Center for Public Representation

June 16, 2025

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Emailed to DOEGeneralCounsel@hq.doe.gov

Department of Energy
Office of Civil Rights and EEO
1000 Independence Avenue SW, Room 5B-168
Washington, DC 20585

Department of Energy
Office of Minority Economic Impact
1000 Independence Avenue SW
Washington DC 20585

RE: Docket Number DOE-HQ-2025-0015 (New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities)

Docket Number DOE-HQ-2025-0024 (Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions))

To Whom It May Concern:

I am writing on behalf of the Center for Public Representation (CPR), which is a national legal advocacy center dedicated to enforcing and expanding the rights of people with disabilities. This is a **significant adverse comment** opposing the direct final rules at Docket Numbers DOE-HQ-2025-0015 and DOE-HQ-2025-0024. These two provisions of the proposed rules would rescind critical portions of the Department of Energy (DOE)'s regulations implementing Section 504 of the Rehabilitation Act.

- Number 2025-0015 would rescind 10 C.F.R. § 1040.73, which requires recipients to ensure that new construction and alteration is fully accessible to people with disabilities.

5 Ferry Street, #314
Easthampton, MA 01027
413-586-6024

www.centerforpublicrep.org

- Number 2025-0024 would rescind portions of DOE's program access rule for existing facilities at 10 C.F.R. § 1040.72(c) & (d), including the requirement to make a transition plan to eliminate access barriers in these existing facilities.

For more than 50 years, CPR has used legal strategies and policy to implement system reform initiatives that promote community integration, choice, and personal autonomy for people with disabilities. CPR is committed to ensuring people with disabilities have access to the services and supports they need to live, work, and participate in their own communities. CPR's work includes providing technical assistance and support to a network of federally funded protection and advocacy programs in each state in each state in and territory of the United States. CPR has litigated systemic cases on behalf of people with disabilities in more than twenty jurisdictions, involving access to services and supports that people with disabilities need to be integrated in their communities. Access to these services necessarily requires access to the physical settings where such services are provided and thus, CPR has a deep concern about the proposed recission of the DOE regulations listed above.

CPR supports and incorporates herein the comments of the Disability Rights Education and Defense Fund (DREDF), submitted on June 10, 2025, and offers additional comments below.

The Proposed Recissions are Procedurally Unlawful

The proposed rescissions are unlawful. The changes cannot be adopted as "direct final rules" as they are neither routine nor noncontroversial. The direct final rule approach is designed for situations in which rule changes "are needed immediately or are routine or noncontroversial." Administrative Conference of the United States, (adopted June 15, 1995); *cf*. 5 U.S.C. § 553(b)(4)(B) (describing exemptions to requirements of Administrative Procedures Act where an agency finds based on good cause that "notice and public procedure … are impracticable, unnecessary, or contrary to the public interest").

The notices published in the Federal Register do not discuss or attempt to make any of these showings. Instead, DOE proposes to upend core legal principles that have governed the implementation of Section 504 for 48 years. *This is neither "routine" nor "noncontroversial."*

Docket Number DOE-HQ-2025-0015

As to Docket Number DOE-HQ-2025-0015, the Federal Register merely asserts that the provisions of 10 C.F.R 1040.73, which sets forth specific requirements for new and altered construction, as well as require conformity with Uniform Federal Accessibility Standards (UFAS), are "unnecessary and unduly burdensome" due to the "general prohibition on

discriminatory activities and related penalties" contained in 10 C.F.R. 1040.71. This unsupported assertion cannot survive even basic regulatory construction analysis, whereby a regulation is "presumptively valid" (*see New York Foreign Freight Forwarders and Brokers Association v. The Federal Maritime Commission,* 337 F.2d 289, 295 (2d Cir.1964), *cert. denied,* 390 U.S. 910, 914, 85 S.Ct. 893, 902, 13 L.Ed.2d 797, 800 (1965)), and an interpretation that renders parts redundant or superfluous is disfavored. *Solis v. Summit Contractors, Inc.,* 558 F.3d 815, 823 (8th Cir. 2009). Basic canons of regulatory interpretation do not permit this justification for recission of 10 C.F.R 1040.73.

Moreover, it is wrong to assume that 1040.71 can adequately replace the specific requirements of 1040.73:

> "...the express prohibitions against disability-based discrimination in Section 504...include *an affirmative obligation* to make benefits, services, and programs accessible to disabled people. That is, an entity that provides services to the public cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied; instead, to satisfy Section 504 ..., such entities may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities."

Pierce v. District of Columbia, 128 F. Supp. 3d 250, 266 (D.D.C. 2015). Thus, the affirmative obligations in 1040.73 go beyond the "general prohibition on discriminatory activities and related penalties" contained in 10 C.F.R. 1040.71. The existence of Section 1040.71 cannot simply substitute for, nor justify rescission of, Section 1040.73.

<u>Docket Number DOE-HQ-2025-0024</u>

As to DOE-HQ-2025-0024, the Federal Register summarily concludes that because more than 20 years have passed since the transition planning requirements in 10 C.F.R. 1040.72(c) and (d) went into effect, that they are "obsolete and outdated." As the transition planning requirements provide ongoing, relevant, reasonable and predictable expectations for various stakeholders when existing facilities are modified, the conclusion that they are obsolete or outdated does not make sense. *See supra*.

DOE cannot show that the proposed recissions are routine or noncontroversial, nor that they are needed immediately, to obviate the need for notice and the opportunity to comment. Thus, the recission of 10 C.F.R. 1040.72(c) and (d) and 10 C.F.R 1040.73 via direct final rule is improper.

The Regulations Have the Force of Law and Cannot Be Eliminated by DOE

The proposed rescissions contradict foundational regulatory provisions implementing Section 504 of the Rehabilitation Act and therefore cannot be adopted through ordinary rulemaking. Section 504 of the Rehabilitation Act prohibits recipients of federal funding from discriminating against disabled people and from excluding them from participation in or denying them the benefits of their programs and activities. 29 U.S.C. § 794(a). As the Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act." *Alexander v. Choate*, 469 U.S. 287, 297 (1985).

The proposed rules would delete 10 C.F.R. § 1040.73, the provision requiring that new construction and alterations be fully accessible as measured by access standards, a requirement that is central to this purpose. Just as important is the requirement that recipients of federal funds undertake careful accessibility planning to remove barriers in existing buildings set out in 10 C.F.R. § 1040.72.

The provisions at issue date back to the Section 504 coordination regulations adopted by the Department of Health, Education, and Welfare (HEW) in 1978[1], which in turn were based on the first Final Rule published by HEW in 1977. The coordination regulations were intended to establish minimum standards for implementing Section 504 across the federal government. These regulations were reached through careful rulemaking that was reviewed and approved by Congress. The Agency cannot lawfully delete these standards.[2]

In adopting the 1977 and 1978 rules, HEW consulted with Congress and engaged in robust and multiple rounds of notice and public comment. The final rules carefully balanced the challenge of making programs accessible in the context of existing buildings with barriers to people with disabilities with the opportunity for new construction and alterations to achieve greater accessibility going forward. HEW, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Final Rule, 42 Fed.Reg. 22675, 22676-77 (May 4, 1977) (describing rulemaking process).

The compromise reached – which has been adopted by more than 80 federal agencies – was and still is to allow some flexibility with respect to existing buildings, while requiring new facilities to comply with access standards. Congress has repeatedly reviewed and approved the

[1] Department of Justice (DOJ), Redesignation and Transfer of Section 504 Guidelines, Final Rule, 46 Fed.Reg. 40686 (Aug. 11, 1981) (republishing Section 504 coordination regulations at 28 C.F.R. Part 41).

[2] Notably, Section 2 of the Administrative Procedures Act mandates that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Thus, the recission of these rules via direct final rule is procedurally deficient for this reason in addition to the reasons explained above.

provisions at issue, and federal courts have enforced them for decades, giving them the force of law. *Rail Corp. v. Darrone*, 465 U.S. 624, 635 nn.15 & 16 (1984). DOE may not lawfully eliminate foundational rules for the implementation of Section 504.

Recission of the rules at issue would also create conflicting enforcement standards: recipients of federal financial assistance from the DOE include many entities that receive funding from other federal departments and agencies, and/or that are subject to the requirements of the Americans with Disabilities Act's (ADA) standards. These recipients would be required to comply with access standards due to their other funding or under the ADA, creating confusion and the risk of uncertainty about liability for discrimination.

Courts have also recognized both the importance of consistent standards to ensure access and the superior expertise of agencies over courts to assess whether access has been provided. *See Kirola v. City & Cty. of San Francisco*., 860 F.3d 1164, 1181 (9th Cir. 2017) ("...an architect putting thousands of measurements into his or her blueprint needs a holistic collection of design rules, not the incremental product of courts deciding cases and controversies one at a time.")

Rescinding the Regulations Would Have Widespread, Harmful Impacts

Access standards are key to making new construction and alterations accessible. Architects and contractors need a comprehensive set of design rules to ensure that new construction and alterations are built to be fully accessible to people with disabilities. The recission of the regulations, including deletion of the regulatory reference to the Uniform Federal Accessibility Standards (UFAS) as a measure of compliance, would directly undermine the goals of Section 504, as well as create confusion, remove predictability and uniformity, and invite conflicting standards of compliance.

Facilities in the programs supported by DOE funds must be accessible for people with disabilities in order to make it possible for them to work in and receive the benefits of a wide range of essential programs. These include critical DOE-funded programs and services such as emergency response to hurricanes and extreme weather events, cybersecurity incidents, and energy disruptions; laboratories where countless scientific advancements occur; and small businesses owned by service-disabled veterans, just to name a few. Physical accessibility is a critical starting point for access to and inclusion in these critical programs and services for millions of people with disabilities in the United States. *See Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) ("…because the barriers to equal participation [by people with disabilities] are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing. As plaintiffs pointedly observe, 'It is not enough to open the door for the handicapped … ; a ramp must be built so the door can be reached.'").

Conclusion

The proposed rescission of Sections 1040.72 (c) and (d), and Section 1040.73, including its reference to the UFAS as the measure of compliance, will undermine one of the primary purposes of Section 504 by encouraging new construction and alterations that are not accessible to people with disabilities. It will also create confusion, additional work and expense, and potential liability for recipient entities.

The careful compromise reached by agencies and Congress – to require that new construction and alteration be fully accessible, while imposing a more flexible standard for existing facilities – would be destroyed by the proposed "direct final rules." Ensuring that new construction and alterations are fully accessible is critical to advancing the goals of Section 504 of the Rehabilitation Act. DOE does not have the authority and must not be allowed to delete foundational rules for the implementation of Section 504 approved by Congress. The rescissions must be rejected.

Thank you for your consideration of these comments.

Sincerely,

Center for Public Representation

/s/

Elissa Gershon
Senior Attorney

Cathy Costanzo
Executive Director