602 of title VI of the Civil Rights Act of 1964, Section 16, Section 401, and §1040.113;

(2) Conclusions of law; and

(3) Seek review by the FERC.

In the event of such a waiver, the Secretary or a designee may find the facts on the basis of the record available and enter an order in substantially the form set forth in the notice of opportunity for hearing.

(e) An order entered in accordance with paragraph (c) or (d) of this section shall constitute the final decision of DOE unless the FERC, within forty-five (45) days after entry of the order, issues a subsequent decision which
§ 1040.122

shall then constitute the final decision of DOE.

(f) A copy of an order entered by the FERC official shall be mailed to the applicant or recipient and to the complainant, if any.

§ 1040.122 Request for hearing or review.

Whenever an applicant or recipient requests a hearing or review in accordance with §1040.121(a)(1) or (b), the DOE General Counsel or his/her designee shall submit such request along with other appropriate documents to the FERC.

§ 1040.123 Consolidated or joint hearings.

In cases in which the same or related facts are asserted to constitute non-compliance with this part with respect to two or more programs to which this part applies or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued to implement the requirements of the laws cited in this part, the Secretary or a designee, in coordination with FERC may, by agreement with other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings and for the application to such hearings of rules of procedure not inconsistent with this part. Final decision in such cases, insofar as programs subject to this part are concerned, shall be made in accordance with procedures established by the FERC.


The FERC has authority under section 402(b) of the DOE Organization Act, Pub. L. 95–91, to promulgate regulations regarding the conduct of hearings to deny or terminate Federal financial assistance. Rules for conduct of hearings will be published by the FERC and will be placed in title 18 CFR.

JUDICIAL REVIEW

§ 1040.131 Judicial review.

Final DOE actions taken under this part to withhold or terminate Federal financial assistance are subject to judicial review under the following laws:

(a) Title VI—Section 603 of the Civil Rights Act of 1964;
(b) Title IX—Section 903 of the Education Amendments of 1972;
(c) Section 16, Section 401, Section 504—Pub. L. 89–554, 5 U.S.C. 702;
(d) Section 419 and Section 420 of the Energy Conservation and Production Act of 1976, as amended.

APPENDIX A TO PART 1040—FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF ENERGY TO WHICH THIS PART APPLIES


7. Traineeships for graduate students in energy related fields. Atomic Energy Act of 1954, as amended, Sections 31 (a) (b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93-409, Section 12(a); Public Law 94-163, Section 337; Public Law 94-163, Section 4(d); Public Law 93-275, Section 5; Public Law 95-39, Title V, Section 502(7); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.


24. Public education in energy. Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93–409; Section 12(a); Public Law 94–163, Section 337; Public Law 93–577; Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 5027); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95–91.


27. Preface (Pre-Freshman and Cooperative Education for Minorities in Engineering). Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83–703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93–458; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, Public Law 95–91, Sections 102 and 203; Public Law 93–409, Section 12(a); Public Law 94–163, Section 337; Public Law 93–577, Section 4(d); Public Law 93–275, Section 5; Public Law 95–39, Title V, Section 5027).


PART 1041—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF ENERGY

§ 1041.101 Purpose.

This part effectuates 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.

§ 1041.112 Application.

This part applies to all programs or activities conducted by the agency.

§ 1041.113 Definitions.

For purposes of this part, the term—Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.
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 agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunication devices 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 (TDD’s), 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 agency’s alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall 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 shall 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.

Handicapped person 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.

Qualified handicapped person means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person 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 agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) Qualified handicapped person is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §1041.140.
§ 1041.104–1041.109


§§ 1041.110–1041.109 [Reserved]

§ 1041.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, 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 such policies and practices is required, the agency shall proceed to make the necessary modifications.

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

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

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

(2) A description of any modifications made.

§ 1041.111 Notice.

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

§ 1041.112–1041.129 [Reserved]

§ 1041.130 General prohibitions against discrimination.

(a) No qualified handicapped person 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 agency.

(b)(1) The agency, 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 handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the 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;

(iii) Provide a qualified handicapped person 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 handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

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

(2) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of
administration the purpose or effect of which would—

(i) Subject qualified handicapped persons 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 handicapped persons.

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

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

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

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

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

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1041.131–1041.139 [Reserved]

§ 1041.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. 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.

 §§ 1041.141–1041.148 [Reserved]

§ 1041.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in §1041.150, no qualified handicapped person shall, because the agency’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1041.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency 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. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §1041.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency 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. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) Methods. The agency may comply with the requirements of this section
§ 1041.151 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 agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. 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.

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

(b) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(c) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency’s facilities that limit the accessibility of its programs or activities to handicapped persons;

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

(3) 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

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

§§ 1041.152–1041.159 [Reserved]

§ 1041.160 Communications.

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

(b) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(c) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency’s facilities that limit the accessibility of its programs or activities to handicapped persons;
(b) The agency 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 agency shall provide signage 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 shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency 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. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §1041.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency 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. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§1041.161–1041.169 [Reserved]

§1041.170 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 or activities conducted by the agency.

(b) The agency 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 Manager of Federally Assisted Programs shall be responsible for coordinating implementing of this section. Complaints may be sent to Director of Equal Opportunity, U.S. Department of Energy, Room 4B-112, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2218.

(d) The agency 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 agency may extend this time period for good cause.

(e) If the agency 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 agency 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), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency 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;

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 agency of the letter required by §1041.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the appeal.
§§ 1041.171–1041.999

of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

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


§§ 1041.171–1041.999 [Reserved]

PART 1042—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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SOURCE: 66 FR 4630, Jan. 18, 2001, unless otherwise noted.

Subpart A—Introduction

§ 1042.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681,
1682, 1683, 1685, 1686, 1687, 1688), which is
designed to eliminate (with certain ex-
ceptions) discrimination on the basis of
sex in any education program or activ-
ity receiving Federal financial assist-
ance, whether or not such program or
activity is offered or sponsored by an
educational institution as defined in
these Title IX regulations. The effective
date of these Title IX regulations is February 20, 2001.

§ 1042.105 Definitions.

As used in these Title IX regulations, the term:
Administratively separate unit means a
school, department, or college of an
educational institution (other than a
local educational agency) admission to
which is independent of admission to
any other component of such institu-
tion.

Admission means selection for part-
time, full-time, special, associate,
transfer, exchange, or any other enroll-
ment, membership, or matriculation in
or at an education program or activity
operated by a recipient.

Applicant means one who submits an
application, request, or plan required
to be approved by an official of the De-
partment of Energy, or by a recipient,
as a condition to becoming a recipient
of Federal financial assistance.

Designated agency official means the
Director, Office of Civil Rights and Di-
versity or any official to whom the Di-
rector’s functions under this part are
relegated.

Educational institution means a local
educational agency (LEA) as defined by
20 U.S.C. 8801(18), a preschool, a private
elementary or secondary school, or an
applicant or recipient that is an institu-
tion of graduate higher education, an
institution of undergraduate higher
education, an institution of profes-
sional education, or an institution of
vocational education, as defined in this
section.

Federal financial assistance means any
of the following, when authorized or
extended under a law administered by
the Federal agency that awards such
assistance:

(1) A grant or loan of Federal finan-
cial assistance, including funds made
available for:

(i) The acquisition, construction, ren-
ovation, restoration, or repair of a
building or facility or any portion
thereof; and

(ii) Scholarships, loans, grants,
wages, or other funds extended to any
entity for payment to or on behalf of
students admitted to that entity, or
extended directly to such students for
payment to that entity.

(2) A grant of Federal real or per-
sonal property or any interest therein,
including surplus property, and the
proceeds of the sale or transfer of such
property, if the Federal share of the
fair market value of the property is
not, upon such sale or transfer, prop-
erly accounted for to the Federal Gov-
ernment.

(3) Provision of the services of Fed-
eral personnel.

(4) Sale or lease of Federal property
or any interest therein at nominal con-
sideration, or at consideration reduced
for the purpose of assisting the recipi-
ent or in recognition of public interest
to be served thereby, or permission to
use Federal property or any interest
therein without consideration.

(5) Any other contract, agreement, or
arrangement that has as one of its pur-
poses the provision of assistance to any
education program or activity, except
a contract of insurance or guaranty.

Institution of graduate higher edu-
cation means an institution that:

(1) Offers academic study beyond the
bachelor of arts or bachelor of science
degree, whether or not leading to a cer-
tificate of any higher degree in the lib-
eral arts and sciences;

(2) Awards any degree in a profes-
sional field beyond the first profes-
sional degree (regardless of whether
the first professional degree in such
field is awarded by an institution of
undergraduate higher education or pro-
fessional education); or

(3) Awards no degree and offers no
further academic study, but operates
ordinarily for the purpose of facili-
tating research by persons who have
received the highest graduate degree in
any field of study.
§ 1042.110 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) Self-evaluation. Each recipient education institution shall, within one year of February 20, 2001:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-
§ 1042.125 Effect of other requirements.

§ 1042.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 1042.135 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 1042.140 Dissemination of policy.

(a) Notification of policy. (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§1042.300 through 1042.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to §1042.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of February 20, 2001 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:
§ 1042.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) Exemption claims. An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 1042.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 1042.215 Membership practices of certain organizations.

(a) Social fraternities and sororities. These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls. These Title IX regulations do not apply to the membership practices of the Young Men’s Christian Association (YMCA), the Young Women’s Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) Voluntary youth service organizations. These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 1042.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) Administratively separate units. For the purposes only of this section,
§ 1042.225 Educational institutions eligible to submit transition plans.

(a) Application. This section applies to each educational institution to which §§1042.300 through 1042.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§1042.300 through 1042.310.

§ 1042.230 Transition plans.

(a) Submission of plans. An institution to which §1042.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) Content of plans. In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan applies, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) Nondiscrimination. No policy or practice of a recipient to which §1042.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§1042.300 through 1042.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) Effects of past exclusion. To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §1042.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply...
for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution’s commitment to enrolling students of the sex previously excluded.

§ 1042.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

   (i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

   (ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual’s personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) Program or activity or program means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

   (i) A department, agency, special purpose district, or other instrumentality of a State or of a local government;

   (ii) A college, university, or other post-secondary institution, or a public system of higher education;

   (iii) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

   (A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship;

   (B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship;

(2) Program or activity does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other post-secondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a “program or activity” subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any
§ 1042.300 Admission.

(a) General. No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§1042.300 through 1042.310 apply, except as provided in §§1042.225 and 1042.230.

(b) Specific prohibitions.

(1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§1042.300 through 1042.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§1042.300 through 1042.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 1042.305 Preference in admission.

A recipient to which §§1042.300 through 1042.310 apply shall not give preference to applicants for admission, on the basis of sex, unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.
§ 1042.310 Recruitment.

(a) Nondiscriminatory recruitment. A recipient to which §§1042.300 through 1042.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §1042.110(a), and may choose to undertake such efforts as affirmative action pursuant to §1042.110(b).

(b) Recruitment at certain institutions. A recipient to which §§1042.300 through 1042.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§1042.300 through 1042.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 1042.400 Education programs or activities.

(a) General. Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 1042.400 through 1042.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§1042.300 through 1042.310 do not apply, or an entity, not a recipient, to which §§1042.300 through 1042.310 would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in §§1042.400 through 1042.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

1. Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

2. Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

3. Deny any person any such aid, benefit, or service;

4. Subject any person to separate or different rules of behavior, sanctions, or other treatment;

5. Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

6. Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

7. Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) Assistance administered by a recipient educational institution to study at a foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; Provided, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) Aids, benefits or services not provided by recipient. (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation
in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:
   (i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and
   (ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 1042.405 Housing.

(a) Generally. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) Housing provided by recipient. (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:
   (i) Proportionate in quantity to the number of students of that sex applying for such housing; and
   (ii) Comparable in quality and cost to the student.

(c) Other housing. (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:
   (A) Proportionate in quantity; and
   (B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 1042.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 1042.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from February 20, 2001. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from February 20, 2001.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that
§ 1042.420 Access to schools operated by LEAs.
A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient;
(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 1042.425 Counseling and use of appraisal and counseling materials.

(a) Counseling. A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) Use of appraisal and counseling materials. A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) Disproportion in classes. Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 1042.430 Financial assistance.

(a) General. Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;
(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient’s students in a manner that discriminates on the basis of sex; or
(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) Financial aid established by certain legal instruments. (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein: Provided, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.
(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on
§ 1042.435 Employment assistance to students.

(a) Assistance by recipient in making available outside employment. A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) Employment of students by recipients. A recipient that employs any of its students shall not do so in a manner that violates §§1042.500 through 1042.550.

§ 1042.440 Health and insurance benefits and services.

Subject to §1042.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§1042.500 through 1042.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 1042.445 Marital or parental status.

(a) Status generally. A recipient shall not apply any rule concerning a student’s actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) Pregnancy and related conditions. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to §1042.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s educational program or activity.
In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 1042.450 Athletics.

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from February 20, 2001. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from February 20, 2001.

§ 1042.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.
§ 1042.500 Employment.

(a) General. (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant’s or employee’s employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 1042.500 through 1042.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) Application. The provisions of §§ 1042.500 through 1042.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for, and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 1042.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 1042.510 Recruitment.

(a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.
§ 1042.530 Marital or parental status.

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee’s or applicant’s family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. Subject to §1042.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a

§ 1042.530 Fringe benefits.

(a) “Fringe benefits” defined. For purposes of these Title IX regulations, fringe benefits means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §1042.515.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee’s sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 1042.525 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex;

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in §1042.500.

§ 1042.520 Fringe benefits.

(a) “Fringe benefits” defined. For purposes of these Title IX regulations, fringe benefits means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §1042.515.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee’s sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 1042.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§ 1042.500 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex;

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in §1042.500.

§ 1042.505 Fringe benefits.

(a) “Fringe benefits” defined. For purposes of these Title IX regulations, fringe benefits means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §1042.515.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee’s sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 1042.500 Recruitment patterns.

A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§1042.500 through 1042.550.
§ 1042.535  Justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 1042.535 Effect of state or local law or other requirements.

(a) Prohibitory requirements. The obligation to comply with §§1042.500 through 1042.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) Benefits. A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 1042.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 1042.545 Pre-employment inquiries.

(a) Marital status. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss” or “Mrs.”

(b) Sex. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 1042.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§1042.500 through 1042.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee’s sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Other Provisions

§ 1042.600 Covered programs.

The financial assistance programs to which this part applies are listed in Appendix A to 10 CFR part 1040.

§ 1042.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) are hereby adopted and applied to these Title IX regulations. These procedures may be found at 10 CFR part 1040, subparts G and H.

PART 1044—SECURITY REQUIREMENTS FOR PROTECTED DISCLOSURES UNDER SECTION 3164 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2000

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SOURCE: 66 FR 4642, Jan. 18, 2001, unless otherwise noted.

§ 1044.01 What are the purpose and scope of this part?

(a) Purpose. This part prescribes the security requirements for making protected disclosures of classified or unclassified controlled nuclear information under the whistleblower protection provisions of section 3164 of the National Defense Authorization Act for Fiscal Year 2000.

(b) Scope. The security requirements for making protected disclosures in this part are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101–12) or any other law that may provide protection for disclosures of information by employees of DOE or of a DOE contractor.

(66 FR 54645, Oct. 30, 2001)

§ 1044.02 Who must follow the requirements contained in this part?

The requirements apply to you if you are:

(a) An employee of DOE, including the National Nuclear Security Administration, or one of its contractors;

(b) Engaged in DOE defense activities; and

(c) Wish to make a protected disclosure as described in §1044.04 of this part.

§ 1044.03 What definitions apply to this part?

The following definitions apply to this subpart:


Classified information means:

(1) Information classified as Restricted Data or Formerly Restricted Data under the Atomic Energy Act; or 

(2) Information that has been determined pursuant to Executive Order 12958 or prior Executive Orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form (also referred to as “National Security Information” in 10 CFR Part 1045 or “defense information” in the Atomic Energy Act).

Contractor means any industrial, educational, commercial or other entity, grantee or licensee at any tier, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement.

Defense activities means activities of DOE engaged in support of:

(1) The production, testing, sampling, maintenance, repair, modification, assembly, disassembly, utilization, transportation, or retirement of nuclear weapons or components of nuclear weapons;

(2) The production, utilization, or transportation of nuclear material for military applications; or

(3) The safeguarding of activities, equipment, or facilities which support the production of nuclear weapons or nuclear material for nuclear weapons.

DOE means the Department of Energy, including the National Nuclear Security Administration.

Unclassified controlled nuclear information means unclassified government information prohibited from unauthorized dissemination under section 148 of the Atomic Energy Act and DOE implementing regulations in 10 CFR part 1017.

§ 1044.04 What is a protected disclosure?

A protected disclosure is:

(a) A disclosure of classified or unclassified controlled nuclear information that you reasonably believe provides direct and specific evidence of—

(1) A violation of law or Federal regulation;

(2) Gross mismanagement, a gross waste of funds, or an abuse of authority; or
§ 1044.05 What is the effect of a disclosure qualifying as a "protected disclosure"?

If a DOE or DOE contractor employee follows the procedures of this part when making a disclosure of classified or unclassified controlled nuclear information, then the employer (DOE or DOE contractor as applicable) may not discharge, demote, or otherwise discriminate against the employee as a reprisal for making the disclosure.

§ 1044.06 Who may receive a protected disclosure?

The following persons or organizations may receive a protected disclosure:

(a) A member of a committee of Congress having primary responsibility for oversight of the department, agency, or element of the Government to which the disclosed information relates;

(b) An employee of Congress who is a staff member of such a committee and has an appropriate security access authorization for the information being disclosed;

(c) The Inspector General of the Department of Energy;

(d) The Federal Bureau of Investigation; or

(e) Any other element of the Government designated by the Secretary of Energy as authorized to receive the information being disclosed.

§ 1044.07 How can you find out if a particular person is authorized to receive a protected disclosure?

You must contact the Department of Energy Inspector General for help in determining whether a particular person is authorized to receive the classified or unclassified controlled nuclear information you wish to disclose. The Inspector General will contact the Office of Safeguards and Security as necessary to determine the security access authorization of the person to receive the protected disclosure.

§ 1044.08 Do you have to submit the documents for classification review before you give them to someone?

Yes, you must submit each document with a classification or control marking and any unmarked document generated in a classified or controlled subject area to the Inspector General. The Inspector General forwards each document to the Office of Nuclear and National Security Information for a determination as to whether the information in the document is properly classified, controlled, or may be released to the public.

§ 1044.09 What do you do if you plan to disclose classified or unclassified controlled nuclear information orally rather than by providing copies of documents?

You must describe in detail to the Inspector General what information you wish to disclose. The Inspector General may require that the information to be disclosed be put in writing in order to ensure the Inspector General obtains and provides accurate advice. The Inspector General will consult with the Office of Nuclear and National Security Information who will provide you with advice, through the Inspector General, as to whether the information is classified or controlled and any steps needed to protect the information.

§ 1044.10 Will your identity be protected?

Yes, both the Inspector General and the Office of Nuclear and National Security Information must protect, consistent with legal requirements, your identity and any information about your disclosure.

§ 1044.11 How do you protect the information that you want to disclose?

To protect classified information and unclassified controlled nuclear information you plan to disclose, you must:

(a) Only disclose the information to personnel who possess the appropriate clearance and need-to-know for the information disclosed as required in 10 CFR part 710, after verifying any special authorizations or accesses, such as Sensitive Compartmented Information,
Special Access Program, and Weapon Data information;
(b) Use only equipment (such as computers or typewriters) that is approved for classified processing for the generation of classified documents;
(c) Mark documents as required by 10 CFR part 1045 (classified information), 10 CFR Part 1017 (unclassified controlled nuclear information), or as required by the Office of Nuclear and National Security Information.
(d) Use only approved copiers to reproduce documents;
(e) Store classified documents in facilities approved by the U.S. Government for the storage of classified material;
(f) Use only appropriate secure means, such as secure facsimile or secure telephone, to provide classified information orally or electronically when transmitting or communicating that information (e.g. the applicable classified mailing address); and
(h) Follow any additional specific instructions from the Office of Safeguards and Security on how to protect the information.
§ 1044.12 What procedures can you invoke if you believe you have been discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure?

If you believe you have been discriminated against as a reprisal for making a protected disclosure, you may submit a complaint to the Director of the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0107, or you may send your complaint to the Director, Office of Hearings and Appeals, by facsimile to FAX number (202) 426–1415. In your complaint, you should give your reasons for believing that you have been discriminated against as a reprisal for making a protected disclosure, and include any information you think is relevant to your complaint. The Office of Hearings and Appeals will conduct an investigation of your complaint unless the Director determines your complaint is frivolous. If an investigation is conducted, the Director will submit a report of the investigation to you, to the employer named in your complaint, and to the Secretary of Energy, or the Secretary’s designee. The Secretary, or the Secretary’s designee, will take appropriate action, pursuant to 42 U.S.C. 7229(k), to abate any discriminatory actions taken as reprisal for making a protected disclosure.

PART 1045—NUCLEAR CLASSIFICATION AND DECLASSIFICATION

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Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

§ 1045.1 Purpose and scope.

This subpart establishes responsibilities associated with this part, describes the Openness Advisory Panel, defines key terms, describes sanctions related to violation of the policies and procedures in this part, and describes how to submit suggestions or complaints concerning the Restricted Data classification and declassification program, and how to request procedural exceptions.

§ 1045.2 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;
(b) Any agency with access to RD or FRD; and
(c) Any person who might generate information determined to be RD or FRD.

§ 1045.3 Definitions.

As used in this part:

Agency means any “Executive Agency” as defined in 5 U.S.C. 105; any “Military Department” as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into possession of RD or FRD information or documents.


Authorized Holder means a person with the appropriate security clearance required to have access to classified information and the need to know the information in the performance of Government-approved activities.

Automatic Declassification means the declassification of information or documents based solely upon:

(1) The occurrence of a specific date or event as determined by the classifier; or
(2) The expiration of a maximum time frame for duration of classification established under Executive Order 12958.

Classification means the act or process by which information is determined to be classified information.

Classification Guide means a written record of detailed instructions as to whether specific information is classified, usually concerning a system, plan, project, or program. It identifies information to be classified and specifies the level (and duration for NSI only) of classification assigned to such information. Classification guides are the primary basis for reviewing documents to determine whether they contain classified information.

Classification Level means one of three designators:

(1) Top Secret is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably
could be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) Secret is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) Confidential. (i) For NSI, Confidential is applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the appropriate official is able to identify or describe.
   (ii) For RD and FRD, Confidential is applied to information, the unauthorized disclosure of which could reasonably be expected to cause undue risk to the common defense and security that the appropriate official is able to identify or describe.

   Classified Information means:
   (1) Information classified as RD or FRD under the Atomic Energy Act; or
   (2) Information determined to require protection against unauthorized disclosure under Executive Order (E.O.) 12958 or prior Executive Orders (also identified as National Security Information or NSI).

   Contractor means any industrial, educational, commercial or other entity, grantee or licensee at all tiers, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement.

   Declassification means a determination by appropriate authority that information or documents no longer require protection, as classified information, against unauthorized disclosure in the interests of national security.

   Department or DOE means Department of Energy.

   Director of Declassification means the Department of Energy Director, Office of Declassification, or any person to whom the Director’s duties are delegated. The Director of Declassification is subordinate to the Director of Security Affairs.

   Director of Security Affairs means the Department of Energy Director, Office of Security Affairs, or any person to whom the Director’s duties are delegated.

   Document means the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

   Formerly Restricted Data (FRD) means classified information jointly determined by DOE and the DoD to be related primarily to the military utilization of nuclear weapons and removed (by transclassification) from the RD category pursuant to section 142(d) of the Atomic Energy Act.

   Government means the executive branch of the Federal Government of the United States.

   Government Information means information that is owned by, produced by or for, or is under the control of the U.S. Government.

   Information means facts, data, or knowledge itself, as opposed to the medium in which it is contained.

   Interagency Security Classification Appeals Panel (ISCAP) means a panel created pursuant to Executive Order 12958 to perform functions specified in that order with respect to National Security Information.

   National Security means the national defense or foreign relations of the United States.

   National Security Information (NSI) means information that has been determined pursuant to Executive Order 12958 or prior Executive Orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form. NSI is referred to as “defense information” in the Atomic Energy Act.

   Nuclear weapon means atomic weapon.

   Person means:
   (1) Any individual, contractor, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State, or any political subdivision thereof, or any political entity within a State; and
   (2) Any legal successor, representative, agent, or agency of the foregoing.

   Portion Marking means the application of certain classification markings
to individual words, phrases, sentences, paragraphs, or sections of a document to indicate their specific classification level and category.

Restricted Data (RD) means a kind of classified information that consists of all data concerning the following, but not including data declassified or removed from the RD category pursuant to section 142 of the Atomic Energy Act:

(1) Design, manufacture, or utilization of atomic weapons;
(2) Production of special nuclear material; or
(3) Use of special nuclear material in the production of energy.

Restricted Data Classifier means an individual who derivatively classifies RD or FRD documents. Within the DoD, RD classifiers may also declassify FRD documents.

Restricted Data Management Official means an individual appointed by any agency with access to RD and FRD who is responsible for managing the implementation of this part within that agency or any person to whom these duties are delegated. This person may be the senior agency official required by E.O. 12958.

Secretary means the Secretary of Energy.

Source Document means a classified document, other than a classification guide, from which information is extracted for inclusion in another document. The classification of the information extracted is determined by the classification markings shown in the source document.

Special Nuclear Material means plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Secretary determines to be special nuclear material pursuant to the Atomic Energy Act.

§ 1045.4 Responsibilities.

(a) The DOE Director of Declassification shall:

(1) Manage the Government-wide system for the classification and declassification of RD and FRD in accordance with the Atomic Energy Act;

(2) In coordination with the DoD, develop regulations to implement the RD and FRD classification system;

(3) Determine whether nuclear-related information is RD;

(4) Oversee agency implementation of the RD and FRD classification system to ensure compliance with this part;

(5) Review agency implementing policies and conduct on-site reviews of each agency’s program established under this part;

(6) Prepare and distribute classification guides concerning RD and FRD and review such guides developed by any agency;

(7) Consider and take action on complaints and suggestions from any person with respect to administration of this program; and

(8) Periodically meet with interested members of the public to solicit input for the classification and declassification program.

(b) The DOE Director of Security Affairs shall:

(1) Declassify RD which may be published without undue risk to the common defense and security;

(2) Jointly with the DoD, determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category; and

(3) Jointly with the DoD, declassify FRD which may be published without undue risk to the common defense and security.

(c) The DoD jointly with the DOE shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance; and

(2) Ensure that classification guides for FRD and RD relating primarily to the military utilization of nuclear weapons are prepared; and

(3) Declassify FRD and RD relating primarily to the military utilization of nuclear weapons which may be published without undue risk to the common defense and security.

(d) The Nuclear Regulatory Commission (NRC) shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance; and
§ 1045.9 RD classification performance evaluation.

(a) Heads of agencies shall ensure that RD management officials and those RD classifiers whose duties involve the classification or declassification of significant numbers of RD or FRD documents shall have their personnel performance evaluated with respect to classification activities.

(b) Procedures for the evaluation under paragraph (a) of this section may be the same as those in place for NSI related classification activities as required by Executive Order 12958.
§ 1045.10 Purpose and scope.

(a) This subpart implements sections 141 and 142 (42 U.S.C. 2161 and 2162) of the Atomic Energy Act, which provide for Government-wide policies and procedures concerning the classification and declassification of RD and FRD information.

(b) This subpart establishes procedures for classification prohibitions for RD and FRD, describes authorities and procedures for identifying RD and FRD information, and specifies the policies and criteria DOE shall use in determining if nuclear-related information is RD or FRD.

§ 1045.11 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.12 Authorities.

(a) The DOE Director of Declassification may determine whether nuclear-related information is RD.

(b) Except as provided in paragraph (c) of this section, the DOE Director of Security Affairs may declassify RD information.

(c) The DOE Director of Security Affairs, jointly with the DoD, may determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category.

(d) The DOE Director of Security Affairs jointly with the DoD may declassify FRD information.

§ 1045.13 Classification prohibitions.

In no case shall information be classified RD or FRD in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person, organization, or Agency;

(c) Restrain competition;

(d) Prevent or delay the release of information that does not require protection for national security or non-proliferation reasons;

(e) Unduly restrict dissemination by assigning an improper classification level; or

(f) Prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety.

§ 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.

(a) Classification of Restricted Data. (1) Submission of Potential RD for Evaluation. Any authorized holder who believes he or she has information which may be RD shall submit it to an RD classifier for evaluation. The RD classifier shall follow the process described in this paragraph whenever he or she is unable to locate guidance in a classification guide that can be applied to the information. The RD classifier shall forward the information to the DOE Director of Declassification via their local classification or security office. The DOE Director of Declassification shall determine whether the information is RD within 90 days of receipt by doing the following:

(i) Determine whether the information is already classified RD under current classification guidance; or

(ii) If it is not already classified, determine if the information concerns the design, manufacture, or utilization of nuclear weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; and

(A) Apply the criteria in § 1045.16 and § 1045.17 as the basis for determining the appropriate classification; and

(B) Provide notification of the decision by revising applicable classification guides, if appropriate.

(2) Protection of Potential RD during Evaluation. Pending a determination by the DOE Director of Declassification, potential RD submitted for evaluation by authorized holders shall be protected at a minimum as Confidential Restricted Data.

(b) Declassification of Restricted Data. The DOE Director of Security Affairs...
shall apply the criteria in §1045.16 when determining whether RD may be declassified.

(c) Classification of Formerly Restricted Data. The DOE Director of Security Affairs, jointly with the DoD, shall remove information which relates primarily to the military utilization of nuclear weapons from the RD classification category and classify it as FRD.

(d) Declassification of Formerly Restricted Data. The DOE Director of Security Affairs, jointly with the DoD, shall apply the criteria in §1045.16 when determining whether FRD may be declassified.

§ 1045.15 Classification and declassification presumptions.

(a) The DOE Directors of Declassification and Security Affairs shall consider the presumptions listed in paragraphs (d) and (e) of this section before applying the criteria in §1045.16.

(b) Not all areas of nuclear-related information are covered by the presumptions.

(c) In general, existing information listed in paragraphs (d) and (e) of this section has the classification status indicated. Inclusion of specific existing information in one of the presumption categories does not mean that new information in a category is or is not classified, but only that arguments to differ from the presumed classification status of the information should use the appropriate presumption as a starting point.

(d) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is unclassified unless application of the criteria in §1045.16 indicates otherwise:

(1) Basic science: mathematics, chemistry, theoretical and experimental physics, engineering, materials science, biology and medicine;

(2) Magnetic confinement fusion technology;

(3) Civilian power reactors, including nuclear fuel cycle information but excluding technologies for uranium enrichment;

(4) Source materials (defined as uranium and thorium and ores containing them);

(5) Fact of use of safety features (e.g., insensitive high explosives, fire resistant pits) to lower the risks and reduce the consequences of nuclear weapon accidents;

(6) Generic weapons effects;

(7) Physical and chemical properties of uranium and plutonium, most of their alloys and compounds, under standard temperature and pressure conditions;

(8) Nuclear fuel reprocessing technology and reactor products not revealing classified production rates or inventories;

(9) The fact, time, location, and yield range (e.g., less than 20 kilotons or 20-150 kilotons) of U.S. nuclear tests;

(10) General descriptions of nuclear material production processes and theory of operation;

(11) DOE special nuclear material aggregate inventories and production rates not revealing size or details concerning the nuclear weapons stockpile;

(12) Types of waste products resulting from all DOE weapon and material production operations;

(13) Any information solely relating to the public and worker health and safety or to environmental quality; and

(14) The simple association or simple presence of any material (i.e., element, compound, isotope, alloy, etc.) at a specified DOE site.

(e) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is classified unless the application of the criteria in §1045.16 indicates otherwise:

(1) Detailed designs, specifications, and functional descriptions of nuclear explosives, whether in the active stockpile or retired;

(2) Material properties under conditions achieved in nuclear explosions that are principally useful only for design and analysis of nuclear weapons;

(3) Vulnerabilities of U.S. nuclear weapons to sabotage, countermeasures, or unauthorized use;

(4) Nuclear weapons logistics and operational performance information (e.g., specific weapon deployments, yields, capabilities), related to military utilization of those weapons required by the DoD;
§ 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.

(a) The DOE Director of Declassification shall classify information as RD and the DOE Director of Security Affairs shall maintain the classification of RD (and FRD in coordination with the DoD) only if undue risk of damage to the common defense and security from its unauthorized disclosure can be identified and described.

(b) The DOE Director of Declassification shall not classify information and the DOE Director of Security Affairs shall declassify information if there is significant doubt about the need to classify the information.

(c) The DOE Directors of Declassification and Security Affairs shall consider the presumptions in §1045.15 (d) and (e) before applying the criteria in paragraph (d) of this section.

(d) In determining whether information should be classified or declassified, the DOE Directors of Declassification and Security Affairs shall consider the following:

(1) Whether the information is so widely known or readily apparent to knowledgeable observers that its classification would cast doubt on the credibility of the classification system;

(2) Whether publication of the information would assist in the development of countermeasures or otherwise jeopardize any U.S. weapon or weapon system;

(3) Whether the information would hinder U.S. nonproliferation efforts by significantly assisting potential adversaries to develop or improve a nuclear weapon capability, produce nuclear weapons materials, or make other military use of nuclear energy;

(4) Whether publication of the information would have a detrimental effect on U.S. foreign relations;

(5) Whether publication of the information would benefit the public welfare, taking into account the importance of the information to public discussion and education and potential contribution to economic growth; and,

(6) Whether publication of the information would benefit the operation of any Government program by reducing operating costs or improving public acceptance.

§ 1045.17 Classification levels.

(a) Restricted Data. The DOE Director of Declassification shall assign one of the following classification levels to RD information to reflect the sensitivity of the information to the national security. The greater the damage expected from unauthorized disclosure, the higher the classification level assigned to the information.

(1) Top Secret. The DOE Director of Declassification shall classify RD information Top Secret if it is vital to the national security and if its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of RD information that warrant Top Secret classification include detailed technical descriptions of critical features of a nuclear explosive design that would enable a proliferant or nuclear power to build or substantially improve a nuclear weapon, information that would make possible the unauthorized use of a U.S. nuclear weapon, or information revealing catastrophic failure or operational vulnerability in a U.S. nuclear weapon.

(2) Secret. The DOE Director of Declassification shall classify RD information Secret if it is vital to the national security and if its unauthorized disclosure could reasonably be expected to cause serious damage to the national security, but the RD information is not sufficiently comprehensive to warrant designation as Top Secret. Examples of RD information that warrant Secret classification include detailed technical descriptions of critical features of a nuclear explosive design (not revealing critical features), key features of uranium enrichment technologies, or specifications of weapon materials.

(3) Confidential. The DOE Director of Declassification shall classify RD information as Confidential if it is deemed to be of significant use to a potential adversary or nuclear proliferant and its unauthorized disclosure could
§ 1045.22 No comment policy.

(a) Authorized holders of RD and FRD shall not confirm or expand upon the classification status or technical accuracy of classified information in the public domain.

(b) Unauthorized disclosure of classified information does not automatically result in the declassification of that information.
§ 1045.30 Purpose and scope.

This subpart specifies Government-wide classification program implementation requirements for agencies with access to RD and FRD, describes authorities and procedures for RD and FRD document classification and declassification, provides for periodic or systematic review of RD and FRD documents, and describes procedures for the mandatory review of RD and FRD documents. This subpart applies to all RD and FRD documents, regardless of whether they also contain National Security Information (NSI), or other controlled information such as “For Official Use Only” information or “Unclassified Controlled Nuclear Information.”

§ 1045.31 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person generating a document containing RD or FRD.

§ 1045.32 Authorities.

(a) Classification of RD and FRD documents. (1) To the maximum extent practical, all RD and FRD documents shall be classified based on joint DOE-Agency classification guides or Agency guides coordinated with the DOE. When it is not practical to use classification guides, source documents may be used as an alternative.

(2) Only individuals designated as RD classifiers may classify RD and FRD documents, except within the DoD. Within the DoD, any individual with access to RD and FRD who has been trained may classify RD and FRD documents.

§ 1045.33 Appointment of restricted data management official.

(a) Each agency with access to RD or FRD shall appoint an official to be responsible for the implementation of this part and shall advise the DOE Director of Declassification of such appointment.

(b) This official shall ensure the proper implementation of this part within his or her agency and shall serve as the primary point of contact for coordination with the DOE Director of Declassification on RD and FRD classification and declassification issues.

(c) Within the DoD, an RD management official shall be appointed in each DoD agency.

§ 1045.34 Designation of restricted data classifiers.

(a) Except within the DoD, RD management officials shall ensure that persons who derivatively classify RD or FRD documents are designated by position or by name as RD classifiers.
§ 1045.35 Training requirements.

(a) RD management officials shall ensure that persons with access to RD and FRD information are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures. RD management officials shall ensure that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents.

(b) The DOE Director of Declassification shall develop training materials related to implementation of this part and shall provide these materials to RD management officials and any other appropriate persons.

(c) The DOE Director of Declassification shall review any RD-related training material submitted by agency and contractor representatives to ensure consistency with current policy.

§ 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.

(a) The DOE and each agency with access to RD and FRD shall consult periodically to assure appropriate implementation of this part. Such consultations may result in DOE conducting an on-site review within the agency if DOE and the RD management official determine that such a review would be mutually beneficial or that it is necessary to remedy a problem.

(b) To address issues concerning implementation of this part, the DOE Director of Declassification shall establish a standing group of all RD management officials to meet periodically.

§ 1045.37 Classification guides.

(a) The classification and declassification determinations made by the DOE Directors of Declassification and Security Affairs under the classification criteria in §1045.16 shall be promulgated in classification guides.

(b) DOE shall jointly develop classification guides with the DoD, NRC, NASA, and other agencies as required for programs for which DOE and these agencies share responsibility.

(c) Agencies shall coordinate with the DOE Director of Declassification whenever they develop or revise classification guides with RD or FRD information topics.

(d) Originators of classification guides with RD or FRD topics shall review such guides at least every five years and make revisions as necessary.

(e) RD classifiers shall use classification guides as the primary basis for classifying and declassifying documents containing RD and FRD.

(f) Each RD management official shall ensure that all RD classifiers have access to all pertinent nuclear classification guides.

§ 1045.38 Automatic declassification prohibition.

(a) Documents containing RD and FRD remain classified until a positive action by an authorized person is taken to declassify them.

(b) In accordance with the Atomic Energy Act, no date or event for automatic declassification ever applies to RD and FRD documents, even if such documents also contain NSI.

(c) E.O. 12958 acknowledges that RD and FRD are exempt from all provisions of the E.O., including automatic declassification.

§ 1045.39 Challenging classification and declassification determinations.

(a) Any authorized holder of an RD or FRD document who, in good faith, believes that the RD or FRD document has an improper classification status is encouraged and expected to challenge the classification with the RD Classifier who classified the document.

(b) Agencies shall establish procedures under which authorized holders of RD and FRD documents are encouraged and expected to challenge any classification status they believe is improper. These procedures shall assure that:

(1) Under no circumstances are persons subject to retribution for bringing forth a classification challenge.
§ 1045.40  Marking requirements.

(a) RD classifiers shall ensure that each RD and FRD document is clearly marked to convey to the holder that it contains RD or FRD information, the level of classification assigned, and the additional markings in paragraphs (b)(3) and (4) of this section.

(b) Front Marking. In addition to the overall classification level of the document, the following notices shall appear on the front of the document, as appropriate:

(1) If the document contains RD:

RESTRIC|TED| DAT|A

This document contains RESTRIC|TED| DAT|A as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions.

(2) If the document contains FRD but does not contain RD:

FORMERLY RESTRIC|TED| DAT|A

Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRIC|RED| DAT|A in foreign dissemination. Section 14b, Atomic Energy Act of 1954.

(3) An RD or FRD document shall be marked to identify the classification guide or source document, by title and date, used to classify the document:

Derived from:

(Classification Guide or source document—title and date)

(4) An RD or FRD document shall be marked with the identity of the RD classifier, unless the classifier is the same as the document originator or signer.

RD Classifier:

(Name and position or title)

(c) Interior Page. RD classifiers shall ensure that RD and FRD documents are clearly marked at the top and bottom of each interior page with the overall classification level and category of the document or the classification level and category of the page, whichever is preferred. The abbreviations “RD” and “FRD” may be used in conjunction with the document classification (e.g., SECRET RD or SECRET FRD).

(d) Declassification Marking. Declassified RD and FRD documents shall be marked with the identity of the individual authorizing the declassification, the declassification date and the classification guide which served as the basis for the declassification. Individuals authorizing the declassification shall ensure that the following marking is affixed on RD and FRD documents which they declassify:

Declassified on:

(Date)

Authorizing Individual:

(Name and position or title)

Authority:

(Classification Guide—title and date)

§ 1045.41  Use of classified addendums.

(a) In order to maximize the amount of information available to the public and to simplify document handling procedures, document originators should segregate RD or FRD into an addendum whenever practical. When RD or
FRD is segregated into an addendum, the originator shall acknowledge the existence of the classified addendum unless such an acknowledgment would reveal classified information.

(b) When segregation of RD or FRD into an addendum is not practical, document originators are encouraged to prepare separate unclassified versions of documents with significant public interest.

(c) When documents contain environmental, safety or health information and a separate unclassified version cannot be prepared, document originators are encouraged to provide a publicly releasable rationale for the classification of the documents.

§ 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.

(a) General. (1) Agencies with documents containing RD and FRD shall respond to mandatory review and Freedom of Information Act (FOIA) requests for these documents from the public.

(2) In response to a mandatory review or Freedom of Information Act request, DOE or DoD may refuse to confirm or deny the existence or nonexistence of the requested information whenever the fact of its existence or nonexistence is itself classified as RD or FRD.

(b) Processing Requests. (1) Agencies shall forward documents containing RD to DOE for review.

(2) Agencies shall forward documents containing FRD to the DOE or to the DoD for review, depending on which is the originating agency.

(3) The DOE and DoD shall coordinate the review of RD and FRD documents as appropriate.

(4) The review and appeal process is that described in subpart D of this part except for the appeal authority. DOE and DoD shall not forward RD and FRD documents to the Interagency Security Classification Appeals Panel (ISCAP) for appeal review unless those documents also contain NSI. In such cases, the DOE or DoD shall delete the RD and FRD portions prior to forwarding the NSI and unclassified portions to the ISCAP for review.

(5) Information Declassification Actions resulting from appeal reviews. (i) Appeal reviews of RD or FRD documents shall be based on existing classification guidance. However, the DOE Director of Declassification shall review the RD and FRD information in the appealed document to determine if it may be a candidate for possible declassification.

(ii) If declassification of the information appears appropriate, the DOE Director of Declassification shall initiate a formal declassification action and so advise the requester.

(c) Denying Official. (1) The denying official for documents containing RD is the DOE Director of Declassification.

(2) The denying official for documents containing FRD is either the DOE Director of Declassification or an appropriate DoD official.

(d) Appeal Authority. (1) The appeal authority for RD documents is the DOE Director of Security Affairs.

(2) The appeal authority for FRD documents is either the DOE Director of Security Affairs, or an appropriate DoD official.

(e) The denying official and appeal authority for Naval Nuclear Propulsion Information is the Director, Office of Naval Reactors.

(f) RD and FRD information contained in documents shall be withheld from public disclosure under exemption 3 of the FOIA (5 U.S.C. 522(b)(3)) because such information is exempt under the statutory jurisdiction of the Atomic Energy Act.

§ 1045.43 Systematic review for declassification.

(a) The Secretary shall ensure that RD documents, and the DoD shall ensure that FRD documents, are periodically and systematically reviewed for declassification. The focus of the review shall be based on the degree of public and researcher interest and likelihood of declassification upon review.

(b) Agencies with RD or FRD document holdings shall cooperate with the DOE Director of Declassification (and with the DoD for FRD) to ensure the systematic review of RD and FRD documents.
§ 1045.44 Review of documents in particular areas of public interest shall be considered if sufficient interest is demonstrated. Proposals for systematic document reviews of given collections or subject areas should be addressed to the Director of Declassification, Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290.

§ 1045.44 Classification review prior to public release.

Any person with authorized access to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for classification by the appropriate DOE organization (for RD) or the appropriate DOE or DoD organization (for FRD) prior to its release.

§ 1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

(a) Individuals reviewing NSI records of permanent historical value under the automatic or systematic review provisions of E.O. 12958 may come upon documents that they suspect may contain RD or FRD, but which are not so marked. Such documents are not subject to automatic declassification.

(b) Such documents shall be reviewed by an RD Classifier as soon as possible to determine their classification status. Assistance may be requested from the DOE Director of Declassification.

§ 1045.46 Classification by association or compilation.

(a) If two pieces of unclassified information reveal classified information when associated, then RD classifiers may classify the document.

(b) RD classifiers may classify a document because a number of pieces of unclassified information considered together contain some added value such as completeness or comprehensiveness of the information which warrants classification.

Subpart D—Executive Order 12958: “Classified National Security Information” Requirements Affecting the Public

§ 1045.50 Purpose and scope.

This subpart describes the procedures to be used by the public in questioning or appealing DOE decisions regarding the classification of NSI under E.O. 12958 and 32 CFR part 2001.

§ 1045.51 Applicability.

This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI.

§ 1045.52 Mandatory declassification review requests.

All DOE information classified as NSI is subject to review for declassification by the DOE if:

(a) The request for a review describes the document containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(b) The information is not exempted from search and review under the Central Intelligence Agency Information Act;

(c) The information has not been reviewed for declassification within the past 2 years; and

(d) The request is sent to the Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874–1290.

§ 1045.53 Appeal of denial of mandatory declassification review requests.

(a) If the Department has reviewed the information within the past 2 years, the request may not be processed. If the information is the subject of pending litigation, the processing of the request may be delayed pending completion of the litigation. The Department shall inform the requester of this fact and of the requester’s appeal rights.
(b) When the Director of Declassification has denied a request for review of NSI, the requester may, within 30 calendar days of its receipt, appeal the determination to the Director of Security Affairs.

c) **Elements of appeal.** The appeal shall be in writing and addressed to the Director of Security Affairs, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities which include, but are not limited to DOE (and predecessor agencies) rulings, regulations, interpretations, and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination being appealed shall be submitted with the appeal.

d) **Receipt of appeal.** An appeal shall be considered to be received upon receipt by the DOE Director of Security Affairs.

e) **Action within 60 working days.** The appeal authority shall act upon the appeal within 60 working days of its receipt. If no determination on the appeal has been issued at the end of the 60-day period, the requester may consider his or her administrative remedies to be exhausted and may seek a review by the Interagency Security Classification Appeals Panel (ISCAP). When no determination can be issued within the applicable time limit, the appeal shall nevertheless continue to be processed. On expiration of the time limit, DOE shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be issued, and of his or her right to seek further review by the ISCAP. Nothing in this subpart shall preclude the appeal authority and the requester from agreeing to an extension of time for the decision on an appeal. The DOE Director of Security Affairs shall confirm any such agreement in writing and shall clearly specify the total time agreed upon for the appeal decision.

(f) **Form of action on appeal.** The DOE Director of Security Affairs’ action on an appeal shall be in writing and shall set forth the reason for the decision. The Department may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under E.O. 12958.

g) **Right of final appeal.** The requester has the right to appeal a final Department decision or a failure to provide a determination on an appeal within the allotted time to the ISCAP for those appeals dealing with NSI. In cases where NSI documents also contain RD and FRD, the RD and FRD portions of the document shall be deleted prior to forwarding the NSI and unclassified portions to the ISCAP for review.

**PART 1046—PHYSICAL PROTECTION OF SECURITY INTERESTS**

**Subpart A—General**

Sec.

1046.1 Purpose.

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1046.11 Medical and physical fitness qualification standards.

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APPENDIX A TO SUBPART B TO PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS

APPENDIX B TO SUBPART B TO PART 1046—TRAINING AND QUALIFICATION FOR SECURITY SKILLS AND KNOWLEDGE


**SOURCE:** 50 FR 45791, Aug. 31, 1993, unless otherwise noted.

**Subpart A—General**

§ 1046.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter “DOE,” security policies and procedures regarding the physical protection of security interests.
§ 1046.2 Scope.
This part applies to DOE contractor employees at Government-owned facilities, whether or not privately operated.

§ 1046.3 Definitions.
For the purposes of this part:

Contractor. The term “contractor” includes subcontractors at all tiers.

Defensive combative personnel. Security police officers other than offensive combative personnel.

Designated physician. An occupational medical physician who is recommended by the designated management supervisory official of the local DOE field office and authorized by the Medical Director, Office of Operational and Environmental Safety, Headquarters, to determine the medical and physical condition of protective force personnel. When an occupational medical physician is not available, physicians who are not board-certified in occupational medicine may be recommended and authorized by the Medical Director as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but contractually shall be responsible to DOE for performance of the medical functions required by this part.

Facility. An educational institution, manufacturing plant, laboratory, office building or other area utilized by the DOE or its contractors or subcontractors for the performance of work under DOE jurisdiction.

Field organization. Any organizational component of the DOE located outside the Washington, DC metropolitan area.

Guard. Also referred to as Security Officer, an unarmed individual who is employed for, and charged with, the protection of classified matter or Government property.

Medical condition. General health, physical condition, and emotional and mental stability.

Offensive combative personnel. Security police officers assigned to response force duties including pursuit and assault functions.

Protective force personnel. Security officers and security police officers assigned to protective details, who are employed to protect DOE security interests.

Requalification date. The date of expiration of current qualification at which demonstration of knowledge, skills and/or abilities is required to maintain specific job status.

Security inspector. Also referred to as Security Police Officer, a uniformed person who is authorized under section 161.k of the Atomic Energy Act of 1954, as amended, or other statutory authority, to carry firearms and to make arrests without warrants and who is employed for, and charged with, the protection of classified matter, special nuclear material, or other Government property.

Security police officer. An armed member of the protective force, previously referred to as a “security inspector.”

Special response team member. A security police officer who has been selected to be part of a unit specially trained to provide additional protection capability.

§ 1046.4 Use of number and gender.
As used in this part, words in the singular also include the plural and words in the masculine also include the feminine and vice versa, as the use may require.

Subpart B—Protective Force Personnel

§ 1046.11 Medical and physical fitness qualification standards.
(a) Except as provided in paragraph (b) of this section DOE contractors shall not employ as protective force personnel any individual who fails to meet the applicable medical and physical fitness qualification standards as set forth in appendix A, to this subpart, “Medical and Physical Fitness Qualification Standards.”

(b)(1) Incumbent security police officers shall meet the applicable physical fitness qualification standards.

(2) Current waivers to the medical qualification standards remain in effect and future waivers are permitted.

(c) Each security police officer shall meet the applicable medical
§ 1046.15 Training and qualification for security skills and knowledge.

(a) DOE contractors shall only employ as protective force personnel individuals who successfully meet the requirements of a formal training program established in accordance with appendix B, “Training and Qualification for Security Skills and Knowledge,” to this subpart. The DOE contractor shall maintain individual training records until 1 year after the termination of the individual as a member of the protective force, unless a longer retention period is specified by other requirements.

(b) DOE contractors shall employ as security police officers, including Special Response Team members, only individuals who are fully qualified and
§ 1046.16 Training certification.

DOE contractors shall employ as protective force personnel only individuals who have successfully completed all applicable training and qualification standards set forth in this subpart including appendices A and B. The DOE contractor shall maintain records of certification for each individual until 1 year after the termination of the individual as a member of the protective force, unless a longer retention period is specified by other requirements.

APPENDIX A TO SUBPART B TO PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS

A. Applicability. This appendix A to subpart B of part 1046 provides the minimum, medical and physical fitness qualifications, criteria and guides to be used by designated physicians and management supervisory officials in advising responsible DOE officials whether the medical and physical condition of protective force personnel to be employed by DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

B. Application of Medical and Physical Fitness Qualification Standards.

(1) The standards in this appendix are the minimum necessary to determine the medical and physical capability of protective force personnel to perform all normal and emergency duties effectively and safely.

(2) Security police officer applicants shall meet the applicable medical and physical fitness standards in this appendix prior to assignment to security police officer duties.

(3) Incumbent security police officers shall meet the applicable physical fitness standards in this appendix within one year of the effective date of these standards and once every twelve months thereafter or shall be relieved of security police officer duties subject to the provisions in paragraph G of this appendix.

(4) Incumbent security police officers shall meet the applicable medical standards prior to assignment to security police officer duties and annually thereafter, subject to the provisions of paragraph G of this appendix.

(5) Security officers shall meet the applicable standards in this appendix prior to assignment to security officer duties and biennially thereafter, subject to the provisions of paragraph J of this appendix.

(6) The determination of whether or not the examinee meets the medical standards in this appendix shall be made by a designated physician.

(7) The determination of whether or not the examinee meets the physical fitness standards in this appendix shall be made by a designated management supervisory official in coordination with a designated physician.

(8) When a designated physician determines that special medical evaluations and practical performance tests are necessary in order for an examinee to demonstrate the examinee’s abilities to perform all normal and emergency duties, a determination of the adequacy of performance shall be made by a designated physician.

(9) For those facilities where it is necessary to determine the medical qualification of security police officers or security police officer applicants to perform special assignment security police officer duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the approval of the Director of Safeguards and Security, Headquarters, prior to application and if approved, shall be implemented in the same manner that these qualification standards have been implemented.

(10) The provisions of DOE 5480.1A, ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH PROTECTION PROGRAM FOR DOE OPERATIONS, of 8–13–81, Chapter VIII, Part 4 (including any updates) apply for return to work after recovery from a temporarily disqualifying medical or surgical condition.

C. Administrative Procedures and Requirements.

(1) Medical Confidentiality and Retention of Medical Reports.

(a) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by a designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(b) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with DOE 5480.1A, Chapter VIII, Part 4, whether or not the individual completes the examination, and whether or not potentially disqualifying defects are recorded.

(2) Change of Health Status of Protective Force Personnel.
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(a) It is the specific responsibility of protective force employees to report immediately to their supervisor any known or suspected change in their health which might impair their capacity for duty or the safe and effective performance of assigned job duties.

(b) Supervisory personnel have the responsibility to make a timely report to a designated physician on any behavioral and health changes and deterioration in work performance that is observed in protective force personnel under their jurisdiction. Examples of areas that may indicate medical and emotional problems include: Incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, excessive absence, lateness, and a tendency to become accident prone.

(c) Use of Corrective Devices. When the use of corrective devices, such as eyeglasses and hearing aids, is required to enable an examinee to meet successfully medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use while performing his or her assigned job duties.

(d) It is incumbent upon cognizant field office management to exercise all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of corrective devices, including the provision of equally effective alternate equipment if such is available.

(e) If eyeglasses are used, they shall be of the safety glass type.

D. Security Police Officer Medical Qualifications Standards.

(1) General Qualifications. The examinee shall possess mental, sensorial, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment;
(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals; and,
(c) Motor power, range of motion, neuromuscular coordination and dexterity.

(2) Specific Minimum Qualifications.

(a) Head, Face, Neck, Scalp. Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) Nose. Ability to detect odor of products of combustion and of tracer and marker gases.

(c) Mouth and Throat. Capacity for clear and audible speech as required for effective communication on the job.

(d) Ears. Hearing loss in the better ear not to exceed 30 db average at 500, 1000, 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 and ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(e) Eyes.

(1) Distant Visual Acuity.

(a) Uncorrected acuity of no less than 20/200 in the better eye.

(b) Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

(c) If uncorrected distant vision in the better eye is not at least 20/40, security police officers shall carry an extra pair of corrective lenses.

(2) Near Visual Acuity. Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

(f) Color Vision. Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks.

(3) Peripheral Vision. Field of vision in the horizontal meridian shall not be less than a total of 140 degrees.

(4) Depth Perception. Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(5) Cardiovascular. Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse; regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If an examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotension, or other evidence of cardiovascular abnormality, an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by a designated physician.

(g) Abdomen and Viscera. No clinically significant abnormalities.

(h) Musculo-Skeletal. Normal symmetrical structure, range of motion, and power.

(i) Skin. No significant abnormal intolerance to chemical, mechanical and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties.

(j) Endocrine/ Nutritional/ Metabolic. Endocrine/nutritional/metabolic status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing conditions.
work and meal schedules without potential or actual incapacity.

(k) Hematopoietic. Normal function.


(m) Neurological. Normal central and peripheral nervous system function.

(n) Mental and Emotional. Normal mental status and an absence of neurotic or psychotic conditions which would adversely affect the ability to handle firearms safely or to act safely and effectively under normal and emergency conditions.

(o) Laboratory.

(1) Hemogram. Freedom from clinically significant abnormalities of the formed elements of the blood that could reasonably be expected to affect the safe and effective performance of assigned duties.

(2) Urinalysis. Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

(d) Other Studies. Any other medical investigative procedure, including electrocardiogram and chest x-ray, which a designated physician considers necessary for adequate medical evaluation.

E. Security Police Officer Medical Disqualification Standards.

(1) Freedom from Incapacity. The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) Conditions for Medical Disqualification. The presence of any of the following conditions shall disqualify the examinee from employment as a security police officer.

(a) Respiratory. Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) Cardiovascular.

1. Ischemic Heart Disease
2. Myocardial Infarction
3. Coronary Insufficiency
4. Angina Pectoris
5. Heart Failure
6. Significant Arrhythmia
7. Arterial Aneurysm
8. Significant Peripheral Vascular Insufficiency
9. Corrosive Heart Surgery
10. Corrective Arterial or Great Vessel Surgery
11. Prosthetic Valve
12. Artificial Pacemaker

(c) Endocrine/Nutritional/Metabolic.

(1) Any endocrine, nutritional, or metabolic condition that would not allow the examinee adequately to meet the stresses and demands of assigned normal or emergency job duties.

(2) Inability to accommodate to changing work schedules or to a delay in meals without potential or actual incapacity.

(3) Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet resistant garments.

(4) Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketosis, or diabetic coma within the previous 2 years.

(5) Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) Skin. Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment or likely to be aggravated by or interfere with established or required decontamination procedures.

(e) Hematopoietic Dysfunction. Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(f) Malignant Neoplasms. Malignant neoplastic disease.

(g) Neurological.

(1) History of epilepsy or other convulsive disorder.

(2) History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(h) Eyes. Total blindness in one or both eyes.

(i) Mental and Emotional. An established history or clinical diagnosis of any of the following:

(1) Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

(2) Attempted suicide or an expressed threat of suicide.

(3) A condition in which a person’s intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

(4) A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

(5) The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. Examples of such medications are certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, and tranquilizers.

F. Physical Fitness Standards for Security Police Officers.

All persons authorized to carry firearms must meet a minimum standard of physical
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fitness. There are two categories for such persons: Offensive Combative and Defensive Combative. Persons not authorized to carry firearms are exempt from these physical fitness standards.

1. Offensive Combative Standard must be met by all security police officers assigned to response force duties. The standard is a one (1) mile run with a maximum qualifying time of 8 minutes 30 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.0 seconds.

2. Defensive Combative Standard must be met by all other security police officers authorized to carry firearms. The standard is one-half (0.5) mile run with a maximum qualifying time of 4 minutes 40 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.5 seconds.

3. Qualification in the appropriate combative standard must be accomplished once every twelve months and under the supervision of the protective force training officer or other individuals designated by the responsible DOE field office.

4. Medical Certification.
   a. Each individual who participates in a physical fitness training program to prepare to meet the physical fitness standards set forth in this appendix shall first be certified by a designated physician that he or she is medically fit to participate in the program. This certification shall be obtained not more than 30 days prior to each individual entering the physical fitness training program.
   b. Before any individual takes the physical fitness standards test he or she shall first be certified by a designated physician that he or she is medically fit to take the physical fitness qualification test. This certification shall be obtained not more than 30 days before taking the physical fitness qualification test.
   c. Individuals who require less than 30 days training prior to actual testing to meet the physical fitness standards need only obtain a single medical certification.

5. Initial Qualification Time Limit. Individuals authorized to carry firearms shall meet the applicable physical fitness standard by September 30, 1994 and annually, thereafter using the date of initial qualification as the anniversary date.

6. New Employees. Individuals authorized to carry firearms who are employed after September 30, 1993 shall meet the applicable physical fitness standard prior to his or her initial assignment to duties which requires such individual to carry firearms.

7. Training Program. Incumbent security police officers shall participate in a physical fitness training program.

b. Retesting. During each testing period a security police officer shall be permitted a maximum of six (6) and a minimum of two (2) opportunities to qualify or requalify before such security police officer must enter a training program or is removed from a security police officer position.

G. Waiver of Security Police Officer Medical Standards and Time Extension to Meet Physical Fitness Standards.

1. Waivers of elements of the medical standards of this appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

   a. The DOE field organization authority, in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security police officers are capable of safely and effectively performing all normal and emergency duties.

   b. The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

   c. A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or performance of the practical test required by a designated physician.

   d. Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed one (1) year.

   e. Individuals who have been adversely affected by application of the standards may appeal the denial of waiver to the cognizant DOE safeguards and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and/or appear in the individual’s behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters, within 30 days of the field office’s determination for a final determination based upon his or her review of the record of the case.

2. There will be no waivers granted from the physical fitness standards set forth in paragraph F of this appendix. However, time extensions not to exceed 6 months may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition as certified by a designated physician, are unable to satisfy the physical fitness standards within the required time period without suffering undue physical harm.

H. Security Officer Medical Qualification Standards.
(1) General Qualifications. The examinee shall possess mental, sensory, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:
(a) Mental alertness and reliable judgment.
(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals.
(c) Motor power, range of motion, neuromuscular coordination, and dexterity.
(2) Specific Minimum Qualifications.
(a) Head, Face, Neck, and Scalp. Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.
(b) Nose. Ability to detect odor of products of combustion and of tracer or marker gases.
(c) Mouth and Throat. Capacity for clear and audible speech as required for effective communication on the job.
(d) Ears. Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry). (e) Eyes. Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.
I. Security Officer Medical Disqualification Standards.
(1) Freedom from Incapacity. The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.
(2) Conditions for Medical Disqualification. The presence of any of the following conditions normally shall disqualify the examinee from employment as a security officer.
(a) Respiratory. Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.
(b) Cardiovascular.
1. Ischemic Heart Disease
2. Myocardial Infarction
3. Coronary Insufficiency
4. Angina Pectoris
5. Heart Failure
6. Significant Arrhythmia
7. Arterial Aneurysm
8. Significant Peripheral Vascular Insufficiency
(c) Endocrine/Nutritional/Metabolic.
1. Diabetes Mellitus. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.
2. Obesity. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.
(d) Hematopoietic Dysfunction. Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.
(e) Malignant Neoplasms. Malignant neoplastic disease.
(f) Neurological.
1. History of epilepsy or other convulsive disorder.
2. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.
(g) Mental and Emotional. An established history or clinical diagnosis of any of the following:
1. Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.
2. Attempted suicide or an expressed threat of suicide.
3. A condition in which a person’s intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.
4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.
5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. For example, certain dosages or requirements for steroids, anticoagulants, antiaryrhythmics, sedatives, tranquilizers, etc.
J. Waiver of Security Officer Medical Standards.
Waivers of elements of the medical standards of this appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:
1. The DOE field organization authority, in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security officers are capable of safely and effectively performing all normal and emergency duties.
2. The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routing and emergency duties.
3. A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the
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APPENDIX B TO SUBPART B TO PART 1046—TRAINING AND QUALIFICATION FOR SECURITY SKILLS AND KNOWLEDGE

A. Applicability. This appendix B to subpart B of part 1046 specifies performance oriented requirements for the security training and qualification of DOE contractor security officers and security police officers, including Special Response Team members.

B. Training and Qualifications.

(1) DOE contractors responsible for protective force personnel will establish formal qualification requirements to ensure the competencies needed by protective force members to perform the tasks required to fulfill their assigned responsibilities. The qualification requirements will be supported by a formal training program which develops and maintains, in an effective and efficient manner, the knowledge, skills and abilities required to perform assigned tasks. The qualification and training programs will be based upon criteria established by the Central Training Academy (CTA) and approved by the Director, Office of Safeguards and Security, in coordination with program offices. The formal qualification and training program shall:

(a) Be based on a valid and complete set of job tasks, with identified levels of skills and knowledge needed to perform the tasks;
(b) Be aimed at achieving a well-defined, minimum level of competency required to perform each task acceptably;
(c) Employ standardized lesson plans with clear performance objectives as a basis for instruction;
(d) Include valid performance-based testing to determine and certify job readiness (i.e. qualification);
(e) Be documented so that individual and overall training status is easily accessible. Individual training records shall be retained until 1 year after termination of the employee as a member of the protective force, unless a longer retention period is specified by other requirements.

(2) DOE contractors responsible for training protective force personnel shall prepare and review annually a task analysis detailing all of the required actions for a specific job assignment. The task analysis shall be used to prepare a job description and as a basic input document for local training requirements and be approved by the Head of the Field Element.

(3) Security Officers.

(a) Training requirements. Prior to initial assignment to duty, each security officer shall successfully complete a basic training course designed to provide the minimum level of skills and knowledge needed to competently perform all tasks associated with security officer job responsibilities. The required tasks and minimum levels of competency shall be determined by a site-specific job analysis, but will include task areas found in paragraph (3)(c) of this appendix as appropriate. The training program will be approved by the Head of the Field Organization and where applicable will include, but not necessarily be limited to, the following types of instruction:

1. Orientation/standards of conduct;
2. Security education/operations and material control and accountability;
3. Safety training;
4. Legal requirements and responsibilities;
5. Weaponless self-defense;
6. Intermediate force weapons;
7. Communications;
8. Vehicle operations; and
9. Post and patrol operations.

(b) Refresher Training. Each security officer will successfully complete a course of refresher training at least every 12 months to maintain the minimum level of competency required for the successful performance of tasks associated with security officer job responsibilities. The type and intensity of training shall be based on a site-specific job analysis and will be approved by the Head of the Field Organization. Failure to achieve a minimum level of competency shall result in the security officer’s placement in a remedial training program. The remedial training program will be tailored to provide the security officer with the necessary training to afford a reasonable opportunity to meet the level of competency required by the job analysis. Failure to demonstrate competency at the completion of the remedial program shall result in loss of security officer status.

(c) Knowledge, Skills and Abilities. Each security officer shall possess the skills necessary to protect DOE security interests...
from theft and other acts that may cause adverse impacts on national security or the health and safety of the public. The requirements for each security officer to demonstrate proficiency, familiarity, knowledge, skills, and abilities of the responsibilities identified in the job analysis include, but are not limited to:

1. Procedures for conducting physical checks of repositories containing classified matter;
2. Operation of all vehicles as required by duty assignment;
3. Site and facility policies and procedures governing the security officer’s role in site protection;
4. Federal and state-granted authority applicable to assigned activities and relative responsibilities between the protective force and other law enforcement agencies;
5. Post or patrol operations including:
   a. Access control systems, procedures and operation
   b. Contraband detection
   c. Search techniques for persons, packages and vehicles
   d. Badging and escort responsibilities
   e. Familiarity and recognition of various types of sensitive matter being protected including the normal location, routine uses, and movements of the material at the duty post
   f. Incident reporting
   g. Methods of weaponless self defense
   (4) Security Police Officers.
   (a) Training requirements. Prior to initial assignment to duty, each security police officer shall successfully complete a basic training course designed to provide the minimum level of skills and knowledge needed to competently perform all tasks associated with security police officer job responsibilities. The required tasks and minimum levels of competency will be based on a site-specific job analysis and will be determined by the Head of the Field Organization. Failure to achieve a minimum level of competency will result in the security police officer’s placement in a remedial training program. The remedial training program will be tailored to provide the security police officer with the necessary training to afford a reasonable opportunity to meet the level of competency required by the job analysis. Failure to demonstrate competency at the completion of the remedial program shall result in loss of security police officer status.
   (c) Knowledge, Skills and Abilities. Each security police officer shall possess the individual and team skills necessary to enable that security police officer to protect DOE security interests from theft, sabotage, and other acts that may cause adverse impacts on national security or the health and safety of the public and to protect life and property. The requirements for each security police officer to demonstrate proficiency, familiarity, knowledge, skills, and abilities of the responsibilities identified in the job analysis include, but are not limited to:
   1. Knowledge and proficiency in the use and care of all weapons as required by duty assignment;
   2. Operation of all vehicles as required by duty assignment;
   3. Operation of all communication equipment as required by duty assignment;
   4. Knowledge of and the ability to apply site and facility policies and procedures governing the security police officer’s role in site protection;
   5. Knowledge of Federal and state-granted authorities applicable to assigned activities and the relative responsibilities between the protective force and local law enforcement agencies in both normal and emergency operations.
   6. Knowledge of and the ability to apply DOE policy on the use of deadly force and limited arrest authority as set forth in 10 CFR part 1047;
   7. Proficiency in post and patrol operations including:
   a. Access control systems, procedures and operation
   b. Contraband detection
   c. Search techniques and systems for individuals, packages and vehicles
   d. Badging and escort responsibilities
   e. Response to and assessment of alarm annunciations and other indications of intrusion
   f. Familiarity and recognition of various types of sensitive matter being protected including the normal location, routine
uses, and movements of the material at the assigned duty post

(g) Observation and physically checking buildings, rooms and repositories containing classified matter

(h) Incident reporting

(i) Response to civil disturbances (e.g., strikes, demonstrators)

(j) Methods of self-defense and of arrest and detention

(k) Basic procedures and elements of investigations

(l) Tactical skills

(5) Special Response Team.

(a) Training requirements. Prior to initial assignment to duties as a Special Response Team member, a security police officer shall successfully complete a basic training course designed to provide the minimum level of skills and knowledge needed to competently perform all tasks associated with Special Response Team job responsibilities. The required tasks and minimum levels of competency required for the successful performance of tasks associated with security police officers and specialized task areas found in paragraph (5)(c) of this appendix as appropriate. The training program will be approved by the Head of the Field Organization.

(b) Refresher Training. Each security police officer assigned as a Special Response Team member will successfully complete a course of refresher training at least every 12 months to maintain the minimum level of competency required for the successful performance of tasks associated with security police officer and Special Response Team job responsibilities. The type and intensity of training will be determined by a site-specific job analysis, but will include the task areas identified for security police officers and specialized task areas found in paragraph (5)(c) of this appendix as appropriate. The training program will be approved by the Head of the Field Organization.

(c) Knowledge, Skills and Abilities. Special Response Team members will be security police officers with special training and shall possess the individual and team skills to provide additional protection capability as demanded by the particular targets, threats and vulnerabilities existing at their assigned DOE facilities. In addition to security police officer requirements, the requirements for each Special Response Team member to demonstrate proficiency, familiarity, knowledge, skills, and abilities of the responsibilities identified in the job analysis include, but are not limited to:

1. Operate as a member of a mobile disciplined response team to engage and defeat adversaries as defined by the approved threat guidance for the facility.

2. Provide and operate special weapons and other equipment which may be necessary to protect a particular facility or to effectively engage an adversary with advanced capabilities.

3. Operate from special tactical vehicles which may be necessary for the protection of a particular facility.

(6) Specialized Requirements. Each person who is assigned specialized responsibilities outside the scope of normal security police officer and Special Response Team duties shall successfully complete the appropriate basic and required periodic training. This training will enable the individual to achieve and maintain the minimum level of skill and knowledge needed to competently perform the tasks associated with the specialized job responsibilities, as well as maintain mandated certification, if applicable. Such personnel include, but are not limited to, flight crews, instructors, armorers, Central Alarm System operators, crisis negotiators, investigators, canine handlers, and law enforcement specialists. The scope of such duties will be based on site-specific needs.

(7) Supervisors.

(a) Training Requirements. Protective force personnel who are assigned supervisory responsibilities shall successfully complete the appropriate basic and annual training necessary to achieve and maintain the minimum level of skill and knowledge needed to competently perform their supervisory job responsibilities. The required tasks and minimum levels of competency will be based on a site-specific job analysis and the specialized task areas found in paragraph (7)(b) of this appendix as appropriate.

(b) Knowledge, Skills and Abilities. Each supervisor shall possess the skills necessary to effectively direct the actions of assigned personnel to protect DOE security interests from theft and other acts that may cause adverse impacts on national security or the health and safety of the public. The requirements for each supervisor to demonstrate proficiency, familiarity, knowledge, skills, and abilities of the responsibilities identified in the job analysis include, but are not limited to:

1. Knowledge of the duties and qualifications of all supervised personnel;

2. Familiarity with the basic operating functions of facilities for which the supervisor has protection responsibilities;

3. Assurance that subordinates and their equipment are ready for duty at the start of each duty shift and the inspection of each duty post at least twice per shift, personally or by other means;

4. Assurance that all duty logs and reports have been properly completed, distributed, and acted upon.

(8) Training Exercises. Exercises of various types will be included in the training process for the purposes of achieving and maintaining skills and assessing individual and team competency levels. The types and frequency of training exercises are to be determined by the Head of the Field Organization or by the training needs analysis conducted as part of
the training program. The training program will include as a minimum, the following:

(a) General. At least monthly, exercises shall be conducted involving each shift. These exercises are to be planned so as to exercise the protective force’s ability to prevent the successful completion of those adversarial acts defined in the approved site-specific statement.

(b) Special Response Teams. Personnel assigned Special Response Team responsibilities shall participate in exercises at least monthly. Such exercises will involve the type of situations and scenarios appropriate to site-specific conditions.

(c) Local Law Enforcement Agencies. Protective forces shall request the FBI and local law enforcement agencies that would assist the protective force during an incident to participate in exercises at least annually.

(d) Records of each training exercise shall be prepared for management review and planning and retained for a period of 1 year, unless a longer retention period is specified by other requirements.

(e) Firearms Qualification Standards.

(a) No persons shall be authorized to carry a firearm as a security police officer until the responsible Head of the Field Organization is assured that the individual who is to be armed is qualified in accordance with firearms standards.

(b) As a minimum, each security police officer shall meet the applicable firearms qualification standards every 6 months. The local DOE Operations Office shall permit the qualification to be accomplished any time prior to the actual 6 month requalification date. The actual qualification date will serve to establish a new requalification date for firearms qualification.

(c) The DOE expects that protective force personnel will maintain firearms proficiency on a continuing basis. Therefore, in the case of a headquarters or field audit, or other situation directed by the Head of the Field Element, a security police officer may be required to demonstrate the ability to meet qualification standards. Failure to meet the performance standard will be treated as if the individual failed the first attempt during routine semiannual qualification. In this event the requirements of paragraphs (h), (i) and (j) of part 9 of appendix B subpart B will be followed.

(d) Each security police officer shall qualify with all weapons required by duty assignment. Each security police officer shall be required to qualify with each firearm as indicated in the DOE requirements of the DOE qualification courses.

(e) Each security police officer shall qualify with the same type of firearm and ammunition equivalent in trajectory and recoil as used while on duty. This ammunition shall be listed on the DOE approved ammunition list.

(f) Each security police officer shall be given a basic principles of firearms safety presentation prior to any range activity. This does not require that a firearms safety presentation be given for each course of fire, but does require that prior to the start of range training or qualification for a given period (e.g., initial qualification, semiannual (every 6 months) qualification, training or range practice) each security police officer shall be given a range safety presentation.

(g) Only courses of fire approved by the Office of Safeguards and Security (SA-10) as standardized DOE qualification courses, shall be used for firearms qualification.

(h) Security police officers shall be allowed two initial attempts to qualify semiannually. A Range Master or other person in charge of the range will state to security police officer(s) on the firing line that “THIS IS A QUALIFYING RUN.” Once this statement is made by the Range Master or person in charge, “this qualifying run” will constitute a qualification attempt. Each security police officer will be provided two qualifying attempts. The security police officer shall qualify during one of these attempts.

(i) Failure to qualify shall result in suspension of a security police officer’s authority under section 161.k. of the Atomic Energy Act of 1954, as amended, to carry firearms and to make arrests. The security police officer will then enter a standardized, remedial firearms training program developed by the Central Training Academy and approved by DOE. The remedial firearms training program will be a combination of basic weapon manipulation skills, firearms safety, and an additional segment of time tailored to provide the security police officer with the necessary individual training to afford a reasonable opportunity to meet the firearms qualification standards.

(j) Any security police officer who, upon completion of the remedial training course, fails to qualify after two subsequent, additional attempts shall lose the security police officer status and his authority to carry firearms and to make arrests under section 161.k. of the Atomic Energy Act of 1954.

(k) Any security police officer who requires remedial training on three (3) consecutive semiannual qualification periods, with the same firearm, shall lose security police officer status.

(l) An appropriate DOE record shall be maintained for each security police officer who qualifies or who attempts to qualify. Records will be retained until 1 year after separation of a protective force officer from security police officer duties, unless a longer retention period is specified by other requirements. A supervisor or the training officer will be designated in writing as the individual authorized to certify the validity of the scores.
PART 1047—LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS

GENERAL PROVISIONS

Sec.
1047.1 Purpose.
1047.2 Scope.
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1047.5 Exercise of arrest authority—general guidelines.
1047.6 Use of physical force when making an arrest.
1047.7 Use of deadly force.


SOURCE: 50 FR 30929, July 31, 1985, unless otherwise noted.

§ 1047.4 Arrest authority.
(a) Under the Act, the authority of a DOE protective force officer to arrest without warrant is limited to the performance of official duties and should be exercised only in the enforcement of:
(1) The following laws only if property of the United States which is in the custody of the DOE or its contractors is involved:
   (i) Felonies: (A) Arson—18 U.S.C. 81—(only applicable to “special maritime and territorial jurisdiction of the United States” as defined by 18 U.S.C. 7).
   (B) Building or property within special maritime and territorial jurisdiction—18 U.S.C. 1363—(only applicable to “special maritime and territorial jurisdiction of United States” as defined by 18 U.S.C. 7).
   (C) Civil disorder—18 U.S.C. 231.
   (D) Communication lines, stations or systems—18 U.S.C. 1362.
   (F) Conspiracy—18 U.S.C. 371—(violation of this section is a felony if the offense which is the object of the conspiracy is a felony).
   (G) Destruction of motor vehicles or motor vehicle facilities—18 U.S.C. 393.
   (I) Government property or contracts—18 U.S.C. 1361—(violation of section is a felony if property damage exceeds $100).
   (J) Military, naval or official passes—18 U.S.C. 499—(pertains to forging or altering official passes).

(f) Offender means the person to be arrested.
(g) Protective Force Officer means any person authorized by DOE to carry firearms under section 161.k. of the Atomic Energy Act of 1954.
(h) Special Nuclear Material (SNM) means: (1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which DOE, pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.
§ 1047.4

(L) Public money, property, or records—18 U.S.C. 641—(violation of section is a felony if the property value exceeds $100).
(ii) Misdemeanors: (A) Conspiracy—18 U.S.C. 371—(violation of section is a misdemeanor if the offense which is the object of the conspiracy is a misdemeanor).
(B) Explosives—18 U.S.C. 844(g).
(C) Government property or contracts—18 U.S.C. 1361—(violation of section is a misdemeanor if the property damage does not exceed $100).
(D) Official badges, identification cards, other insignia—18 U.S.C. 701—(pertains to the manufacture, sale, and possession of official insignia).
(E) Public money, property or records—18 U.S.C. 641—(violation of section is a misdemeanor if the property value does not exceed $100).
(2) The following criminal provisions of the Atomic Energy Act:
(i) Felonies: (A) Section 222. Violation of Specific Sections—42 U.S.C. 2272.
(B) Section 223. Violation of Sections Generally—42 U.S.C. 2273.
(C) Section 224. Communication of Restricted Data—42 U.S.C. 2274.
(D) Section 225. Receipt of Restricted Data—42 U.S.C. 2275.
(b) Felony Arrests. A protective force officer is authorized to make an arrest for any felony listed in paragraph (a)(1)(i) or (a)(2)(i) of this section if the offense is committed in the presence of the protective force officer or if he or she has reasonable grounds to believe that the individual to be arrested has committed or is committing the felony.
(1) In the presence of means that the criminal act must have taken place in the physical presence of (under the observation of) the protective force officer. Knowledge of the existence of a criminal violation obtained in any other way (e.g., information from other persons) is not sufficient to permit an arrest under this part of the Act.
(2) Reasonable grounds to believe means that, at the moment of arrest, either the facts and circumstances within the knowledge of the protective force officer, or of which the protective force officer had reasonably trustworthy information, were sufficient to cause a prudent person to believe that the suspect had committed or was committing the offense.
(c) Misdemeanor Arrest. A protective force officer is authorized to make an arrest for any misdemeanor listed in paragraph (a)(1)(ii) or (a)(2)(ii) of this section if the offense is committed in the presence of the protective force officer.
(d) Other Authority. The Act does not provide authority to arrest for violations of state criminal statutes or for violations of federal criminal statutes other than those listed in paragraph (a) of this section. Therefore, arrests for violations of such other criminal statutes shall be made by other peace officers (e.g., U.S. Marshals or Federal Bureau of Investigation (FBI) agents for federal offenses; LLEA officers for state or local offenses) unless:
(1) The protective force officer can make a citizen’s arrest for the criminal offense under the law of the state,
(2) The protective force officer is an authorized state peace officer or otherwise deputized by the particular state to make arrests for state criminal offenses, or
(3) The protective force officer has been deputized by the U.S. Marshals Service or other federal law enforcement agency to make arrests for the criminal offense.
(e) In those locations which are within the “special maritime and territorial jurisdiction of the United States,” as defined in 18 U.S.C. 7, the Assimilative Crimes Act (18 U.S.C. 13) adopts the law of the state for any crime under state law not specifically...
prohibited by Federal statute and provides for federal enforcement of that state law. The local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate, shall provide guidance in this matter.

§ 1047.5 Exercise of arrest authority—general guidelines.

(a) In making an arrest, the protective force officer should announce his or her authority (e.g., “Security Officer”) and that the person is under arrest prior to taking the person into custody. If the circumstances are such that making such announcements would be useless or dangerous to the officer or others, the protective force officer may dispense with these announcements.

(b) The protective force officer at the time and place of arrest may search any arrested person for weapons and criminal evidence and the area into which the arrested person might reach for a weapon or to destroy evidence. Guidance on the proper conduct and limitations in scope of search and seizure of evidence shall be obtained from the local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate.

(c) After the arrest is effected, the arrested person shall be advised of his or her constitutional right against self-incrimination (Miranda warnings). If the circumstances are such that making such advisement is dangerous to the officer or others, this requirement may be postponed until the immediate danger has passed.

(d) Custody of the person arrested should be transferred to other federal law enforcement personnel (i.e., U.S. Marshals or FBI agents) or to LLEA personnel, as appropriate, as soon as practicable. The arrested person should not be questioned or required to sign written statements unless:

(1) Questioning is necessary for security or safety reasons (e.g., questioning to locate a bomb), or

(2) Questioning is authorized by other federal law enforcement personnel or LLEA officers responsible for investigating the crime.

§ 1047.6 Use of physical force when making an arrest.

(a) When a protective force officer has the right to make an arrest as discussed above, the protective force officer may use only that physical force which is reasonable and necessary to apprehend and arrest the offender; to prevent the escape of the offender; or to defend himself or herself or a third person from what the protective force officer believes to be the use or threat of imminent use of physical force by the offender. It should be noted that verbal abuse alone by the offender cannot be the basis under any circumstances for use of physical force by a protective force officer.

(b) Protective force officers shall consult the local DOE Office of Chief Counsel and contractor legal counsel, as appropriate, for additional guidance on use of physical force in making arrests.

§ 1047.7 Use of deadly force.

(a) Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm. Its use may be justified only under conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed. A protective force officer is authorized to use deadly force only when one or more of the following circumstances exists:

(1) Self-Defense. When deadly force reasonably appears to be necessary to protect a protective force officer who reasonably believes himself or herself to be in imminent danger of death or serious bodily harm.

(2) Serious offenses against persons. When deadly force reasonably appears to be necessary to prevent the commission of a serious offense against a person(s) in circumstances presenting an imminent danger of death or serious bodily harm (e.g. sabotage of an occupied facility by explosives).

(3) Nuclear weapons or nuclear explosive devices. When deadly force reasonably appears to be necessary to prevent the theft, sabotage, or unauthorized control of a nuclear weapon or nuclear explosive device.

(4) Special nuclear material. When deadly force reasonably appears to be
necessary to prevent the theft, sabotage, or unauthorized control of special nuclear material from an area of a fixed site or from a shipment where Category II or greater quantities are known or reasonably believed to be present.

(5) **Apprehension.** When deadly force reasonably appears to be necessary to apprehend or prevent the escape of a person reasonably believed to: (i) have committed an offense of the nature specified in paragraphs (a)(1) through (a)(4)1 of this section; or (ii) be escaping by use of a weapon or explosive or who otherwise indicates that he or she poses a significant threat of death or serious bodily harm to the protective force officer or others unless apprehended without delay.

(b) **Additional Considerations Involving Firearms.** If it becomes necessary to use a firearm, the following precautions shall be observed:

1. A warning, e.g. an order to halt, shall be given, if feasible, before a shot is fired.
2. Warning shots shall not be fired.

**PART 1048—TRESPASSING ON STRATEGIC PETROLEUM RESERVE FACILITIES AND OTHER PROPERTY**

Sec. 1048.1 Purpose.
1048.2 Scope.
1048.3 Unauthorized entry.
1048.4 Unauthorized introduction of weapons or dangerous materials.
1048.5 Violations.
1048.6 Posting.
1048.7 Applicability of other laws.

**AUTHORITY:** Sec. 662, Pub. L. No. 100–531, 102 Stat. 2632 (42 U.S.C. 7270b); section 6, Pub. L. No. 100–185, 101 Stat. 1280 (18 U.S.C. 3571(b)(5)).

**SOURCE:** 56 FR 1910, Jan. 17, 1991, unless otherwise noted.

§ 1048.1 **Purpose.**

The regulations in this part are issued for the protection and security of: (a) The Strategic Petroleum Reserve (SPR), its storage or related facilities, and real property subject to the jurisdiction or administration, or in the custody of DOE under part B, title I of the Energy Policy and Conservation Act, as amended (42 U.S.C. 6231–6247) (EPCA); and (b) persons upon the SPR or other property subject to DOE jurisdiction under part B, title I of the EPCA.

§ 1048.2 **Scope.**

The regulations in this part apply to entry into or upon all SPR storage or related facilities, and real property subject to DOE jurisdiction or administration, or in its custody under part B, title I of the EPCA, which have been posted with a notice of the prohibitions and penalties contained in this part.

§ 1048.3 **Unauthorized entry.**

Unauthorized entry into or upon an SPR facility or real property subject to this part, without authorization, is prohibited.

§ 1048.4 **Unauthorized introduction of weapons or dangerous materials.**

Unauthorized carrying, transporting, introducing or causing to be introduced into or upon an SPR facility or real property subject to this part, of a dangerous weapon, explosive or other dangerous material likely to produce substantial injury or damage to persons or property, is prohibited.

§ 1048.5 **Violations.**

Willful unauthorized entry, or willful unauthorized introduction of weapons or dangerous materials into or upon real property subject to this part, constitutes a violation of these regulations. Violation of these regulations is a misdemeanor, and a person convicted of violating these regulations is subject to the maximum fine permitted by law, imprisonment for not more than one year, or both.

§ 1048.6 **Posting.**

Notices stating the pertinent prohibitions of §§1048.3 and 1048.4 and the penalties of §1048.5 will be conspicuously posted at all entrances of each facility or parcel of real property subject to the regulations in this part, and at such intervals along the perimeters thereof as will provide reasonable assurance of notice to persons about to enter.

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1These offenses are considered by the Department of Energy to pose a significant threat of death or serious bodily harm.
PART 1049—LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS OF THE STRATEGIC PETROLEUM RESERVE

Sec.
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1049.5 Exercise of arrest authority—General guidelines.
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1049.7 Exercise of arrest authority—Use of deadly force.
1049.8 Training of SPR Protective Force Officers and qualification to carry firearms.
1049.9 Firearms and firearms incidents.

AUTHORITY: 42 U.S.C. 7101 et seq.

SOURCE: 56 FR 58492, Nov. 20, 1991, unless otherwise noted.

§ 1049.1 Purpose.

The purpose of these guidelines is to set forth internal Department of Energy (DOE) security policies and procedures regarding the exercise of arrest authority and the use of force by DOE employees and DOE contractor and subcontractor employees while discharging their official duties pursuant to section 661 of the Department of Energy Organization Act.

§ 1049.2 Scope.

These guidelines apply to the exercise of arrest authority and the use of force, as authorized by section 661 of the Department of Energy Organization Act, as amended, 42 U.S.C. 7101 et seq., by employees of DOE and employees of DOE’s SPR security contractor and subcontractor. These policies and procedures apply with respect to the protection of:

(a) The SPR and its storage or related facilities; and

(b) Persons upon the SPR or its storage or related facilities.

§ 1049.4 Arrest authority.

(a) Under the Act, the authority of a DOE Protective Force Officer to arrest without warrant is to be exercised only in the performance of official duties of protecting the SPR and persons within or upon the SPR.

(b) A Protective Force Officer is authorized to make an arrest for a felony committed in violation of laws of the United States, or for a misdemeanor committed in violation of laws of the United States if the offense is committed in the officer’s presence.

(c) A Protective Force Officer also is authorized to make an arrest for a felony committed in violation of laws of the United States if the Officer has reasonably grounds to believe that the felony has been committed, or that the
§ 1049.5 Exercise of arrest authority—General guidelines.

(a) In making an arrest, and before taking a person into custody, the Protective Force Officer should:

1. Announce the Protective Force Officer’s authority (e.g., by identifying himself as an SPR Protective Force Officer);

2. State that the suspect is under arrest; and

3. Inform the suspect of the crime for which the suspect is being arrested. If the circumstances are such that making these announcements would be useless or dangerous to the Officer or to another person, the Protective Force Officer may dispense with these announcements.

(b) At the time and place of arrest, the Protective Force Officer may search the person arrested for weapons and criminal evidence, and may search the area into which the person arrested might reach to obtain a weapon to destroy evidence.

(c) After the arrest is effected, the person arrested shall be advised of his constitutional right against self-incrimination (“Miranda warnings”). If the circumstances are such that immediately advising the person arrested of this right would result in imminent danger to the Officer or other persons, the Protective Force Officer may postpone this requirement. The person arrested shall be advised of this right as soon as practicable after the imminent danger has passed.

(d) As soon as practicable after the arrest is effected, custody of the person arrested should be transferred to other Federal law enforcement personnel (e.g., U.S. Marshals or FBI agents) or to local law enforcement personnel, as appropriate, in order to ensure that the person is brought before a magistrate without unnecessary delay.

(e) Ordinarily, the person arrested shall not be questioned or required to sign written statements unless such questioning is:

1. Necessary to establish the identity of the person arrested and the purpose for which such person is within or upon the SPR;

2. Necessary to avert an immediate threat to security or safety (e.g., to locate a bomb); or

3. Authorized by other Federal law enforcement personnel or local law enforcement personnel responsible for investigating the alleged crime.

§ 1049.6 Exercise of arrest authority—Use of non-deadly force.

(a) When a Protective Force Officer is authorized to make an arrest as provided in the Act, the Protective Force Officer may use only that degree of non-deadly force that is reasonable and necessary to apprehend and arrest the suspect in order to prevent escape or to defend the Protective Force Officer or other persons from what the Officer reasonably believes to be the use or threat of imminent use of non-deadly force by the suspect. Verbal abuse by the suspect, in itself, is not a basis for the use of non-deadly force by a Protective Force Officer under any circumstances.

(b) Protective Force Officers should consult the local DOE Office of Chief Counsel and contractor legal counsel for additional guidance on the use of non-deadly force in the exercise of arrest authority, as appropriate.

§ 1049.7 Exercise of arrest authority—Use of deadly force.

(a) The use of deadly force is authorized only under exigent circumstances where the Protective Force Officer reasonably believes that such force is necessary to:

1. Protect himself from an imminent threat of death or from serious bodily harm;

2. Protect any person or persons in or upon the SPR from an imminent threat of death or serious bodily harm.
(b) If circumstances require the use of a firearm by a Protective Force Officer, the Officer shall give a verbal warning (e.g., an order to halt), if feasible. A Protective Force Officer shall not fire warning shots under any circumstances.

§ 1049.8 Training of SPR Protective Force Officers and qualification to carry firearms.

(a) Protective Force Officers shall successfully complete training required by applicable Department of Energy orders prior to receiving authorization to carry firearms. The Department of Energy Office of Safeguards and Security shall approve the course.

(b) Prior to initial assignment to duty, Protective Force Officers shall successfully complete a basic qualification training course which equips them with at least the minimum level of competence to perform tasks associated with their responsibilities. The basic course shall include the following subject areas:

(1) Legal authority, including use of deadly force and exercise of limited arrest authority;
(2) Security operations, including policies and procedures;
(3) Security tactics, including tactics for Protective Force Officers acting alone or as a group;
(4) Use of firearms, including firearms safety and proficiency with all types of weapons expected to be used;
(5) Use of non-deadly weapons, weaponless self-defense, and physical conditioning;
(6) Use of vehicles, including vehicle safety in routine and emergency situations;
(7) Safety, first aid, and elementary firefighting procedures;
(8) Operating in such a manner as to preserve SPR sites and facilities;
(9) Communications, including methods and procedures.

(c) After completing training, and receiving the appropriate security clearance, Protective Force Officers shall be authorized to carry firearms and exercise limited arrest authority. Protective Force Officers shall receive an identification card, which must be carried whenever on duty and whenever armed.

(d) On an annual basis, each Protective Force Officer must successfully complete training sufficient to maintain at least the minimum level of competency required for the successful performance of all assigned tasks identified for Protective Force Officers.

(e) Protective Force Officers shall be qualified in the use of firearms by demonstrating proficiency in the use of firearms on a semiannual basis prior to receiving authorization to carry firearms. Protective Force Officers shall use firearms of the same type and barrel length as firearms used by Protective Force Officers while on duty, and the same type of ammunition as that used by Protective Force Officers.

(f) Protective Force Officers shall be allowed two attempts to qualify in the use of firearms. Protective Force Officers shall qualify in the use of firearms within six months of failing to qualify. If an Officer fails to qualify, the Officer shall complete a remedial firearms training program. A Protective Force Officer who fails to qualify in the use of firearms after completion of a remedial program, and after two further attempts to qualify shall not be authorized to carry firearms or to exercise limited arrest authority.

§ 1049.9 Firearms and firearms incidents.

(a) Protective Force Officers shall receive firearms of a type suitable to adequately protect persons and property within or upon the SPR. Firearms and ammunition shall be secured, inventoried, and maintained in accordance with applicable Department of Energy orders, when not in use.

(b) The authority of a Protective Force Officer to carry firearms and to exercise limited arrest authority shall be suspended if the Officer participates...
§ 1049.10 Disclaimer.

These guidelines are set forth solely for the purpose of internal Department of Energy guidance. These guidelines do not, and are not intended to, and may not be relied upon to, create any substantive or procedural rights enforceable at law by any party in any matter, civil or criminal. These guidelines do not place any limitations on otherwise lawful activities of Protective Force Officers or the Department of Energy.

PART 1050—FOREIGN GIFTS AND DECORATIONS

Subpart A—General

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Subpart B—Guidelines for Acceptance of Foreign Gifts or Decorations

1050.201 Policy against accepting foreign gifts or decorations.
1050.202 Allowable acceptance of gifts.
1050.203 Acceptance of decorations.
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Subpart C—Procedures and Enforcement

1050.301 Reports.
1050.302 Use or disposal of gifts and decorations accepted on behalf of the United States.
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Subpart D—Gifts to Foreign Individuals

1050.401 Prohibition against use of appropriated funds.
(2) A special Government employee as defined in 18 U.S.C. 202(a), and an expert or consultant who is under contract to the DOE pursuant to 5 U.S.C. 3109, including, in the case of an organization performing services under such section, any individual involved in the performance of such services;

(3) A member of a Uniformed Service or an employee of another Government agency assigned or detailed to the DOE or FERC;

(4) The spouse of an individual described in paragraphs (a)(1) through (a)(3) of this section (unless such individual and his or her spouse are legally separated) or a dependent (within the meaning of section 152 of the Internal Revenue Code of 1954) of such an individual, other than a spouse or dependent who is an employee under paragraphs (a)(1) through (a)(3).

(b) Foreign government means:

(1) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government described in paragraph (b)(1); and

(3) Any agent or representative of any such unit or such organization, while acting as such.

(c) Gift means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.

(d) Decoration means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.

(e) Minimal value means that value as defined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period in accordance with the definition of “minimal value” as set forth in the Federal Property Management Regulations of title 41 of the Code of Federal Regulations as applied to the Utilization, Donation, and Disposal of Foreign Gifts and Decorations.


(g) Appropriate General Counsel means either the DOE General Counsel when the employee involved is an employee of that portion of the DOE which excludes FERC, or the FERC General Counsel when the employee involved is an employee of FERC.


§ 1050.104 Responsibilities and authorities.

(a) The Director of Administration shall:

(1) Assure that all employees are given access to or a copy of the Act and these regulations;

(2) Maintain liaison with the Department of State and prepare Departmental reports to the Department of State consistent with the Act and these regulations;

(3) Provide advice and assistance on implementation of the act and these regulations, in coordination with the Assistant Secretary for International Affairs (IA) and the appropriate General Counsel;

(4) Collect and maintain for public inspection all employee statements submitted pursuant to these regulations;

(5) Arrange for independent appraisal of the value of gifts or decorations, upon the request of the General Services Administration or the Inspector General (or other appropriate DOE official); and

(6) Accept and maintain custody and make all determinations regarding the use and disposition of all gifts and decorations accepted by employees on behalf of the United States, in coordination with IA, the appropriate General Counsel, and, for gifts to the Secretary, Deputy Secretary or Under Secretary, the appropriate official in the Office of the Secretary.

(b) The Assistant Secretary for International Affairs (IA) shall assist the Directorate of Administration, where appropriate, in making determinations concerning the effects of the proposed acceptance, use, or disposition of a foreign gift or decoration on the foreign relations of the United States.
§ 1050.201 Policy against accepting foreign gifts or decorations.

(a) The Constitution of the United States, Article I, section 9, clause 8, provides that "...* * * no Person holding any Office of Profit or Trust under * * * [the United States], shall, without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any * * * foreign State." In the Foreign Gifts and Decorations Act the Congress consented to the acceptance by Federal employees of gifts and decorations with certain constraints and under certain procedures. Acceptance of any gift or decoration not consistent with this Act, the Department of Energy Organization Act, or the regulations in this part is prohibited.

(b) No employee shall request or otherwise encourage the tender of a gift or decoration from a foreign government. No employee shall accept a gift or decoration from a foreign government except as provided in §§1050.202 or 1050.203 of this part and in accordance with the additional procedures set forth in §§1050.204 and 1050.301 of this part.

§ 1050.202 Allowable acceptance of gifts.

(a) An employee may accept and retain gifts from foreign governments where the gift is tendered or received as a souvenir or mark of courtesy, and is of minimal value. Initial responsibility for determining the value of a gift lies with the employee.

(b) Subject to the prior approval requirements described in §1050.204(a) of this part, an employee may accept gifts of more than minimal value, tendered as a souvenir or mark of courtesy, where it appears that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. Otherwise, an employee, when offered a gift of more than minimal value from a foreign government, other than a gift designated in paragraph (c) of this section, should advise the donor that acceptance of such gifts by the employee is contrary to the policy of the United States. If a gift described in this paragraph is accepted by an employee and not immediately returned thereby, it shall be deemed to have been accepted on behalf of the United States. Upon acceptance it becomes the property of the United States. Within 60 days after acceptance by the employee, the gift shall be deposited with the Directorate of Administration for disposal or official Departmental use as determined by the Director of Administration, in accordance with §1050.302 of this part, and an appropriate statement shall be filed by the employee in accordance with §1050.301(a) of this part.

(c) Subject to the prior approval requirements described in §1050.204(a) of this part, an employee may accept and retain gifts of more than minimal value:

1. Where the gift is in the nature of an educational scholarship.
2. Where the gift is in the form of medical treatment.

An employee accepting a gift pursuant to this paragraph shall file an appropriate statement in accordance with §1050.301(a) of this part.

(d) An employee may accept gifts (whether or not of minimal value) of travel or expenses for travel (such as transportation, food, lodging, or entertainment) taking place entirely outside of the United States where the provision of such travel or expenses is in accordance with diplomatic custom or treaty and where the Head of the employee’s Office grants prior written approval. A spouse or dependent may accept gifts of travel or travel expenses.
when accompanying the employee, provided this is done with the prior written approval of the Head of the employee’s Office. The Head of the employee’s Office shall consult with the appropriate General Counsel in connection with granting approval under this paragraph. Travel or expenses for travel may not be accepted merely for the personal benefit, pleasure, enjoyment, or financial enrichment of the individual involved. An appropriate statement shall be filed in accordance with §1050.301(b) of this part. When any portion of the travel (such as the origination or termination of a flight) is within the United States, it may not be paid for by a foreign government, except as set forth in paragraph (e) of this section.

(e) Pursuant to section 652 of the DOE Organization Act, an employee may accept gifts from the International Atomic Energy Agency or other energy-related international organizations (e.g., the Nuclear Energy Agency and the International Energy Agency) covering transportation expenses to or from a foreign country in connection with scientific or technical assistance projects of such agencies for which the Department of Energy has lead U.S. Government agency responsibility. Such gifts may be accepted only with the prior written approval of the Head of the employee’s Office, who is hereby delegated authority to accept such gifts in accordance with section 652.

§ 1050.203 Acceptance of decorations.

(a) An employee may accept, retain and wear a decoration tendered by a foreign government in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance.

(b) Acceptance of a decoration in accordance with paragraph (a) of this section shall be reviewed and approved by the Directorate of Administration in accordance with §1050.204 of this part. Otherwise, it will be deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited, within 60 days of acceptance, with the Directorate of Administration for disposal or official Departmental use as determined by the Directorate of Administration in accordance with §1050.302 of this part.

§ 1050.204 Advance approval for acceptance of gifts or decorations.

(a) If an employee is advised that a gift of more than minimal value as described in §1050.202 (b) or (c) is to be tendered to him or her, the employee shall, if time permits, request the written advice of the Directorate of Administration regarding the appropriateness of accepting or refusing the gift. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the gift and the reasons for which it is being tendered. The Directorate of Administration shall consult with Assistant Secretary for International Affairs and the appropriate General Counsel in connection with advising the employee. If such advice cannot be obtained and refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, the gift may be accepted, but the Directorate of Administration shall be informed as soon as possible. In either event, the employee shall proceed as provided in §§1050.202 and 1050.301 of this part.

(b) Where an employee is notified of the intent of a foreign government to award him a decoration for outstanding or unusually meritorious service, approval required under §1050.203 should be obtained prior to acceptance of the award. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the decoration and the reasons for which it is being awarded. The Directorate of Administration shall consult with the Assistant Secretary for International Affairs and the appropriate General Counsel. If time does not permit the employee to obtain approval for the award of the decoration before its receipt, the employee may accept it, but shall seek such approval immediately thereafter.
§ 1050.301 Reports.

(a) Within 60 days of accepting a gift of more than minimal value, other than gifts of travel or travel expenses, which are covered in paragraph (b) of this section, an employee shall, in addition to depositing a tangible gift (e.g. wearing apparel, liquor, etc.) with the Directorate of Administration in accordance with §1050.202 of this part, file with the Directorate of Administration a statement concerning the gift containing the information identified on the sample form set forth in appendix I. The form set forth in appendix I must also be filed if the aggregate value of gifts accepted by the recipient from all sources over any period of one year exceeds $250.

(b) Within 30 days after accepting travel or travel expenses in accordance with §1050.202 of this part, an employee shall file with the Directorate of Administration a statement concerning the travel containing the information identified on the sample form set forth in appendix II. Such a statement need not be filed, however, if the travel is in accordance with specific travel arrangements made by the Department in cooperation with the foreign government.

(c) The Directorate of Administration shall:
   (1) Maintain the statements filed pursuant to these regulations and make them available for public inspection and copying during regular business hours; and
   (2) Not later than January 31 of each year compile and transmit to the Department of State for publication by the Department in cooperation with the foreign government.

(d) The Directorate of Administration may determine that the gift or decoration may be retained for the official use of the Department, if it can be properly displayed in an area at Headquarters or at a field facility accessible to employees or members of the public or if it is otherwise usable in carrying out the mission of the Department. The Assistant Secretary for International Affairs shall be consulted to determine whether failure to accept the gift or decoration for the official use of the Department will have an adverse effect on the foreign relations of the United States. In no case shall a gift or decoration be accepted for the official use of the Department when the enjoyment and beneficial use of the gift will accrue primarily to the benefit of the donee or any other individual employee. Gifts or decorations that are retained for the official use of the Department shall be handled in accordance with the provisions of paragraph (d) of this section when their official use is ended.

(d) If a gift or decoration is not retained for official use of the Department, or if its official use has ended, the Directorate of Administration shall, within 30 days after its deposit or after its official use has ended—
   (1) Report the gift or decoration to the General Services Administration (GSA) for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 and the Federal Property Management Regulations at 41 CFR part 101–49, or
   (2) If the gift or decoration is in cash, currency, or monies (except those with possible historic or numismatic value), or is a noncash monetary gift such as a...
check, money order, bonds, shares of stock, or other negotiable instrument, forward it to the Finance and Accounting Office for deposit with the Department of the Treasury.

(e) The Directorate of Administration shall retain custody of gifts and decorations not returned to the donor or retained for the official use of the Department until GSA directs it concerning their disposition. At the request of GSA, the Directorate of Administration shall arrange for appraisal of specific gifts and decorations.

§ 1050.303 Enforcement.

(a) An employee who violates the provisions of the Act or these regulations may be subject to disciplinary action or civil penalty action as set forth in paragraphs (c) and (d) of this section.

(b) Suspected violations of the Act or these regulations shall be reported promptly to the appropriate General Counsel and the Inspector General.

(c) The Inspector General will be responsible for taking the following actions:

(1) If the results of an investigation by the Inspector General do not provide any support for a determination that a violation of the Act or these regulations has occurred, then no further action shall be taken.

(2) If it is determined that the employee knowingly and through actions within his own control has done any of the following, the matter shall be referred to the Attorney General for appropriate action:

(i) Solicited or accepted a gift from a foreign government in a manner inconsistent with the provisions of the Act and these regulations;

(ii) As the approved recipient of travel expenses failed to follow the procedures set forth in the Act and these regulations; or

(iii) Failed to deposit or report a gift as required by the Act and these regulations.

(3) If it is determined that the employee failed to deposit a tangible gift with the Directorate of Administration within 60 days, or to account properly for acceptance of travel expenses, or to comply with the requirements of these regulations relating to the disposal of gifts and decorations retained for official use, but that the criteria of knowledge and control specified in paragraph (c)(2) of this section for referral to the Attorney General have not been met, then the matter shall be referred by the Inspector General to appropriate Departmental officials for administrative action.

(d) As set forth in section 7342(h) of title 5, United States Code, the Attorney General may bring a civil action in any district court of the United States against any employee who knowingly solicits or accepts a gift from a foreign government not consented to by the Act, or who fails to deposit or report such gift as required by the Act. The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $5,500.


Subpart D—Gifts to Foreign Individuals

§ 1050.401 Prohibition against use of appropriated funds.

No appropriated funds other than funds from the “Emergencies in the Diplomatic and Consular Service” account of the Department of State may be used to purchase any tangible gift of more than minimal value for any foreign individual unless such gift has been approved by the Congress.

[59 FR 46896, Aug. 31, 1994]
STATEMENT CONCERNING GIFTS RECEIVED FROM A FOREIGN GOVERNMENT

Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95-105, August 17, 1977) and DOE implementing regulations at 10 CFR part 1050. These provisions apply to foreign gifts tendered to or accepted by Federal employees and their spouses and dependents. The name
of the employee should always be indicated in item 1; if the employee is the recipient of the gift then items 5 and 6 should be marked N/A-not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division and the position of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7. Self explanatory.

Item 8. Self explanatory.

Item 9. Indicate the retail value in the United States at the time of acceptance. If there is any uncertainty as to the value of the gift, it is the recipient’s responsibility to make a reasonable effort to determine value. If the value is $100 or under, and if the aggregate value of the gifts accepted by the recipient from all sources over any period of one year does not exceed $250, then the gift may be retained by the recipient and this Statement need not be submitted.

Item 10. Identify in this item whether or not approval to accept the gift was sought or given in advance in accordance with §1050.204 of the DOE regulations. Also identify those circumstances supporting a determination that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States.

Items 11 and 12. Self explanatory.

Item 13. Though there is no assurance that the item will be sold or if it is sold that it will be feasible for the recipient to participate in the sale, GSA regulations provide for participation by the recipient where feasible.
STATEMENT CONCERNING ACCEPTANCE OF TRAVEL OR TRAVEL EXPENSES FROM A FOREIGN GOVERNMENT

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<th>Description</th>
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<td>5.</td>
<td>Name of Recipient</td>
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<td>7a.</td>
<td>Description of Transportation Provided:</td>
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<td>8.</td>
<td>Date of Acceptance</td>
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<td>Nature of Employee's Official Business Related to Travel:</td>
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<td>13a.</td>
<td>Name of Individual Responsible for Payment of Travel or Travel Expenses</td>
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<td></td>
<td>Signature of Recipient</td>
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Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95-105, August 17, 1977) and DOE implementing regulations at 10 CFR part 1050. These provisions apply to travel or travel expenses.
expenses for travel entirely outside of the United States\(^1\) tendered to or accepted by Federal employees and their spouses and dependents. The name of the employee should always be indicated in item 1; if the employee is the recipient of the travel or travel expenses, then items 5 and 6 should be marked N/A—not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7a. Indicate the location and mode of transportation and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 7b. Indicate nature and location of travel expenses provided and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 8. Indicate dates of travel.

Item 9. Self explanatory.

Item 10. Travel and travel expenses may be accepted in accordance with DOE regulations where the travel is official agency business. Spouses and dependents may accept such travel and expenses only when accompanying the employee. Item 18 therefore should be completed to identify the employee’s official business whether the recipient is an employee or a spouse or dependent.

Item 11. Identify in this item any treaty or diplomatic custom that related to acceptance of the travel or expenses, and any circumstances indicating that acceptance would be consistent with the interests of the U.S. Also provide information regarding any prior approval of the acceptance.

Items 12, 13a, and 13b. Self explanatory.

\(^1\)The Congress has consented in Pub. L. 95–105 only to acceptance of travel or travel expenses that is entirely outside of the United States. Travel, any portion of which (such as the origination or termination of a flight) is within the United States, may not be paid for by a foreign government. All such travel must be handled within applicable DOE Travel Regulations and Standards of Conduct Regulations.

PART 1060—PAYMENT OF TRAVEL EXPENSES OF PERSONS WHO ARE NOT GOVERNMENT EMPLOYEES

§ 1060.101 Persons who may be paid.

(a) Payment may not be authorized or approved for transportation, lodging, subsistence, or other travel expenses from DOE funds to, or on behalf of, a person who is not a Government employee unless such payment is made—

(1) Pursuant to an invitation received by that person from the Department to confer with a DOE employee on matters essential to the advancement of DOE programs or objectives and (i) in the case of a person invited to confer at the post of duty of the conferring DOE employee, a designated official has approved and stated the reasons for the invitation in writing, or (ii) in the case of a person invited to confer at a place other than the post duty of the conferring DOE employee, a principal departmental official has approved and stated the reasons for the invitation in writing;

(2) Pursuant to an invitation for an interview to a prospective employee of the Department who is an applicant for (i) a position in the Department classified at GS–16 or above of the General Schedule or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than the minimum rate of
§ 1060.201 Relatives, contractors, and assistance award recipients.

Notwithstanding any other provision in this part, a DOE employee may not authorize or approve, require another person to authorize or approve, or advocate the authorization or approval of, payment from DOE funds of travel expenses of a person who is not a Government employee and who is (a) the DOE employee’s relative (except in the case of payment under §1060.101(a)(4)), or (b) in the case of payment under §1060.101(a)(1), a DOE contractor or a DOE assistance award recipient or the employee of a DOE contractor or a DOE assistance award recipient unless the travel expenses are incurred with respect to matters outside the scope of the contract or assistance award, as the case may be. (See also §1060.101(e.).)

§ 1060.301 Government employees.

Nothing in this part shall be interpreted as being applicable to authorization or approval of payment of travel expenses of Government employees, including DOE employees.

§ 1060.401 Applicability of internal DOE rules.

Payment of travel expenses under §1060.101(a) (1) through (5) shall be subject to other Department rules relating to authorization of travel.

§ 1060.501 Definitions.

For purposes of this part—
(a) Counselor means the General Counsel of the Department or the General Counsel of the Federal Energy Regulatory Commission or their delegates, as appropriate.
(b) Designated official means (1) a principal departmental officer, (2) an individual who is appointed to a position in the Department by the President of the United States with the advice and consent of the Senate, (3) the Administrator of a power administration, or (4) the head of a Field Organization.
(c) DOE or Department means the Department of Energy established by the Department of Energy Organization...
Employee means—
(1) An employee as defined by 5 U.S.C. 2105;
(2) A special Government employee as defined in 18 U.S.C. 202(a);
(3) A member of a Uniformed Service.

Handicapped individual means a person who has a physical or mental disability or health impairment, and includes an individual who is temporarily incapacitated because of illness or injury.

Principal departmental officer means the Secretary, Deputy Secretary, or Under Secretary, or, in the case of the Federal Energy Regulatory Commission, the Chairman or Executive Director of the Commission.

Relative means, with respect to a DOE employee, an individual who is related to the employee, by blood, marriage, or operation of law, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandchild, grandparent, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, and shall also include the grandparent of an employee’s spouse, an employee’s finance or fiancee, or any person residing in the employee’s household.
CHAPTER XVII—DEFENSE NUCLEAR FACILITIES SAFETY BOARD

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PART 1703—PUBLIC INFORMATION AND REQUESTS

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Source: 56 FR 21261, May 8, 1991, unless otherwise noted.

§ 1703.101 Scope.

This part contains the Board’s regulations implementing the Freedom of Information Act, 5 U.S.C. 552.

§ 1703.102 Definitions; words denoting number, gender and tense.

Agency record is a record in the possession and control of the Board that is associated with Board business. Agency records do not include records such as:

(1) Publicly available books, periodicals, or other publications that are owned or copyrighted by non-federal sources;

(2) Records solely in the possession and control of Board contractors;

(3) Personal records in the possession of Board personnel that have not been circulated, were not required by the Board to be created or retained, and may be retained or discarded at the author’s sole discretion. In determining whether such records are agency records the Board shall consider whether, and to what extent, the records were used in agency business;

(4) Records of a personal nature that are not associated with any Board business; or

(5) Non-substantive information in the calendar or schedule books of the Chairman or Members, uncirculated except for typing or recording purposes.

Board means the Defense Nuclear Facilities Safety Board.

Chairman means the Chairman of the Board.

Designated FOIA Officer means the person designated by the Board to administer the Board’s activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody of or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

General Counsel means the chief legal officer of the Board.

General Manager means the chief administrative officer of the Board.

Member means a Member of the Board.

In determining the meaning of any provision of this part, unless the context indicates otherwise: the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1703.103 Requests for board records available through the public reading room.

(a) A Public Reading Room will be maintained at the Board’s headquarters and will be open between 8:30 a.m. and 4:30 p.m. Mondays through Fridays, with the exception of legal holidays. Documents may be obtained in person or by written or telephonic request from the Public Reading Room by reasonably describing the records sought. The purpose of the Public Reading Room is to provide easy accessibility to a substantial portion of the Board’s records. The Board considers that documents available through the Public Reading Room have been placed in the public domain.

(b) The public records of the Board that are available for inspection and copying upon request in the Public Reading Room include:

(1) The Board’s rules and regulations;
§ 1703.104 Board records exempt from public disclosure.

The following records are exempt from public disclosure:

(a)(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(b) Records related solely to the internal personnel rules and practices of an agency;

(c) Records specifically exempted from disclosure by statute, provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Interagency or intragency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Board;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings,

(2) Would deprive a person of a right to a fair trial or an impartial adjudication,

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such
§ 1703.105 Requests for board records not available through the public reading room (FOIA requests).

(a) Upon the request of any person, the Board shall make available for public inspection and copying any reasonably described agency record in the possession and control of the Board, but not available through the Public Reading Room, subject to the provisions of this part. If a member of the public files a request with the Board under the FOIA for records that the Board determines are available through the Public Reading Room, the Board will treat the request under the simplified procedures of §1703.103.

(b)(1) A person may request access to Board records that are not available through the Public Reading Room by using the following procedures:

(i) The request must be in writing and must describe the records requested to enable Board personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any Board personnel who have been contacted regarding the request prior to the submission of the written request.

(ii) A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described. The request must enable the Board to identify and locate the records by a process that is not unreasonably burdensome or disruptive of Board operations.

(2) The request should be addressed to the Designated FOIA Officer and clearly marked “Freedom of Information Act Request.” The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. For purposes of calculating the time for response to the request under §1703.108, the request shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or his designee.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under §1703.107(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

(4) No request shall be deemed to have been received until the Board has:

(i) Received a statement of willingness to pay, as indicated in §1703.105(b)(3)(i), or

(ii) Received and approved a request for waiver or reduction of fees. However, the FOIA request shall be deemed to have been received if the request for waiver or reduction of fees includes a statement of willingness to pay the fee anticipated to be incurred in processing the request under this section, or to pay that fee not to exceed a specific amount, should the request for fee waiver or reduction be denied.

(c) with respect to records in the files of the Board that have been obtained from other federal agencies:

(1) Where the record originated in another federal agency, the Designated FOIA Officer shall refer the request to that agency and so inform the requester, unless the originating agency agrees to direct release by the Board.

(2) Requests for Board records containing information received from another agency, or records prepared jointly by the Board and other agencies, shall be treated as requests for Board records. The Designated FOIA Officer shall, however, coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, shall cite the other agency Denying Official as well as the Designated FOIA Officer if a denial by the Board is also involved.

(d) If a request does not reasonably describe the records sought, as provided in paragraph (b) of this section, the Board response shall specify the reasons why the request failed to meet those requirements and shall offer the
§ 1703.106 Requests for waiver or reduction of fees.

(a) The Board shall collect fees for record requests made under §1703.105, as provided in §1703.107(b), unless a requester submits a request in writing for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduction request within five working days of the request coming into his possession. No determination shall be made that a fee waiver or reduction request should be denied, until the Designated FOIA Officer has consulted with the General Counsel’s Office. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth his appeal rights under §1703.109.

(b) A person requesting the board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact of disclosure of the requested records on the public’s understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the agency records sought.

(c) The Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records made under §1703.105, it can determine that disclosure of the information in the agency records is in the public interest because it is likely...
to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Board shall consider the following factors:

(1) Whether the subject of the requested agency records concerns the operations or activities of the Government;

(2) Whether disclosure of the information is likely to contribute significantly to public understanding of Government operations or activities;

(3) Whether, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(4) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

§ 1703.107 Fees for record requests.

(a) Fees for records available through the Public Reading Room.

(1) With the exception of copies of transcripts of Board public hearings addressed in paragraph (a)(2) of this section, the fees charged shall be limited to costs of duplication of the requested records. The Board shall either duplicate the requested records or have them duplicated by a commercial contractor. If the Board duplicates the records, it shall not charge the requester for the associated labor costs. A schedule of fees for this duplication service shall be prescribed in accordance with paragraph (b)(6) of this section. A person may obtain a copy of the schedule of fees in person or by mail from the Public Reading Room. There shall be no charge for responses consisting of ten or fewer pages.

(2) Transcripts of Board public hearings are made by private contractors. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the duplication service noted in paragraph (a) of this section, if the particular contract so permits. Copies of the contracts shall be available for public inspection in the Public Reading Room.

(3) Requests for certification of copies of official Board records must be accompanied by a fee of $5.00 per document. Inquiries and orders may be made to the Public Reading Room in person or by mail.

(b) Fees for records not available through the Public Reading Room (FOIA requests).

(1) Definitions. For the purpose of paragraph (b) of this section:

Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the FOIA;

Direct costs means those expenditures which the Board incurs in search, review and duplication, as applicable to different categories of requesters, to respond to requests under §1703.105. Direct costs include, for example, the average hourly salary and projected benefits costs of Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Board records are stored.

Educational institution refers to a pre-school, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research;

Noncommercial scientific institution refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry;

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to
the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media may be included in this category. A "freelance" journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination.

(2) Fees. (i) If documents are requested for commercial use, the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time and for document review time, and the costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

   (ii) If documents are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the Board’s charges shall be limited to the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

   (iii) For a request not described in paragraphs (b)(2) (i) or (ii) of this section the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time, and the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

        (iv) [Reserved]

        (v) The Board, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Board for a FOIA request would be less than the appropriate threshold, the Board shall not charge the requesters.

        (vi) Payment of fees must be by check or money order made payable to the U.S. Treasury.

        (vii) Requesters may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, the Board may aggregate any such requests and charge the requester accordingly. The Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

        (viii) Whenever the Board estimates that duplication or search costs are likely to exceed $25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request to meet the requester’s needs at a lower cost.

(3) Fees for unsuccessful search. The Board may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure.

(4) Advance payments. (i) If the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request to meet the requester’s needs at a lower cost.
of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(ii) If a requester has previously failed to pay a fee charged in a timely fashion, the Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Board will begin to process a new request or a pending request from that requester.

(iii) When the Board requires advance payment under this paragraph, the administrative time limits prescribed in §1703.108(b) will begin only after the Board has received the fee payments.

5 Debt collection. The Board itself may endeavor to collect unpaid FOIA fees, or may refer unpaid FOIA invoices to the General Services Administration, or other federal agency performing financial management services for the Board, for collection.

6 Annual adjustment of fees.—(i) Update and publication. The Board, by its designee, the General Manager, shall promulgate a schedule of fees and the average hourly pay rates and average hourly projected benefits cost and will update that schedule once every twelve months. The General Manager shall publish the schedule for public comment in the Federal Register.

(ii) Payment of updated fees. The fee applicable to a particular FOIA request will be the fee in effect on the date that the request is received.


§ 1703.108 Processing of FOIA requests.

(a) Where a request complies with §1703.105 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

1 Granting the request.

2 Denying the request.

3 Granting or denying it in part,

4 Stating that the request has been referred to another agency under §1703.105, or

5 Informing the requester that responsive records cannot be located or do not exist.

(b) Action pursuant to this section to provide access to requested records shall be taken within twenty working days. This time period may be extended up to ten additional working days, in unusual circumstances, by written notice to the requester. If the Board will be unable to satisfy the request in this additional period of time, the requester will be so notified and given the opportunity to—

1 Limit the scope of the request so that it can be processed within the time limit, or

2 Arrange with the Designated FOIA Officer an alternative time frame for processing the original request or a modified request.

(c) For purposes of this section and §1703.109, the term unusual circumstances may include but is not limited to the following:

1 The need to search for and collect the requested records from field facilities or other establishments that are separate from the Board’s Washington, DC offices:

2 The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which may be responsive to a single request; or

3 The need for consultation, which shall be conducted with all practicable speed, with another agency pursuant to §1703.105(d).

(d) If no determination has been made at the end of the ten day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be
§ 1703.109

made; and that the requester can seek remedy through the courts, but shall ask the requester to forgo such action until a determination is made.

(e) Nothing in this part shall preclude the Designated FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement shall be confirmed in writing and shall clearly specify the total time agreed upon.

(f) The procedure for appeal of denial of a request for Board records is set forth in §1703.109.


§ 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.

(a)(1) A person whose request for access to records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the General Counsel within 30 days of the determination. Appeals filed pursuant to this section must be in writing, directed to the General Counsel at the address indicated in §1703.105(b)(2) and clearly marked “Freedom of Information Act Appeal.” Such an appeal received by the Board not addressed and marked as indicated in this paragraph will be so addressed and marked by Board personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in §1703.106(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the reasons for such extension and the expected determination date.

§ 1703.110 Requests for classified records.

The Board may at any time be in possession of classified records and Unclassified Controlled Nuclear Information (UCNI) received from the Department of Energy or other federal agencies. The Board shall refer requests under §1703.105 for such records or information to the Department of Energy or other originating agency without making an independent determination as to the releasability of such documents. The Board shall refer requests for classified records in a manner consistent with Executive Order 12356, “National Security Information,” 3 CFR, 1982 Comp., p. 166, or any superseding Executive Order. The Board shall refer requests for UCNI in a manner consistent with 42 U.S.C. 2168 and the Department of Energy’s implementing regulations in 10 CFR part 1017 or any successor regulations.

§ 1703.111 Requests for privileged treatment of documents submitted to the board.

(a) Scope. Any person submitting a document to the Board may request privileged treatment by claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of FOIA and should otherwise be withheld from public disclosure.

(b) Procedures. A person claiming that information is privileged under paragraph (a) of this section must file:

(1) An application, accompanied by an affidavit, requesting privileged treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information and addressing the factors set forth in paragraph (e) of this section;

(2) The original document, boldly indicating on the front page “Contains Privileged Information—Do Not Release” and identifying within the document the information for which the privileged treatment is sought;

(3) Three copies of the redacted document (i.e., without the information for
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which privileged treatment is sought) and with a statement indicating that
information has been removed for privileged treatment; and

(4) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Board.

(c) Effect of privilege claim. (1) The Designated FOIA Officer shall place documents for which privileged treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege. The Board retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) Notification of request and opportunity to comment. When a FOIA requester seeks a document for which privilege is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) Factors to be considered by Board. In determining whether to grant the document privileged status and to deny the request for the document the Board shall consider:

(1) Whether the information has been held in confidence by its owner;

(2) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(3) Whether the information was transmitted to and received by the Board in confidence;

(4) Whether the information is available in public sources; and

(5) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(f) Notification before release. Notice of a decision by the Designated FOIA Officer to deny a claim of privilege, in whole or in part, shall be given to any person claiming that information is privileged no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(g) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Board shall notify the person who submitted documents containing such confidential commercial information of the suit.

§ 1703.112 Computation of time.

In computing any period of time under this part, the day of the Board's action is not included. The last day of the period is included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the end of the next working day. Whenever a person has the right or is required to take some action within a prescribed period after notification by the Board and the notification is made by mail, five days shall be added to the prescribed period. Only two days shall be added when a notification is made by express mail.
§ 1704.1 Definitions.

1704.2 Definitions.

1704.3 Open meetings requirement.

1704.4 Grounds on which meetings may be closed or information may be withheld.

1704.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

1704.6 Procedures for public announcement of meetings.

1704.7 Changes following public announcement.

1704.8 Transcripts, recordings, or minutes of closed meetings.

1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

1704.10 Severability.

AUTHORITY: 5 U.S.C. 552b; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 9609, Mar. 7, 1991, unless otherwise noted.

§ 1704.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the Defense Nuclear Facilities Safety Board (Board). The Board may waive the provisions set forth in this part to the extent authorized by law.

(b) Requests for all documents other than the transcripts, recordings, and minutes described in § 1704.8 shall be governed by Board regulations pursuant to the Freedom of Information Act (5 U.S.C. 552).

§ 1704.2 Definitions.

As used in this part:

(a) Chairman and Vice Chairman mean those Members designated by the President to serve in said positions, pursuant to 42 U.S.C. 2286(c).


(c) General Counsel means the Board’s principal legal officer, or an attorney serving as Acting General Counsel.

(d) Meeting means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official Board business. A meeting does not include:

(1) Notation voting or similar consideration of business for the purpose of recording of votes, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(2) Action by three or more Members to:

(i) Open or to close a meeting or to release or to withhold information pursuant to § 1704.5;

(ii) Set an agenda for a proposed meeting(s);

(iii) Call a meeting on less than seven days’ notice as permitted by § 1704.6(b); or

(iv) Change the subject matter or the determination to open or to close a publicly announced meeting under § 1704.7(b).

(3) A session attended by three or more Members for which the purpose is to have the Board’s staff or expert consultants to the Board brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(4) A session attended by three or more Members for which the purpose is to have the Department of Energy (including its contractors) or other persons or organizations brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(5) A gathering of Members for the purpose of holding informal preliminary discussions or exchange of views which do not effectively predetermine official action.

(e) Member means an individual duly appointed and confirmed to the collegial body, known as “the Board.”

§ 1704.3 Open meetings requirement.

(a) Any meetings of the Board, as defined in § 1704.2, shall be conducted in accordance with this part. Except as provided in § 1704.4, the Board’s meetings, or portions thereof, shall be open to public observation.
§ 1704.4 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§ 1704.5, 1704.6, and 1704.7 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are:
   (1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and
   (2) In fact properly classified pursuant to such Executive order. In making the determination that this exemption applies, the Board shall rely upon the classification assigned to a document by the Department of Energy or other originating agency;

(b) Relate solely to the internal personnel rules and practices of the Board;

(c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): Provided, That such statute:
   (1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
   (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

This exemption applies to Board meetings, or portions of meetings, involving deliberations regarding recommendations which, under 42 U.S.C. 2286d (a) and (g)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would:
   (1) Interfere with enforcement proceedings;
   (2) Deprive a person of a right to a fair trial or an impartial adjudication;
   (3) Constitute an unwarranted invasion of personal privacy;
   (4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;
   (5) Disclose investigative techniques and procedures; or
   (6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the Board, except that this subsection shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal;

(i) Specifically concern the Board’s issuance of a subpoena, or the Board’s participation in a civil action or proceeding, an action in a foreign court or
§ 1704.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A majority of all Members may vote to close a meeting or withhold information pertaining to that meeting. A separate vote shall be taken with respect to any action under §1704.4. A majority of the Board may act by taking a single vote with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member’s vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in §1704.4(e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the Board shall make available a written copy of such vote reflecting the vote of each Member on the question, and if a portion of a meeting is to be closed to the public a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

(d) For every closed meeting, the General Counsel of the Board shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemption provision. If the General Counsel invokes the exemption for classified or sensitive unclassified information under §1704.4(a), he shall rely upon the classification or designation assigned to the document containing such information by the Department of Energy or other originating agency. A copy of such certification, together with a statement setting forth the time and place of the meeting and the persons present, shall be retained by the Board as part of the transcript, recording, or minutes required by §1704.8.

§ 1704.6 Procedures for public announcement of meetings.

(a) For each meeting, the Board shall make public announcement, at least one week before the meeting, of the:

(1) Time of the meeting;
(2) Place of the meeting;
(3) Subject matter of the meeting;
(4) Whether the meeting is to be open or closed; and
(5) The name and business telephone number of the official designated by the Board to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

(1) A majority of all Members determines by recorded vote that Board business requires that such meeting be scheduled in less than seven days; and
(2) The public announcement required by paragraph (a) of this section is made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by §1704.7, the Board shall submit a notice of public announcement for publication in the Federal Register.

§ 1704.7 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public
announced only if the Board publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement if:

(1) A majority of all Members determines by recorded vote that Board business so requires and that no earlier announcement of the change was possible; and

(2) The Board publicly announces such change and the vote of each Member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting is not a change requiring the approval of the Board under paragraph (b) of this section.

§ 1704.8 Transcripts, recordings, or minutes of closed meetings.

Along with the General Counsel's certification and presiding officer's statement referred to in §1704.5(d), the Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The Board may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to §1704.4(i). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote.

§ 1704.9 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

The Board shall make promptly available to the public in the Public Reading Room the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a closed meeting, except for such item, or items, of discussion or testimony as determined by the Board to contain matters which may be withheld under the exemptive provisions of §1704.4. Copies of the nonexempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. If at some later time the Board determines that there is no further justification for withholding a portion of a transcript, electronic recording, or minutes or other item of information from the public which has previously been withheld, such portion or information shall be made publicly available. The Board shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any Board proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

§ 1705.01 Scope.

§ 1705.02 Definitions.

The following terms used in these regulations are defined in the Privacy Act, 5 U.S.C. 552a(a): agency, individual, maintain, record, system of records, statistical record, and routine use. The Board’s use of these terms conforms with the statutory definitions. References in this part to “the Act” refer to the Privacy Act of 1974.

§ 1705.03 Systems of records notification.

(a) Public notice. The Board has published in the FEDERAL REGISTER its systems of records. The Office of the Federal Register biennially compiles and publishes all systems of records maintained by all Federal agencies, including the Board.

(b) Requests regarding record systems. Any person who wishes to know whether a system of records contains a record pertaining to him or her may file a request in person or in writing. Written requests should be directed to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. Telephone requests should be made by calling the Board at 202–208–6400, and asking to speak to the Privacy Act Officer.

§ 1705.04 Requests by persons for access to their own records.

(a) Requests in writing. A person may request access to his or her own records in writing by addressing a letter to: Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The request should contain the following information: (1) Full name, address, and telephone number of requester,
(2) Proof of identification, which should be a copy of one of the following: Valid driver’s license, valid passport, or other current identification which contains both an address and picture of the requester,
(3) The system of records in which the desired information is contained, and
(4) At the requester’s option, authorization for copying expenses (see §1705.10 below).

(b) Requests in person. Any person may examine his or her own records on the Board’s premises. To do so, the person should call the Board’s offices at 202–208–6400 and ask to speak to the Privacy Act Officer. This call should be made at least two weeks prior to the time the requester would like to see the records. During this call, the requester should be prepared to provide the same information as that listed in paragraph (a) of this section, except for proof of identification.

§ 1705.05 Processing of requests.

(a) Requests in writing. The Privacy Act Officer will acknowledge receipt of the request within five working days of its receipt in the Board’s offices. The acknowledgment will advise the requester if any additional information is needed to process the request. Within fifteen working days of receipt of the request, the Privacy Act Officer will provide the requested information or will explain to the requester why additional time is needed for response.

(b) Requests in person. Following the initial call from the requester, the Privacy Act Officer will determine (1) whether the records identified by the requester exist, and (2) whether they are subject to any exemption under §1705.11 below. If the records exist and are not subject to exemption, the Privacy Act Officer will call the requester and arrange an appointment at a mutually agreeable time when the records can be examined. The requester may be accompanied by one person of his or her own choosing, and should state during this call whether or not a second individual will be present at the appointment. At the appointment, the requester will be asked to present identification as stated in §1705.04(a)(2).

(c) Excluded information. If a request is received for information compiled in reasonable anticipation of litigation, the Privacy Act Officer will inform the requester that this information is not subject to release under the Privacy Act (see 5 U.S.C. 552a(d)(5)).

§ 1705.06 Appeals from access denials.

When access to records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The
Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., suite 700, Washington, DC 20004. The appeal letter must (a) specify those denied records which are still sought, and (b) state why the denial by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within twenty working days after the appeal letter has been received in the Board’s offices. The appeal determination will explain the basis for continuing to deny access to any requested records.

§ 1705.07 Requests for correction of records.

(a) Correction requests. Any person is entitled to request correction of a record pertaining to him or her. This request must be made in writing and should be addressed to Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The letter should clearly identify the corrections desired. An edited copy of the record will usually be acceptable for this purpose.

(b) Initial response. Receipt of a correction request will be acknowledged by the Privacy Act Officer in writing within five working days of receipt of the request. The Privacy Act Officer will endeavor to provide a letter to the requester within thirty working days stating whether or not the request for correction has been granted or denied. If the Privacy Act Officer decides to deny any portion of the correction request, the reasons for the denial will be provided to the requester.

§ 1705.08 Appeals from correction denials.

(a) When amendment of records has been denied by the Privacy Act Officer, the requester may file an appeal in writing. This appeal should be directed to The Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004. The appeal letter must (1) specify the records subject to the appeal, and (2) state why the denial of amendment by the Privacy Act Officer is erroneous. The Chairman or his designee will respond to such appeals within thirty working days (subject to extension by the Chairman for good cause) after the appeal letter has been received in the Board’s offices.

(b) The appeal determination, if adverse to the requester in any respect, will: (1) Explain the basis for denying amendment of the specified records, (2) inform the requester that he or she may file a concise statement setting forth reasons for disagreeing with the Chairman’s determination, and (3) inform the requester of his or her right to pursue a judicial remedy under 5 U.S.C. 552a(g)(1)(A).

§ 1705.09 Disclosure of records to third parties.

Records subject to the Privacy Act that are requested by any person other than the individual to whom they pertain will not be made available except in the following circumstances:

(a) Their release is required under the Freedom of Information Act in accordance with the Board’s FOIA regulations, 10 CFR part 1703;

(b) Prior consent for disclosure is obtained in writing from the individual to whom the records pertain; or

(c) Release is authorized by 5 U.S.C. 552a(b) (1) or (3) through (11).

§ 1705.10 Fees.

A fee will not be charged for search or review of requested records, or for correction of records. When a request is made for copies of records, a copying fee will be charged at the same rate established for FOIA requests. See 10 CFR 1703.107. However, the first 100 pages of copying will be free of charge.

§ 1705.11 Exemptions.

Pursuant to 5 U.S.C. 552a(k), the Board has determined that system of records DNFSB–3, “Drug Testing Program Records,” is partially exempt from 5 U.S.C. 552(a)(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f). The exemption pertains to portions of these records which would identify persons supplying information on drug abuse by Board employees or contractors.
PART 1706—ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTERESTS

Sec. 1706.1 Scope; statement of policy.
1706.2 Definitions.
1706.3 Applicability.
1706.4 Head of the contracting activity.
1706.5 General rules.
1706.6 Solicitation provisions.
1706.7 Procedures.
1706.8 Waiver.
1706.9 Examples.
1706.10 Remedies.
1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

AUTHORITY: 42 U.S.C. 2286b(c).
SOURCE: 57 FR 44652, Sept. 29, 1992, unless otherwise noted.

§ 1706.1 Scope; statement of policy.
(a) Scope. This part sets forth the guidelines, requirements, and procedures the Defense Nuclear Facilities Safety Board will follow in determining whether a contractor or offeror has an organizational or consultant conflict of interest (OCI) and in avoiding, neutralizing, or mitigating OCIs.

(b) Policy. It is the policy of the Board to identify and then avoid or mitigate organizational and consultant conflicts of interest. Normally, the Board will not award contracts to offerors who have OCIs and will terminate contracts where OCIs are identified following contract award. In exceptional circumstances, the Board reserves the right to waive conflicts of interest if it determines that such action is in the best interests of the Government, pursuant to §1706.8, and to take such mitigating measures as it deems appropriate pursuant to such section.

§ 1706.2 Definitions.
Advisory or assistance services means services acquired by contract to advise or assist the Board, whether with respect to its internal functions or its oversight of defense nuclear facilities, or otherwise to support or improve policy development or decisionmaking by the Board, or management or administration of the Board, or to support or improve the operation of the Board’s management systems. Such services may take the form of the provision of information, advice, reports, opinions, alternatives, conclusions, recommendations, training, direct assistance, or performance of site visits, technical reviews, investigation of health and safety practices or other appropriate services.

Affiliates means associated business concerns or individuals if, directly or indirectly, either one controls or can control the other or a third party controls or can control both.

Board means, as the context requires, the Defense Nuclear Facilities Safety Board, its Chairman, or any other officer of the Defense Nuclear Facilities Safety Board to whom the appropriate delegation has been made under 42 U.S.C. 2286(c)(3).

Contract means any contract, agreement, or other arrangement with the Board, except as provided in §1706.3.

Contractor means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, or other entity, or any group of one or more of the foregoing, which is a party to a contract with the Board, and the affiliates and successors in interest of such party. The term “contractor” also includes the chief executive and directors of a party to a contract with the Board, the key personnel of such party identified in the contract, and current or proposed consultants or subcontractors to such party. The term “contractor” shall also include consultants engaged directly by the Board through the use of a contract.

Defense nuclear facility means any United States Department of Energy (DOE) defense nuclear facility, as defined in 42 U.S.C. 2286g, subject to the Board’s oversight.

Evaluation activities means activities that involve evaluation of some aspect of defense nuclear facilities.

Mitigating means, with respect to an organizational or consultant conflict of interest, reducing or counteracting the effects of such a conflict of interest on the Board, but without eliminating or avoiding the conflict of interest.
§ 1706.3 Applicability.

(a) General applicability. This part applies to contractors and offerors only, except as otherwise herein provided. This part shall be incorporated by reference and made a part of all Board contracts in excess of the small purchases threshold, except as provided in the last sentence of this §1706.3(a). In addition, if determined appropriate by the contracting officer for the Board, this part may be incorporated by reference and made a part of Board contracts below the small purchases threshold, except as provided in the last sentence of this §1706.3(a). This part does not apply to the acquisition of services, including, without limitation, consulting services, through the personnel appointment process or to Board agreements with other federal government agencies, but shall apply to Board agreements with the management and operating contractors (and subcontractors and consultants thereunder) of the National Laboratories.

(b) Subcontractors and consultants. The requirements of this part shall also apply to subcontractors and consultants proposed for, or working on, a Board contract, in each case where the amount of the subcontract or consultant agreement under which such subcontract or consultant is or will be work under a prime contract with the Board.

Task order contract means a Board contract that contains a broad scope of work but does not authorize the contractor to perform specific tasks within that broad scope until the contracting officer issues task orders.

Unfair competitive advantage means an advantage obtained by an offeror or contractor to the Board by virtue of the relationship of the offeror or contractor with the Board or access to information not available to other offerors or contractors, and recognized in appropriate legal precedent as unfair.

In determining the meaning of any provision of this part, unless the context indicates otherwise, the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

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In determining the meaning of any provision of this part, unless the context indicates otherwise, the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.
§ 1706.4 Head of the contracting activity.
The head of the contracting activity for the Board shall be the General Manager.

§ 1706.5 General rules.

(a) Award of Contracts. Contracts shall generally not be awarded to an offeror:

(1) For any services where the award would result in the offeror evaluating products or services it has provided to the Board, is then providing to the Board, or is then offering to provide for the Board;

(2) For evaluation activities or research related to the Board's oversight of defense nuclear facilities, where the award would result in the offeror evaluating products or services it has provided, is then providing, or is then offering to provide to DOE or to contractors or subcontractors for defense nuclear facilities; or

(3) For any other services (the acquisition of which is otherwise covered by this part), where the Board has determined, pursuant to §1706.7, that an actual or potential OCI exists and cannot be avoided, and the Board does not waive that OCI. Paragraphs (a) (1) and (2) of this section also apply when award would result in evaluation of products or services of another entity where the offeror has been, is, or would be substantially involved in the development of the product or performance of the service, or has other substantial involvement regarding the product or services.

(b) Subsequent related contracts. (1) A Board contractor under a Board contract shall normally be ineligible to participate in Board contracts or subcontracts that stem directly from the contractor's performance of work under a previous Board contract, where the Board determines that an OCI would exist because:

(i) The expectation of receiving the subsequent contract is likely to diminish the contractor's capacity to give impartial assistance and advice, or otherwise result in a biased work product; or

(ii) An offeror on the subsequent contract would have an unfair competitive advantage by virtue of having performed the first contract.

(2) If a contractor under a Board contract prepares a complete or essentially complete statement of work or specifications in the performance of a contract, the contractor shall be ineligible to perform or participate in the initial contractual effort that is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications.

(c) National Laboratory personnel. The Board may engage personnel of the National Laboratories who have expertise needed by the Board in the performance of its oversight responsibilities, provided that prior to each such engagement, the Board determines either:

(1) That the nature of work performed by such personnel for DOE does not pose actual or potential OCIs with respect to the particular work covered by the Board contract; or

(2) That such engagement is in the Government's best interests and that a waiver should be granted pursuant to §1706.8. In all cases involving National Laboratory personnel, notice of the circumstances of the contract, stating the
rationale for use of the personnel, shall be published in the Federal Register.

(d) Work for others. During the term of any Board contract, the contractor may not enter into consulting or other contractual arrangements with other persons or entities, the result of which could give rise to an OCI with respect to the work being performed under the contract. The prime contractor shall ensure that all of its employees, subcontractors, and consultants under the contract abide by this paragraph. If the contractor has reason to believe that any proposed arrangement with other persons or entities may involve an actual or potential OCI, it shall promptly inform the Board in writing of all pertinent facts regarding such proposed arrangement. In the case of task order contracts, this paragraph applies, subject to §1706.7(c), only to specific ongoing tasks that the contracting officer authorizes the contractor to perform.

(e) Contractor protection of Board information that is not publicly available. If the contractor in the performance of a Board contract obtains access to information, such as Board plans, policies, reports, studies, or financial plans, or internal data protected by the Privacy Act (5 U.S.C. 552a), proprietary information, or any other data which has not been released to the public, the contractor shall not:

1. Use such information for any private purpose until the information has been released or is otherwise made available to the public;
2. Compete for work for the Board based on such information for a period of six months after either the contract has been completed or such information has been released or otherwise made available to the public, whichever occurs first, or submit an unsolicited proposal to the Government based on such information until one year after such information is released or otherwise made available to the public, unless a waiver permitting such action has been granted pursuant to §1706.8; or
3. Release the information without prior written approval of the contracting officer, unless such information has previously been released or otherwise made available to the public by the Board.

§1706.6 Solicitation provisions.

(a) Advisory or assistance services. There shall be included in all formal Board solicitations for advisory or assistance services where the contract amount is expected to exceed $25,000 (or the then applicable small purchases threshold), a provision requiring a certificate representing whether award of the contract to the offeror would present actual or potential OCIs. Apparent successful offerors will be required to submit such certificates, but the Board may also require such a certificate to be submitted in other circumstances, such as:

1. Where the contracting officer has identified certain offerors who have passed an initial screening and has determined that it is appropriate to request the identified offerors to file the certificate in order to expedite the award process; or
2. In the case of modifications for additional effort under Board contracts, except those issued under the "changes" clause. If a certificate has been previously submitted with regard to the contract being modified, only an updating of such statement shall be required for a contract modification.

In addition, if determined appropriate by the contracting officer for the Board, such certificates may be required in connection with any other contracts subject to this part or in which this part has been incorporated by reference.

(b) Marketing consultant services. There shall further be included in all Board solicitations, except sealed bids, where the contract amount is expected to exceed $200,000, a provision requiring an organizational conflicts of interest certificate from any marketing consultants engaged by an offeror in support of the preparation or submission of an offer for a Board contract by that offeror.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]
§ 1706.7 Procedures.

(a) Pre-award disclosure and resolution of OCIs. If a certificate under §1706.6 indicates, or the Board otherwise learns, that actual or potential OCIs could be, or would appear to be, created by contract award to a particular offeror, the Board shall afford the affected offeror an opportunity to provide in writing all relevant facts bearing on the certificate. If the Board thereafter determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

1. Disqualify the offeror;
2. Include in the contract appropriate terms and conditions which avoid the conflict, in which case no waiver is required; or
3. Make a finding that it is in the best interests of the Government to seek award of the contract under the waiver provisions of §1706.8, and, where reasonably possible, include contract terms and conditions or take other measures which mitigate the OCIs.

(b) Post-award disclosure and resolution of OCIs. (1) If, after contract award, the contractor discovers actual or potential OCIs with respect to the contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement shall include a description of the action that the contractor has taken or proposes to avoid or mitigate such conflicts.

(2) If a disclosure under this section indicates, or the Board otherwise learns, that actual or potential OCIs exist, the Board may afford the contractor an opportunity to provide all relevant facts bearing on the conflict, in which case no waiver is required; or

3. If the Board determines that an actual or potential OCI exists, one of the following actions shall ultimately be taken:

i. Terminate the contract, or, in the case of a task order contract, terminate the particular task;
ii. Insist on appropriate contract terms and conditions which avoid the OCIs, in which case no waiver is required; or

iii. Make a finding that it is in the best interests of the Government to permit the contractor to continue to perform the contract (or task) under the waiver provisions of §1706.8, and, where reasonably possible, insist on appropriate contract terms and conditions or take other measures which mitigate the OCIs.

(c) Task order contracts. (1) Because a task order contract generally entails a broad scope of work, apparent successful offerors shall be required to identify in their certificates filed in accordance with §1706.6 any actual or potential OCIs that come within the full scope of the contract. The Board may decline to award a task order contract to an offeror based upon such information or it may decline to approve performance of a particular task by the contractor if an actual or potential OCI is subsequently identified with respect to that particular task. The Board may also take the other actions identified in §1706.7(a) to avoid or mitigate such conflicts.

(2) Contractors performing task order contracts for the Board shall disclose to the contracting officer any new work for others they propose to undertake that may present an actual or potential OCI with regard to the performance of any work under the full scope of the Board contract. Such disclosure shall be made at least 15 days prior to the submission of a bid or proposal for the new work. The disclosure shall include the statement of work and any other information necessary to describe fully the proposed work and contemplated relationship.

(3) If the Board has issued a task order or a letter request for proposal under the contract with a contractor who has disclosed to the contracting officer that it proposes to undertake new work for persons other than the Board as described in §1706.7(c)(2), for services in the same technical area and/or at the same defense nuclear facility that is the subject of the proposed new work (including overlap based upon generic work performed for others by the contractor), the Board shall inform the contractor that entering into a contract for the new work may result in termination by the Board of the task order contract, if the Board determines that such work would give rise to an OCI and the Board does not grant a waiver.
(d) **Decisions on OCIs.** The contracting officer shall make recommendations to the General manager regarding disqualification or actions to be taken by the Board to avoid or mitigate any actual or potential OCI.

(1) The General Manager shall have the authority to approve, modify, or disapprove such recommendations regarding avoidance of an actual or potential OCI. If an offeror or contractor disagrees with the actions approved by the General Manager and requests review of the action, the Chairman shall make the decision on the actions to be taken by the Board.

(2) Any recommended action respecting the best interests of the Government and mitigation measures to be taken with respect to an actual or potential OCI must be approved by the Chairman in conjunction with the decision to grant a waiver pursuant to §1706.8, and any recommended action to terminate a contract or a particular task on account of an actual or potential OCI must be approved by the Chairman.

(3) Decisions on OCIs by the General Manager or the Chairman shall be made with the advice of the Office of the General Counsel.

[57 FR 44652, Sept. 29, 1992; 58 FR 13684, Mar. 12, 1993]

§ 1706.8 **Waiver.**

(a) **Waiver of OCIs.** The need for a waiver of any OCI in connection with the award or continuation of specific contracts may be identified either by the contracting officer for the Board or other Board employee or by a written request filed by an offeror or contractor with the contracting officer. The request may be combined with the certificate or disclosure required under §§1706.6 or 1706.7, or with additional statements filed under §1706.7 regarding matters raised in the certificate or disclosure. The contracting officer shall review all of the relevant facts brought to his attention and shall bring the matter to the General Manager, who shall make a written recommendation to the Chairman of the Board regarding whether a waiver should be granted for a contract award or for continuation of an existing contract.

(b) **Criteria for Waiver of OCIs.** (1) The Chairman is authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable) upon a determination that awarding or extending the particular contract, or not terminating the particular contract, would be in the best interests of the Government. Issuance of a waiver shall ordinarily be limited to those situations in which:

(i) The work to be performed under contract is vital to the Board program;

(ii) The work cannot be satisfactorily performed except by a contractor or offeror whose interests give rise to a question of OCI; and

(iii) Contractual and/or technical review and supervision methods can be employed by the Board to mitigate the conflict.

(2) The Chairman is also authorized to waive any OCI (and the corresponding provision of §1706.5 where applicable), without regard to the foregoing factors, if the Chairman determines, notwithstanding the existence of the OCI, that it is in best interests of the Government to award or extend the particular contract, or not to terminate it, without compliance with §1706.8(b)(1).

(c) **Waiver of Rules or Procedures.** The Chairman is also authorized to waive any rules or procedures contained in this part upon a determination that application of the rules or procedures in a particular situation would not be in the best interests of the Government. Any request for such a waiver must be in writing and shall describe the basis for the waiver.

(d) **Office of General Counsel.** Waivers of OCIs or of any rule or procedure contained in this part shall be made after consultation with the Office of General Counsel.

(e) **Federal Register.** Except as otherwise provided in §1706.8(c), notice of each waiver granted under this section shall be published in the Federal Register with an explanation of the basis for the waiver. In the discretion of the Board, notices of instances of avoidance of OCIs may also be published in the Federal Register.
§ 1706.9 Examples.

The examples in this section illustrate situations in which questions concerning OCIs may arise. The examples are not all inclusive, but are intended to provide offerors and contractors with guidance on how this subpart will be applied.

(a) Circumstances—(1) Facts. A Board contractor for technical assistance in the review of a safety aspect of a particular defense nuclear facility proposes to use the services of an expert who also serves on an oversight committee for a contractor of other defense nuclear facilities.

(2) Guidance. Assuming the work of the oversight committee has no direct or indirect relationship with the work at the facility that is the subject of the Board’s contract, there would not be an OCI associated with the use of this expert in the performance of the Board contract.

(b) Circumstances—(1) Facts. A Board contractor studying the potential for a chemical explosion in waste tanks at a defense nuclear facility advises the Board that it has been offered a contract with DOE to study the chemical composition of the waste in the same tanks.

(2) Guidance. The contractor would be advised that accepting the DOE contract would result in termination of its performance under its contract with the Board.

(c) Circumstances—(1) Facts. The Board issues a task order under an existing contract for the evaluation of the adequacy of fire protection systems at a defense nuclear facility. The contractor then advises the Board that it is considering making an offer on a solicitation by DOE to evaluate the same matter.

(2) Guidance. The contractor would be advised that entering into a contract with DOE on that solicitation could result in the contract with the Board being terminated.

(d) Circumstances—(1) Facts. A firm responding to a formal Board solicitation for technical assistance provides information regarding a contract it currently has with DOE. The effort under the DOE contract is for technical assistance work at DOE facilities not subject to Board oversight and outside its jurisdiction.

(2) Guidance. The Board would analyze the work being performed for DOE to ensure no potential or actual conflict of interest would be created through award of the Board contract. Should the Board determine that no potential or actual conflict of interest exists, the contractor would be eligible for award. If the Board determines that a potential or actual conflict of interest would arise through a contract award, it may disqualify the firm or, if the Board determines that such action is in the best interests of the Government, the Board may waive the conflict or the rules and procedures and proceed with the award.

(e) Circumstances—(1) Facts. The Board discovers that a firm competing for a contract has a number of existing agreements with DOE in technical areas which are unrelated to the Board’s oversight authority. While these contracts may not represent a potential or actual conflict of interest regarding the substance of the technical effort, their total value constitutes a significant portion of the firm’s gross revenues.

(2) Guidance. A conflict of interest may exist due to the firm’s substantial pecuniary dependence upon DOE. Consequently, the Board may question the likelihood that the contractor would provide unbiased opinions, conclusions, and work products because of this extensive financial relationship. The Board will review and consider the extent of the firm’s financial dependence on DOE, the nature of the proposed Board contract, the need by the Board for the services and expertise to be provided by the firm and the availability of such services and expertise elsewhere, and whether the likelihood of the firm’s providing objective technical evaluations and opinions to the Board could be influenced in view of its DOE relationship. Based on this analysis, the Board may either determine that there is no conflict and make the award, waive the conflict if one is identified and establish procedures to mitigate it where possible, or disqualify the offeror.

(f) Circumstances—(1) Facts. The Board discovers that a firm competing
§ 1706.11 Organizational conflicts of interest certificate—Advisory or assistance services.

As prescribed in or permitted by §1706.6(a), insert the following provision in Board solicitations:

ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST CERTIFICATE—ADVISORY AND ASSISTANCE SERVICES (OCT. 1990)

(a) An organizational or consultant conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) In order to comply with the Office of Federal Procurement Policy Letter 89–1, Conflict of Interest Policies Applicable to Consultants, the offeror shall provide the certificate described in paragraph (c) of this provision.

(c) The certificate must contain the following:

(1) Name of the agency and the number of the solicitation in question.

(2) The name, address, telephone number, and federal taxpayer identification number of the offeror.

(3) A description of the nature of the services rendered by or to be rendered on the instant contract.
4 The name, address, and telephone number of the client or clients, a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the certification, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter as the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable.

5 A statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory or assistance services to be provided in connection with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and

6 The signature, name, employer’s name, address, and telephone number of the person who signed the certificate.

Persons required to certify but who fail to do so may be determined to be nonresponsible. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

[End of provision]

* If approved by the head of the contracting activity, this period may be increased up to 36 months.

PART 1707—TESTIMONY BY DNFSB EMPLOYEES AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

Subpart A—General Provisions

Sec. 1707.101 Scope and purpose.
§ 1707.201 General prohibition.

(3) Maintain DNFSB’s impartiality among private litigants where DNFSB is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of DNFSB.

(c) In providing for these requirements, DNFSB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of DNFSB. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1707.102 Applicability.

This part applies to demands and requests to employees for factual, opinion, or expert testimony relating to official information, or for production of official records or information, in legal proceedings whether or not the United States or the DNFSB is a named party. However, it does not apply to:

(a) Demands upon or requests for a DNFSB employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of DNFSB;

(b) Demands upon or requests for a former DNFSB employee to testify as to matters in which the former employee was not directly or materially involved while at the DNFSB;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(d) Congressional demands and requests for testimony or records.

§ 1707.103 Definitions.

DNFSB means the Defense Nuclear Facilities Safety Board.

DNFSB employee or employee means:

(1) Any current or former officer or employee of DNFSB;

(2) Any contractor or contractor employee working on behalf of the DNFSB or who has performed services for DNFSB; and

(3) Any individual who is serving or has served in any advisory capacity to DNFSB, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by DNFSB and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with DNFSB.

Demand means a subpoena, or an order or other demand of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a DNFSB employee that is issued in a legal proceeding.

General Counsel means the General Counsel of DNFSB or a person to whom the General Counsel has delegated authority under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Records or official records and information mean:

(1) All documents and materials which are DNFSB agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in DNFSB files; and

(3) All other information or materials acquired by a DNFSB employee in the performance of his or her official duties or because of his or her official status.

Request means any formal or informal request, by whatever method, for the production of records and information or for testimony which has not been demanded by a court or other competent authority.

Testimony means any written or oral statements, including but not limited to depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

Subpart B—Requests for Testimony and Production of Documents

§ 1707.201 General prohibition.

No employee may produce official records and information or provide any
testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

§ 1707.202 Factors DNFSB will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;
(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
(c) DNFSB has an interest in the decision that may be rendered in the legal proceeding;
(d) Allowing such testimony or production of records would assist or hinder DNFSB in performing its statutory duties or use DNFSB resources where responding to the request will interfere with the ability of DNFSB employees to do their work;
(e) Allowing such testimony or production of records would be in the best interest of DNFSB or the United States;
(f) The records or testimony can be obtained from other sources;
(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;
(h) Disclosure would violate a statute, executive order or regulation;
(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, or otherwise protected information, or would otherwise be inappropriate for release;
(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings;
(k) Disclosure would compromise constitutional rights;
(l) Disclosure would result in DNFSB appearing to favor one litigant over another;
(m) Disclosure relates to documents that were produced by another agency;
(n) A substantial Government interest is implicated;
(o) The demand or request is within the authority of the party making it;
(p) The demand or request is sufficiently specific to be answered.

§ 1707.203 Filing requirements for demands or requests for documents or testimony.

You must comply with the following requirements whenever you issue demands or requests to a DNFSB employee for official records, information, or testimony.

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on DNFSB or a DNFSB employee before submitting a written request and receiving a final determination, DNFSB will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;
(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance of the testimony, records, or information you seek from the DNFSB;
(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;
(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on DNFSB to produce the records or provide testimony;
(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a DNFSB employee, such as a retained expert;
(6) If testimony is requested, the intended use of the testimony, a general
summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each DNFSB employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Defense Nuclear Facilities Safety Board reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

§ 1707.204 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

§ 1707.205 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Defense Nuclear Facilities Safety Board will process requests in the order in which they are received.

§ 1707.206 Final determination.

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a DNFSB employee.

§ 1707.207 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of DNFSB employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester’s expense.

(b) The DNFSB may offer the employee’s written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose classified, privileged, or otherwise protected information;
§ 1707.208 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, DNFSB may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original DNFSB records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official DNFSB records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

§ 1707.209 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred to in §1707.201, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

§ 1707.210 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay the demand, the employee upon whom the demand is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

Subpart C—Schedule of Fees

§ 1707.301 Fees.

(a) Generally. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to DNFSB.

(b) Fees for records. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by DNFSB in its Freedom of Information Act fee regulations at 10 CFR part 1703.

(c) Witness fees. Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court’s rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.
(d) Payment of fees. You must pay witness fees for current DNFSB employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former DNFSB employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) Certification (authentication) of copies of records. The Defense Nuclear Facilities Safety Board may certify that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from DNFSB at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of $15.00 for each document certified.

(f) Waiver or reduction of fees. The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) De minimis fees. Fees will not be assessed if the total charge would be $10.00 or less.

Subpart D—Penalties

§ 1707.401 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by DNFSB or as ordered by a Federal court after DNFSB has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former DNFSB employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current DNFSB employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.
# CHAPTER XVIII—NORTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION

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PART 1800—DECLARATION OF PARTY STATE ELIGIBILITY FOR NORTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT

Sec. 1800.10 Purpose and scope.  
1800.11 Definitions.  
1800.12 Procedures for declaring a state eligible for membership in the Compact.  
1800.13 Conditions for becoming an eligible party state.  
1800.14 Modification to and enforcement of the rules in this part.  

SOURCE: 65 FR 30835, May 15, 2000, unless otherwise noted.

§ 1800.10 Purpose and scope.  
Pursuant to Articles IV.i.(1), (7), (15), and VII.e. of the Northeast Interstate Low-Level Radioactive Waste Compact (enacted by the “Omnibus Low-Level Radioactive Waste Compact Consent Act of 1985,” Public Law 99–240, 99 Stat. 1842, Title I) (the “Compact”), the Northeast Interstate Low-Level Radioactive Waste Commission (the “Commission”) establishes through this part the conditions that it deems necessary and appropriate to be met by a state requesting eligibility to become a party state to this Compact. The Commission shall apply these conditions to evaluate the petition of any state seeking to be eligible to become a party state pursuant to Article VII of the Compact.

§ 1800.11 Definitions.  
The definitions contained in Article II of the Compact and Article I.B. of the Commission’s By Laws shall apply throughout this part. For the purposes of this part, additional terms are defined as follows:  
(a) By Laws refers to the Commission’s By Laws as adopted and amended by the Commission pursuant to Article IV.c. and Article IV.l.(7) of the Compact, most recently amended on December 10, 1998, and dated July 1999;  
(b) Person means an individual, corporation, business enterprise or other legal entity, either public or private, and expressly includes states;  
(c) Nuclear power station means any facility holding a license from the U.S. Nuclear Regulatory Commission under 10 CFR Part 50.  
(d) Existing party states means Connecticut and New Jersey collectively.

§ 1800.12 Procedures for declaring a state eligible for membership in the Compact.  
(a) Any state seeking to become an eligible state under the Compact shall submit to the Chairman of the Commission six copies of a petition to become an eligible state. The petition shall discuss each of the conditions specified in §1800.13 and shall:  
(1) Affirm that the petitioning state fully satisfies each condition; or  
(2) Explain why the petitioning state does not or cannot fully satisfy any particular condition.  
(b) Upon receipt of a petition from any state seeking to become an eligible state under the Compact, the Commission shall publish a notice in accordance with Article I.F.1. of the By Laws and shall initiate an adjudicatory proceeding to act on the petition. Any person may submit written comments on a petition, and all such comments must be received by the Commission within 30 days of notice that a petition has been submitted.  
(c) The Commission shall evaluate the petition against the conditions for declaration of an eligible state specified in §1800.13. As part of the proceeding to evaluate a petition to become an eligible state, the Commission may, in its discretion, conduct a hearing pursuant to Article IV.i.(6) of the Compact and Article V.F.1. of the Commission’s By-Laws. For good cause shown, the Commission may issue an order shortening the notice period for hearings provided in Article I.F.1. of the By Laws to a period of not less than ten days.  
(d) After review of the petition and after any hearing, if held, the Commission shall issue an order accepting or rejecting the petition or accepting the petition with conditions. If the Commission accepts the petition without conditions, the petitioning state shall be declared an eligible state and shall become a new party state upon passage of the Compact by its state legislature,
repeal of all statutes or statutory provisions that pose unreasonable impediments to the capability of the state to satisfy the conditions for eligibility (as determined by the Commission) and payment of (or arrangement to pay) the fee specified in Article IV.j.(1). If the Commission accepts the petition with conditions, the petitioning state may become an eligible state by satisfying all of the conditions in the Commission’s order and providing an amended petition incorporating its compliance with all of the conditions in this subpart and in the Commission’s order. The Commission will consider the amended petition as part of the original adjudicatory proceeding and will issue a new order accepting or rejecting the amended petition.

(e) A state that submits a petition for declaration as an eligible state that is rejected by the Commission may submit a new petition at any time. The Commission will consider the new petition without reference to the prior petition but may use evidence obtained in any prior proceeding to evaluate the new petition.

(f) The Commission’s consideration of a petition for declaration of an eligible state shall be governed by the Compact, the Commission’s By Laws, and this part.

§ 1800.13 Conditions for becoming an eligible party state.

The Commission shall evaluate a petition to become an eligible party state on the basis of the following conditions and criteria:

(a) To be eligible for Compact membership, a state must agree that it will be the voluntary host state upon admission to the Compact and will continue to be the voluntary host state for at least that period of time until all currently licensed nuclear power stations within the region have been fully decommissioned and their licenses (including any licenses for storage of spent nuclear fuel under 10 CFR Part 72) have been terminated.

(b) To be eligible for Compact membership, a state must agree that, so long as the petitioning state remains within the Compact, it will be the sole host state.
control period as a result of the radioactive waste and waste management operations of any regional facility. The petitioning state must agree that this indemnification obligation will survive the termination of the petitioning state’s membership in the Compact.

(h) To be eligible for Compact membership, a state must agree that any incentive payments made by the existing party states as an inducement for a state to join the Compact will be returned to the existing party states, with interest, on a pro rata basis if, for any reason, the regional disposal facility ceases to be available to generators in the existing party states for a period of more than six months (other than periods that have been expressly approved and authorized by the Commission) or is unavailable for disposal of 800,000 cubic feet of waste from generators within the borders of the existing states. In the event of such unavailability, the new party state must agree to return the incentive payments based on the following schedule:

(1) 75% of the incentive payment if the regional facility becomes unavailable prior to January 1, 2002;

(2) 50% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2002, and prior to January 1, 2004;

(3) 30% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2004, and prior to January 1, 2006;

(4) 20% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2006, and prior to January 1, 2009;

(5) 10% of the incentive payment if the regional facility becomes unavailable on or after January 1, 2009, and prior to the time when all currently licensed nuclear power stations within the region have been fully decommissioned and their licenses (including any licenses for storage of spent nuclear fuel under 10 CFR Part 72) have been terminated.

(i) To be eligible for Compact membership, a state must agree with the existing states that once a new party state has been admitted to membership in the Compact pursuant to the rules in this part, declaration of any other state as an eligible party state will require the unanimous consent of all members of the Commission.

§ 1800.14 Modification to and enforcement of the rules in this part.

(a) Because of the importance of the conditions for declaration of an eligible state under the Compact, the rules in this part may only be modified, amended, or rescinded after a public hearing held pursuant to Article IV.1.(6) of the Compact and Article V.F.1. of the Commission’s By Laws and by a unanimous vote of all members of the Commission.

(b) Any party state may enforce the rules in this part by bringing an action against or on behalf of the Commission in the United States District Court for the District of Columbia pursuant to Article IV.n. of the Compact.

(c) If, for any reason, any portion of the rules in this part shall be declared invalid or unenforceable, the remainder of the rules in this part shall remain in full force and effect.
FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Material Approved for Incorporation by Reference
Table of CFR Titles and Chapters
Alphabetical List of Agencies Appearing in the CFR
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Material Approved for Incorporation by Reference

(Revised as of January 1, 2002)

The Director of the Federal Register has approved under 5 U.S.C. 552(a) and 1 CFR Part 51 the incorporation by reference of the following publications. This list contains only those incorporations by reference effective as of the revision date of this volume. Incorporations by reference found within a regulation are effective upon the effective date of that regulation. For more information on incorporation by reference, see the preliminary pages of this volume.

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American Society of Heating, Refrigerating and Air Conditioning Engineers, Inc. (ASHRAE)
1791 Tullie Circle, NE, Atlanta, Georgia 30329
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All changes in this volume of the Code of Federal Regulations which were made by documents published in the Federal Register since January 1, 1986, are enumerated in the following list. Entries indicate the nature of the changes affected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 1986, see the "List of CFR Sections Affected, 1973–1985", published in four separate volumes.

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