States. An assessment rate of 3 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. The importer of imported tablestock potatoes, potato products, or seed potatoes shall pay the assessment to the board through the U.S. Customs Service and Border Protection at the time of entry or withdrawal for consumption of such potatoes and potato products into the United States.

* * * * *

(3) * * *

Tablestock potatoes, frozen or processed potatoes, and seed potatoes	Assessment	
	Cents/cwt	Cents/kg
0701.10.0020	3.0	0.066
0701.10.0040	3.0	0.066
0701.90.1000	3.0	0.066
0701.90.5010	3.0	0.066
0701.90.5020	3.0	0.066
0701.90.5030	3.0	0.066
0701.90.5040	3.0	0.066
0710.10.0000	6.0	0.132
2004.10.4000	6.0	0.132
2004.10.8020	6.0	0.132
2004.10.8040	6.0	0.132
2005.20.0070	4.716	0.104
0712.90.3000	21.429	0.472
1105.10.0000	21.429	0.472
1105.20.0000	21.429	0.472
2005.20.0040	21.429	0.472
2005.20.0020	12.240	0.27
1108.13.0010	27.0	0.595

* * * * *

Dated: November 30, 2009.

Rayne Pegg,

Administrator.

[FR Doc. E9–28924 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 609

RIN 1901–AB27

Loan Guarantees for Projects That Employ Innovative Technologies

AGENCY: Office of the Chief Financial Officer, Department of Energy.

ACTION: Final rule.

SUMMARY: On August 7, 2009, the Department of Energy (DOE or the Department) published a Notice of Proposed Rulemaking and Opportunity for Comment (NOPR) to make certain changes to the existing regulations for the loan guarantee program authorized by Section 1703 of Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary) to make loan guarantees for projects that ''avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.'' Section 1703 of Title XVII also identifies ten categories of technologies and projects that are potentially eligible for loan guarantees. The two principal goals of section 1703 of Title XVII are to encourage commercial use in the United States of new or significantly improved energy-related technologies and to achieve substantial environmental benefits. DOE believes that commercial use of these technologies will help sustain and promote economic growth, produce a more stable and secure energy supply and economy for the United States, and improve the environment.

Through experience gained implementing the loan guarantee program authorized by section 1703 of Title XVII, and information received from industry indicating the wide variety of ownership and financing structures which participants would like to employ in implementing projects seeking loan guarantees, DOE believes it is appropriate to make certain changes to the existing regulations to provide flexibility in the determination of an appropriate collateral package to secure guaranteed loan obligations, facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions regarding DOE's treatment of collateral, consistent with the intent and purposes of Title XVII. Having considered all of the comments submitted to DOE in response to the NOPR, the Department today is issuing this final rule.

DATES: This rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: David G. Frantz, Director, Loan Guarantee Program Office, 1000 Independence Avenue, SW., Washington, DC 20585–0121, e-mail: *lgprogram@hq.doe.gov;* or Susan S. Richardson, Chief Counsel for the Loan Guarantee Program, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585–0121, e-mail: *lgprogram@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

Today's final rule amends the regulations implementing the loan

guarantee program authorized by section 1703 of Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514) (referred to as Title XVII). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary), after consultation with the Secretary of the Treasury, to make loan guarantees for projects that ''(1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.'' (42 U.S.C. 16513(a))

On August 7, 2009, the Department published a Notice of Proposed Rulemaking and Opportunity for Comment (NOPR, 74 FR 39569) to make certain changes to the regulations for the Title XVII loan guarantee program.

Section 1702 of Title XVII outlines general terms and conditions for loan guarantee agreements and directs the Secretary to include in loan guarantee agreements ''such detailed terms and conditions as the Secretary determines appropriate to (i) protect the interests of the United States in case of a default; and (ii) have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project. (42 U.S.C. 16512(g)(2)(c)). Further, section 1702(d) addresses certain threshold requirements that must be met before the guaranty is made; and section 1702(g) addresses the Secretary's rights in the case of default of the loan. Specifically, section 1702(d) of Title XVII states, under the heading ''Repayment'' and addressing ''Subordination,'' that ''[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing.'' Further, when addressing the situation of default, section 1702(g)(2) of Title XVII states, with respect to ''subrogation'' and ''superiority of rights,'' that ''[t]he rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, shall be superior to the rights of any other person with respect to the property.''

On October 23, 2007, DOE issued a final rule implementing Title XVII. In that final rule, DOE interpreted the interplay between these two provisions of section 1702 such that both describe the rights the Secretary must secure as a condition of making a guarantee. This understanding is reflected in the text of the regulations which requires that the Secretary receive a first lien security interest in all project assets as an incident to making a guarantee. Moreover, this interpretation of the applicability of the superiority of rights provision as a required element of the Secretary's making a guarantee was embedded in the text of the rule and was made explicit in the preambles to the proposed and final rules implementing section 1703 of Title XVII.

The Department has critically reexamined the statute, particularly its text and structure, and now concludes, as described below, that the interpretation of the statute requiring receipt of a first lien on all project assets is not one that it was legally compelled to adopt, and was not correct. A first lien on all project assets is better understood as one element that the Secretary may require for a particular project, but is not compelled by the statute to require. This final rule reflects what the Department has concluded is the correct interpretation of section 1702.

First, it should be borne in mind that nowhere does section 1702 itself require that the Secretary receive a first lien on all project assets as a condition of his ability to make a loan guarantee. Instead the statute requires only that the Secretary's guaranteed obligation ''not be subordinate to other financing.'' In fact, section 1702 does not require that the lender or the Secretary receive any collateral as a statutory requirement for making a loan guarantee.

Next, the ''first lien on all project assets'' requirement contained in the regulations seems traceable only to the ''superiority of rights'' provision contained in section 1702(g)(2)(B). The structure and wording of the statute, however, is indicative that section 1702(g)'s provisions are designed to govern post-default rights of the Secretary, rather than to impose conditions that must be met at the time the Secretary determines to make a loan guarantee. So understood, the ''property acquired'' as to which the Secretary's rights ''shall be superior to the rights of any other person'' relates to property ''acquired'' by the Secretary pursuant to his right of subrogation to the rights of the lender in any collateral or security interest.

As a structural matter, it is notable that the ''superiority of rights'' provision appears within and under the heading ''subrogation'' contained in section 1702(g)(2). Consideration of the structure of the statute is aided by the various captions that introduce its various substantive provisions. In general, those captions—first ''repayment,'' then ''subordination,'' then ''defaults,'' ''payment by the Secretary,'' ''subrogation,'' and then ''superiority of rights,'' reinforce the structural understanding of the statute as keying its particular provisions to the sequence of stages that are foreseeable in the loan guarantee relationship. So perceived, the topic of ''superiority of rights'' would become germane only as a subset of the sequence that begins with a ''default'' and after ''payment by the Secretary.''

It is also notable that the ''superiority of rights'' provision does not contain terms such as ''lien'', ''security interest'', ''collateral'' or the like, which could lead one to conclude that the plain meaning of the provision is to require a first lien on all project assets. Instead, the provision uses the words ''any property acquired'' with ''acquired'' in the past tense, which would indicate that the provision is intended to apply to property that has actually been acquired rather than property that one may or is entitled to acquire (as in the granting of a lien or security interest in collateral), which further supports DOE's interpretation.

Moreover, in reviewing applications for projects seeking a loan guarantee under section 1703 of Title XVII, DOE became aware that its original reading of the statute was in tension with the financing structure of many commercial transactions in the energy sector. For example, the tenancy in common ownership structure proposed for the next generation of nuclear generating facilities, under which multiple entities own undivided interests in a single facility, does not lend itself to the unitary project ownership anticipated by the regulations. In fact, tenancy in common is the typical form of ownership of utility grade power plants that are jointly owned by public power agencies, cooperative power systems and investor-owned utilities. Approximately one-third of all currently operating nuclear power reactors, and approximately one-third of all planned nuclear power reactors for which applications are pending at the Nuclear Regulatory Commission are jointly owned through tenancies in common. As such, each owner holds an undivided interest in the physical project assets, and each owner typically finances its investment in the project separately. In this scenario, DOE would not be guaranteeing a direct loan to a project company, and may be guaranteeing the loan obligations of only some but not all of the project owners. As a result, it may not be commercially feasible to obtain a lien on all project assets. Moreover, in certain circumstances, both in large infrastructure projects and in smaller

projects, creditworthy sponsors may be willing to offer a corporate lending structure in which DOE would rely on the balance sheet of the sponsor. In such a case, the credit of the sponsor may be sufficient to support a more modest pledge of assets.

Additionally, in response to prior solicitations, DOE has received expressions of interest from Export Credit Agencies (ECAs) concerning their possible participation in eligible projects as co-lenders, co-guarantors or insurers of loans. ECAs are governmental, quasi-governmental, or private institutions supported by and acting on behalf of their host governments that facilitate financing for home country exporters doing business in other nations. In addition to ECAs, there is a variety of other potential sources of financing for power generation projects, including municipal bond financing. There also could be interest rate or commodity hedging agreements and, after completion, working capital facilities for project companies. The ECAs, and likely the other sources of financing, will expect to share, on a *pari passu* basis, in collateral pledged to secure the borrower's debt obligations.

Thus, the interpretation of the statute contained in the October 23, 2007, final rule effectively disqualifies from participation in Title XVII programs proposed energy production facilities that employ innovative technologies that are jointly owned through a tenants in common structure or where there are appropriate co-lenders or co-guarantors who require a *pari passu* structure. DOE does not believe that a statute intended to encourage commercial use in the United States of new or significantly improved energy-related technologies would be written in a way as to make ineligible such industry participants.

As stated and explained above, DOE has concluded that section 1702 of Title XVII does not mandate that DOE receive a first lien position on all projects assets. In light of this interpretation of section 1702 of Title XVII, DOE is issuing this final rule which amends the existing regulations. Specifically, to ensure that the loan guarantee program has the ability to respond to the kinds of structuring issues discussed above, this final rule deletes the requirement of a first priority lien on all project assets (and other pledged collateral) and leaves to the Secretary the determination of an appropriate collateral package, as well as intercreditor arrangements. Such a determination by the Secretary is contemplated by sections 1702(a) and 1702(g)(2)(C), and remains subject to the requirement of section 1702(d)(3) that the guaranteed obligation not be subordinate to other financing. The Department believes that having the flexibility to determine on a project-by-project basis the scope of the collateral package and whether *pari passu* lending is in the best interests of the United States, will enable the Department to reduce its exposure on individual projects, diversify its portfolio and maximize the benefits of the resources available for the loan guarantee program.

II. Public Comments on the NOPR and DOE's Responses

The NOPR provided for the submission of comments through September 8, 2009. DOE received from the public several requests to extend the comment period. In response to those requests for additional time to comment on the proposed rule, DOE extended the comment period by two weeks.

DOE received timely comments on the NOPR from 2,123 interested parties (excluding requests for the extension of the comment period). DOE carefully reviewed all comments timely received on the NOPR.

Many of the comments that were received address matters that are not related to the specific rule changes proposed in the NOPR and are therefore outside the scope of this rulemaking. While DOE reviewed all of those comments, DOE will not address in this final rule any comments that are not within the scope of this rulemaking.

DOE summarizes below public comments received on the NOPR that are within the scope of this rulemaking, and discusses the Department's responses to those comments. In three cases, as described below, the Department made adjustments to the rule text as set forth in the NOPR. In addition, the Department made technical adjustments to the rule text in this final rule to implement more effectively the rule change and also made editorial and other corrections to the rule text that are not discussed in this preamble.

A. Definition of Eligible Project

Public Comments: Section 609.2 of the regulations defines ''Eligible Project'' to mean ''a project located in the United States that employs a New or Significantly Improved Technology that is not a Commercial Technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.'' Several commenters expressed the view that this definition should be amended to clarify that an ''Eligible Project'' may include an undivided interest (*i.e.*, interest held as a tenant in common) in a project or facility. As mentioned in the preamble, tenancy in common is the typical form of ownership of utility grade power plants that are jointly owned by public power agencies, cooperative power systems and investor-owned utilities.

DOE Response: DOE notes that the term ''project'', which is used in the definition of ''Eligible Project'', is not defined in Title XVII. DOE believes that the term ''project'' should be given its plain meaning to include any ''planned undertaking'', which would include any project consisting of an undivided interest (*i.e.*, interest held as a tenant in common) in project assets or facilities. As such, DOE believes that it is unnecessary to amend the definition of ''Eligible Project'' to include any text referring to ''undivided interest'', ''tenancy in common'' or the like. However, DOE has adjusted the rule text in Sections 609.4(b) and 609.6(b)(5) of the regulations to clarify that applicants may submit project proposals with respect to their undivided ownership interests in project assets or facilities.

B. Definition of Intercreditor Agreement

Public Comments: Several commenters proposed technical changes to the definition of ''Intercreditor Agreement'' based on a concern that the definition may have been drafted too narrowly to accomplish one of the stated purposes of the rule change, which is to provide DOE with flexibility in the determination of appropriate collateral sharing and related intercreditor arrangements with other project lenders.

DOE Response: DOE has carefully reviewed these proposed technical changes and, based on these comments as well as DOE's further review, has made technical adjustments to the definition of ''Intercreditor Agreement''. DOE believes that the modified definition of ''Intercreditor Agreement'', as reflected in this final rule, provides the necessary flexibility to DOE while protecting the interests of the United States by requiring that any such agreement be ''in form and substance satisfactory to DOE''.

C. Shorter Amortization of Non-Guaranteed Obligations

Public Comments: Section 609.10(d)(6) of the regulations provides that ''[t]he non-guaranteed portion of any Guaranteed Obligation must be repaid on a pro-rata basis, and may not be repaid on a shorter amortization schedule than the guaranteed portion.'' Several commenters expressed concern that this provision may prevent certain

credit providers, including Export Credit Agencies (ECAs) and other financial institutions, from participating in financings of Eligible Projects if such institutions require repayment on a shorter amortization schedule than the DOE-guaranteed loan. As indicated in the preamble, there exists a variety of potential sources of financing for power generation projects, including, but not limited to, ECAs.

DOE Response: DOE has carefully reviewed this issue and recognizes that there may be a diversity of appropriate financing arrangements and circumstances, including but not limited to participation by ECAs and other financial institutions, for the types of projects potentially eligible for DOE loan guarantees. DOE also recognizes that increasing the number of financial institutions that can participate in financings of Eligible Projects may have the effect of diversifying project-related risks. Accordingly, DOE has made adjustments to the text of Section 609.10(d)(6) of the regulations to permit shorter or faster amortization schedules for project-related financing or other credit arrangements (other than the Guaranteed Obligation), if DOE determines that the resulting financing structure of the project (1) allocates to DOE a reasonably proportionate share of the default risk, in light of (i) DOE's share of the total project financing, (ii) risk allocation among the credit providers, and (iii) internal and external credit enhancements; and (2) is appropriate to assure reasonable prospect of repayment of the principal of and interest on the DOE Guaranteed Obligation and to protect the interests of the United States in the case of default.

D. Opposition to the Rule Change

Public Comments: DOE received comments from a number of commenters opposed to the development of nuclear energy in general. These commenters expressed concern that the rule change appears to be promulgated with only one interest in mind—that of the nuclear power industry—and are opposed to the rule change. These commenters also expressed concern that the rule change will add unnecessary risk, such as the risk that taxpayers' money will be lost by ''waiving'' DOE's first lien rights to collateral.

DOE received a joint comment from a number of environmental and civic organizations (collectively, the ''*Joint Comment*'') that made a number of assertions, including: (1) That the rule change violates or is inconsistent with Title XVII of the Act, (2) that DOE has failed to explain why DOE's interpretations and rationales in the preamble to the 2007 final rule with respect to the first lien issue are incorrect, (3) that the rule change does not provide DOE with a basis for establishing terms or conditions of loan guarantee agreements that provide ''a reasonable prospect of repayment of the principal and interest'' on a loan, (4) that the rule change unreasonably gives the Secretary unbridled discretion in establishing substitutions for the protection of a first lien, and (5) that by the rule change DOE will encourage risky investments and raise the potential for defaults.

DOE received a comment from a self-described ''budget watchdog'' group expressing concern that the removal of the first lien requirement will weaken protections for the taxpayers and will jeopardize the recovery of taxpayer-provided loan guarantee funds.

DOE received a comment from an environmental group that made a number of assertions, including (1) that the rule change conflicts with the statute, (2) that DOE's analysis is irrational and does not comport with the statute's plain language, (3) that there is insufficient evidence to support DOE's reasoning for the rule change, and (4) that the rule change will place taxpayer dollars at risk. In particular, the commenter asserted that the plain meaning of section 1702(d)(3) (which provides that ''the obligation shall be subject to the condition that the obligation is not subordinate to other financing'') is to require a first lien on collateral. This assertion is based on the reasoning that the word ''subordinate'' means ''inferior'' and therefore the meaning of the words ''not subordinate'' would be the antonym of ''subordinate'' or ''inferior'' which is ''superior''.

DOE Response: As explained in this preamble, DOE has concluded that section 1702 of Title XVII does not mandate that DOE receive a first lien position on all projects assets, and it is in light of this interpretation of section 1702 of Title XVII that DOE is issuing this final rule. DOE believes that the rule change, as reflected in this final rule, is correct as a matter of statutory interpretation and will facilitate the implementation of section 1703 of Title XVII.

It should be noted that under section 1703(b) of Title XVII, Congress expressly provided for ten categories of projects that are eligible for DOE loan guarantees, and one of those categories is ''advanced nuclear energy facilities.'' It should also be noted that the rule change, as reflected in this final rule, is not limited to any one particular energy sector or industry. DOE believes that this final rule will facilitate the financing of a variety of eligible projects, as authorized by Congress, across different energy sectors and industries.

With respect to the comments regarding risk, it should be noted that the rule change, as reflected in this final rule, does not mean that DOE ''waives'' its right to require first lien rights in collateral for any project. Rather, it correctly leaves to the Secretary the determination of an appropriate financing structure, including a collateral package, credit support and intercreditor arrangements, for individual projects. DOE believes that this flexibility is in the best interests of the United States, as it gives the Department the ability to participate in projects that contain diversified funding sources. DOE believes that instead of increasing risk, this approach will likely reduce DOE's risk—by reducing DOE's exposure (*i.e.*, the amount of the DOE-guaranteed loan) on individual projects that also receive financing from non DOE-guaranteed sources—and consequently should help DOE diversify its portfolio.

With respect to the Joint Comment, DOE responds as follows:

(1) DOE believes that its interpretation of the Act, as reflected in the rule change, is correct as a matter of statutory interpretation and is consistent with the provisions, intent and purposes of the Act, for the reasons set forth above;

(2) DOE believes that, in the preamble to the NOPR and above, it has adequately explained its reasoning behind the rule change, including why the interpretations and rationales provided in the preamble to the 2007 final rule were incorrect. Additionally, DOE believes that its straightforward interpretation of the Act, as expressed in this final rule, renders unnecessary the convoluted reasoning in the preamble to the 2007 final rule which concluded that while *pari passu* liens on project assets are prohibited by the statute, DOE may nevertheless agree to share the proceeds of collateral in a *pari passu* manner as long as DOE controls the disposition of all project assets. Under that strained reasoning, DOE may enter into intercreditor or other arrangements to share proceeds from the sale of project collateral with lenders or other holders of the non-guaranteed portion of the DOE-guaranteed loan facility, but without explanation as to why co-lenders or co-guarantors who provide separate credit facilities and do not participate in the DOE-guaranteed loan facility are excluded from making any

such intercreditor or other arrangements;

(3) DOE does not believe that the rule change will prevent or hinder DOE from requiring an appropriate financing structure, including collateral arrangements and credit support, on any individual project in order to make the determination that there is ''a reasonable prospect of repayment of the principal and interest'' on the related loan. This requirement with respect to each loan guarantee will continue to be in effect. As explained above, the rule change does not ''waive'' DOE's right to require first liens or otherwise require an appropriate collateral package and credit support for any project. It should also be noted that this final rule contains numerous criteria for the programmatic, technical and financial evaluation of loan guarantee applications;

(4) DOE notes that section 1702(g)(2)(C) of Title XVII provides that ''a guarantee agreement shall include such detailed terms and conditions as the Secretary determines appropriate to (i) protect the interests of the United States in the case of default''. Accordingly, the Act gives the Secretary the discretion in determining what is ''appropriate'' with respect to the ''detailed terms and conditions'' of a loan guarantee agreement in the case of default. As explained above, the rule change correctly provides the Secretary with the flexibility to determine appropriate terms and conditions, including collateral, credit support and intercreditor terms, for individual projects; and

(5) DOE does not believe that the rule change itself will result in increased risk-taking or potential for defaults but rather, as explained above, the rule change will likely enhance the ability of DOE to reduce its risks.

With respect to the comments from the ''budget watchdog'' group, the rule change, as explained above, does not ''waive'' DOE's right to require first liens or otherwise to require an appropriate collateral package and credit support on any project. DOE will continue to be required to determine that there is ''a reasonable prospect of repayment of the principal and interest'' for each DOE-guaranteed loan. DOE will also continue to require such terms and conditions for guarantee agreements as DOE determines appropriate to protect the interests of the United States in the case of default.

With respect to the comment from the environmental group regarding the plain meaning of section 1702(d)(3), DOE notes that the plain meaning of ''not X'' does not necessarily mean the antonym or opposite of ''X''. For example, the phrase ''not less than'' does not simply mean ''greater than'' but should more properly be understood to mean ''equal to or greater than.'' DOE believes that a *pari passu* (a Latin term meaning ''with equal step'') obligation is not a subordinate or inferior obligation.

With respect to the other assertions by the environmental group, DOE reiterates its responses above and believes that they are adequately responsive to those assertions.

III. Regulatory Review

A. Executive Order 12866

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

B. National Environmental Policy Act of 1969

Through the issuance of this final rule, DOE is making no decision relative to the approval of a loan guarantee for a particular proposed project. DOE has, therefore, determined that publication of this final rule is covered under the Categorical Exclusion found at paragraph A.6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required at this time. However, appropriate NEPA project review will be conducted prior to execution of a Loan Guarantee Agreement.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov*.

DOE is not obliged to prepare a regulatory flexibility analysis for this rulemaking because there is no requirement to publish a general notice of proposed rulemaking for rules related to loans under the Administrative Procedure Act (5 U.S.C. 553(a)(2)).

D. Paperwork Reduction Act

This final rule involves a collection of information previously approved by OMB under Control Number [1910–5134].

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Act) (2 U.S.C. 1531 *et seq.*) requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in an agency rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of State, Tribal, or local governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments.

The term ''Federal mandate'' is defined in the Act to mean a Federal intergovernmental mandate or a Federal private sector mandate (2 U.S.C. 658(6)). Although the rule will impose certain requirements on non-Federal governmental and private sector applicants for loan guarantees, the Act's definitions of the terms ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' exclude, among other things, any provision in legislation, statute, or regulation that is a condition of Federal assistance or a duty arising from participation in a voluntary program (2 U.S.C. 658(5) and (7), respectively). Today's final rule establishes requirements that persons voluntarily seeking loan guarantees for projects that would use certain new and improved energy technologies must satisfy as a condition of a Federal loan guarantee. Thus, this final rule falls under the exceptions in the definitions of ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' for requirements that are a condition of

Federal assistance or a duty arising from participation in a voluntary program. The Act does not apply to this rulemaking.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

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

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that this rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

L. Approval by the Office of the Secretary of Energy

The Secretary of Energy has approved the issuance of this final rule.

List of Subjects in 10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on November 30, 2009.

Steve Isakowitz,

Chief Financial Officer.

■ For the reasons stated in the preamble, chapter II of title 10 of the Code of Federal Regulations is amended by revising part 609 to read as follows:

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

Sec.

Authority: 42 U.S.C. 7254, 16511–16514.

§ 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and, after consultation with the Department of the Treasury, approving applications for

loan guarantees to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(b) Except as set forth in paragraph (c) of this section, this part applies to all Pre-Applications, Applications, Conditional Commitments and Loan Guarantee Agreements to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(c) Sections 609.3, 609.4 and 609.5 of this part shall not apply to any Pre-Applications, Applications, Conditional Commitments or Loan Guarantee Agreements submitted, or entered into, as applicable, on or before December 31, 2007; provided, that DOE accepted the Pre-Application and invited an Application pursuant to such Pre-Application.

(d) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

§ 609.2 Definitions.

Act means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

Administrative Cost of Issuing a Loan Guarantee means the total of all administrative expenses that DOE incurs during:

(1) The evaluation of a Pre-Application, if a Pre-Application is requested in a solicitation, and an Application for a loan guarantee;

(2) The offering of a Term Sheet, executing the Conditional Commitment, negotiation, and closing of a Loan Guarantee Agreement; and

(3) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

Applicant means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal entity that has submitted an Application to DOE and has the authority to enter into a Loan Guarantee Agreement with DOE under the Act.

Application means a comprehensive written submission in response to a solicitation or a written invitation from DOE to apply for a loan guarantee pursuant to § 609.6 of this part.

Borrower means any Applicant who enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

Commercial Technology means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is issued by DOE. A technology is in general use if it has been installed in and is being used in three or more commercial projects in the United States in the same general application as in the proposed project, and has been in operation in each such commercial project for a period of at least five years. The five-year period shall be measured, for each project, starting on the in service date of the project or facility employing that particular technology. For purposes of this section, commercial projects include projects that have been the recipients of a loan guarantee from DOE under this part.

Conditional Commitment means a Term Sheet offered by DOE and accepted by the Applicant, with the understanding of the parties that if the Applicant thereafter satisfies all specified and precedent funding obligations and all other contractual, statutory and regulatory requirements, or other requirements, DOE and the Applicant will execute a Loan Guarantee Agreement: Provided that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and Provided further that the Secretary may not delegate this authority to terminate a Conditional Commitment.

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer and/or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

Credit Subsidy Cost has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)(C)), which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(1) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement.

DOE means the United States Department of Energy.

Eligible lender means:

(1) Any person or legal entity formed for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banks, institutional investors, venture capital investment companies, trusts, or other entities designated as trustees or agents acting on behalf of bondholders or other lenders; and

(2) Any person or legal entity that meets the requirements of § 609.11 of this part, as determined by DOE; or

(3) The Federal Financing Bank.

Eligible project means a project located in the United States that employs a New or Significantly Improved Technology that is not a Commercial Technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.

Equity means cash contributed by the Borrowers and other principals. Equity does not include proceeds from the non-guaranteed portion of Title XVII loans, proceeds from any other non-guaranteed loans, or the value of any form of government assistance or support.

Federal Financing Bank means an instrumentality of the United States government created by the Federal Financing Bank Act of 1973 (12 U.S.C. 2281 *et seq*). The Bank is under the general supervision of the Secretary of the Treasury.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Holder means any person or legal entity that owns a Guaranteed Obligation or has lawfully succeeded in due course to all or part of the rights, title, and interest in a Guaranteed Obligation, including any nominee or trustee empowered to act for the Holder or Holders.

Intercreditor Agreement means any agreement or instrument among DOE and one or more other persons providing financing or other credit arrangements or that otherwise provides for rights of DOE, in each case, in form and substance satisfactory to DOE and entered into or accepted by DOE in connection with a DOE loan guarantee upon a determination by DOE that such agreement or instrument is reasonable and necessary to protect the interests of the United States, and addressing such matters as collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements, as such agreement or instrument may be amended or

modified from time to time with the consent of DOE.

Loan Agreement means a written agreement between a Borrower and an Eligible Lender or other Holder containing the terms and conditions under which the Eligible Lender or other Holder will make loans to the Borrower to start and complete an Eligible Project.

Loan Guarantee Agreement means a written agreement that, when entered into by DOE and a Borrower, an Eligible Lender or other Holder, pursuant to the Act, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal and interest on specified Guaranteed Obligations of a Borrower to Eligible Lenders or other Holders subject to the terms and conditions specified in the Loan Guarantee Agreement.

New or Significantly Improved Technology means a technology concerned with the production, consumption or transportation of energy and that is not a Commercial Technology, and that has either:

(1) Only recently been developed, discovered or learned; or

(2) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

OMB means the Office of Management and Budget in the Executive Office of the President.

Pre-Application means a written submission in response to a DOE solicitation that broadly describes the project proposal, including the proposed role of a DOE loan guarantee in the project, and the eligibility of the project to receive a loan guarantee under the applicable solicitation, the Act and this part.

Project costs means those costs, including escalation and contingencies, that are to be expended or accrued by Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.12 of this part. Project costs do not include costs for the items set forth in § 609.12(c) of this part.

Project Sponsor means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, or the Applicant.

Secretary means the Secretary of Energy or a duly authorized designee or successor in interest.

Term Sheet means an offering document issued by DOE that specifies the detailed terms and conditions under which DOE may enter into a Conditional Commitment with the Applicant. A Term Sheet imposes no obligation on the Secretary to enter into a Conditional Commitment.

United States means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or any territory or possession of the United States of America.

§ 609.3 Solicitations.

(a) DOE may issue solicitations to invite the submission of Pre-Applications or Applications for loan guarantees for Eligible Projects. DOE must issue a solicitation before proceeding with other steps in the loan guarantee process including issuance of a loan guarantee. A Project Sponsor or Applicant may only submit one Pre-Application or Application for one project using a particular technology. A Project Sponsor or Applicant, in other words, may not submit a Pre-Application or Application for multiple projects using the same technology.

(b) Each solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that solicitation;

(2) The place and time for response submission;

(3) The name and address of the DOE representative whom a potential Project Sponsor may contact to receive further information and a copy of the solicitation;

(4) The form, format, and page limits applicable to the response submission;

(5) The amount of the application fee (First Fee), if any, that will be required;

(6) The programmatic, technical, financial and other factors the Secretary will use to evaluate response submissions, including the loan guarantee percentage requested by the Applicant and the relative weightings that DOE will use when evaluating those factors; and

(7) Such other information as DOE may deem appropriate.

§ 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. Pre-Applications must meet all requirements specified in the solicitation and this part. At a minimum, each Pre-Application must contain all of the following:

(a) A cover page signed by an individual with full authority to bind the Project Sponsor or Applicant that attests to the accuracy of the information in the Pre-Application, and that binds the Project Sponsor(s) or Applicant to the commitments made in the Pre-Application. In addition, the information requested in paragraphs (b) and (c) of this section should be submitted in a volume one and the information requested in paragraphs (d) through (h) of this section should be submitted in a volume two, to expedite the DOE review process.

(b) An executive summary briefly encapsulating the key project features and attributes of the proposed project (for clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities);

(c) A business plan which includes an overview of the proposed project, including:

(1) A description of the Project Sponsor, including all entities involved, and its experience in project investment, development, construction, operation and maintenance;

(2) A description of the new or significantly improved technology to be employed in the project, including:

(i) A report detailing its successes and failures during the pilot and demonstration phases;

(ii) The technology's commercial applications;

(iii) The significance of the technology to energy use or emission control;

(iv) How and why the technology is ''new'' or ''significantly improved'' compared to technology already in general use in the commercial marketplace in the United States;

(v) Why the technology to be employed in the project is not in ''general use;''

(vi) The owners or controllers of the intellectual property incorporated in and utilized by such technologies; and

(vii) The manufacturer(s) and licensee(s), if any, authorized to make the technology available in the United States, the potential for replication of

commercial use of the technology in the United States, and whether and how the technology is or will be made available in the United States for further commercial use;

(3) The estimated amount, in reasonable detail, of the total Project Costs;

(4) The timeframe required for construction and commissioning of the project;

(5) A description of any primary off-take or other revenue-generating agreements that will provide the primary sources of revenues for the project, including repayment of the debt obligations for which a guarantee is sought.

(6) An overview of how the project complies with the eligibility requirements in section 1703 of the Act (42 U.S.C. 16513);

(7) An outline of the potential environmental impacts of the project and how these impacts will be mitigated;

(8) A description of the anticipated air pollution and/or anthropogenic greenhouse gas reduction benefits and how these benefits will be measured and validated; and

(9) A list of all of the requirements contained in this part and the solicitation and where in the Pre-Application these requirements are addressed;

(d) A financing plan overview describing:

(1) The amount of equity to be invested and the sources of such equity;

(2) The amount of the total debt obligations to be incurred and the funding sources of all such debt if available;

(3) The amount of the Guaranteed Obligation as a percentage of total project debt; and as a percentage of total project cost; and

(4) A financial model detailing the investments in and the cash flows generated and anticipated from the project over the project's expected life-cycle, including a complete explanation of the facts, assumptions, and methodologies in the financial model;

(e) An explanation of what estimated impact the loan guarantee will have on the interest rate, debt term, and overall financial structure of the project;

(f) Where the Federal Financing Bank is not the lender, a copy of a letter from an Eligible Lender or other Holder(s) expressing its commitment to provide, or interest in providing, the required debt financing necessary to construct and fully commission the project;

(g) A copy of the equity commitment letter(s) from each of the Project Sponsors and a description of the sources for such equity; and

(h) A commitment to pay the Application fee (First Fee), if invited to submit an Application.

§ 609.5 Evaluation of Pre-Applications.

(a) Where Pre-Applications are requested in a solicitation, DOE will conduct an initial review of the Pre-Application to determine whether:

(1) The proposal is for an Eligible Project;

(2) The submission contains the information required by § 609.4 of this part; and

(3) The submission meets all other requirements of the applicable solicitation.

(b) If a Pre-Application fails to meet the requirements of paragraph (a) of this section, DOE may deem it non-responsive and eliminate it from further review.

(c) If DOE deems a Pre-Application responsive, DOE will evaluate:

(1) The commercial viability of the proposed project;

(2) The technology to be employed in the project;

(3) The relevant experience of the principal(s); and

(4) The financial capability of the Project Sponsor (including personal and/or business credit information of the principal(s)).

(d) After the evaluation described in subsection (c) of this section, DOE will determine if there is sufficient information in the Pre-Application to assess the technical and commercial viability of the proposed project and/or the financial capability of the Project Sponsor and to assess other aspects of the Pre-Application. DOE may ask for additional information from the Project Sponsor during the review process and may request one or more meetings with the Project Sponsor.

(e) After reviewing a Pre-Application and other information acquired under paragraph (c) of this section, DOE may provide a written response to the Project Sponsor or Applicant either inviting the Applicant to submit an Application for a loan guarantee and specifying the amount of the Application filing fee (First Fee) or advising the Project Sponsor that the project proposal will not receive further consideration. Neither the Pre-Application nor any written or other feedback that DOE may provide in response to the Pre-Application eliminates the requirement for an Application.

(f) No response by DOE to, or communication by DOE with, a Project Sponsor, or an Applicant submitting a Pre-Application or subsequent Application shall impose any obligation on DOE to enter into a Loan Guarantee Agreement.

§ 609.6 Submission of Applications.

(a) In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part.

(b) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant and the Project Sponsors;

(2) Payment of the Application filing fee (First Fee) for the Pre-Application, if any, and Application phase;

(3) A detailed description of all material amendments, modifications, and additions made to the information and documentation provided in the Pre-Application, if a Pre-Application was requested in the solicitation, including any changes in the proposed project's financing structure or other terms;

(4) A description of how and to what measurable extent the project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases, including how to measure and verify those benefits;

(5) A description of the nature and scope of the proposed project, including:

(i) Key milestones;

(ii) Location of the project;

(iii) Identification and commercial feasibility of the new or significantly improved technology(ies) to be employed in the project;

(iv) How the Applicant intends to employ such technology(ies) in the project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the technology(ies) in the United States;

(vi) For clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities.

(6) A detailed explanation of how the proposed project qualifies as an Eligible Project;

(7) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(8) A detailed description of the engineering and design contractor(s), construction contractor(s), equipment supplier(s), and construction schedules for the project, including major activity and cost milestones as well as the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties to be provided;

(9) A detailed description of the operations and maintenance provider(s), the plant operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(10) A description of the management plan of operations to be employed in carrying out the project, and information concerning the management experience of each officer or key person associated with the project;

(11) A detailed description of the project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(12) An analysis of the market for any product to be produced by the project, including relevant economics justifying the analysis, and copies of any contractual agreements for the sale of these products or assurance of the revenues to be generated from sale of these products;

(13) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the project over the term of the Loan Guarantee Agreement;

(14) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations and maintenance of the project;

(15) A copy of the financial closing checklist for the equity and debt to the extent available;

(16) Applicant's business plan on which the project is based and Applicant's financial model presenting project *pro forma* statements for the proposed term of the Guaranteed Obligations including income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(17) Financial statements for the past three years, or less if the Applicant has been in operation less than three years, that have been audited by an independent certified public accountant, including all associated notes, as well as interim financial statements and notes for the current fiscal year, of Applicant and parties providing Applicant's financial backing, together with business and financial interests of controlling or commonly controlled organizations or persons, including parent, subsidiary and other affiliated corporations or partners of the Applicant;

(18) A copy of all legal opinions, and other material reports, analyses, and reviews related to the project;

(19) An independent engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address: the project's siting and permitting, engineering and design, contractual requirements, environmental compliance, testing and commissioning and operations and maintenance;

(20) Credit history of the Applicant and, if appropriate, any party who owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the project or the Applicant;

(21) A preliminary credit assessment for the project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(22) A list showing the status of and estimated completion date of Applicant's required project-related applications or approvals for Federal, State, and local permits and authorizations to site, construct, and operate the project;

(23) A report containing an analysis of the potential environmental impacts of the project that will enable DOE to assess whether the project will comply with all applicable environmental requirements, and that will enable DOE to undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(24) A listing and description of assets associated, or to be associated, with the project and any other asset that will serve as collateral for the Guaranteed Obligations, including appropriate data as to the value of the assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(25) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based;

(26) Written affirmation from an officer of the Eligible Lender or other Holder confirming that it is in good standing with DOE's and other Federal agencies' loan guarantee programs;

(27) A list of all of the requirements contained in this part and the solicitation and where in the Application these requirements are addressed;

(28) A statement from the Applicant that it believes that there is ''reasonable prospect'' that the Guaranteed Obligations will be fully paid from project revenue; and

(29) Any other information requested in the invitation to submit an Application or requests from DOE in order to clarify an Application;

(c) DOE will not consider any Application complete unless the Applicant has paid the First Fee and the Application is signed by the appropriate entity or entities with the authority to bind the Applicant to the commitments and representations made in the Application.

§ 609.7 Programmatic, technical and financial evaluation of Applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those to whom a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, the applicable solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. Greater weight will be given to applications that rely upon a smaller guarantee percentage, all else being equal. Concurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee. Applications will be denied if:

(1) The project will be built or operated outside the United States;

(2) The project is not ready to be employed commercially in the United States, cannot yield a commercially

viable product or service in the use proposed in the project, does not have the potential to be employed in other commercial projects in the United States, and is not or will not be available for further commercial use in the United States;

(3) The entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an Eligible Lender or other Holder, as defined in § 609.11 of this part;

(4) The project is for demonstration, research, or development.

(5) The project does not avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases; or

(6) The Applicant will not provide an equity contribution.

(b) In evaluating Applications, DOE will consider the following factors:

(1) To what measurable extent the project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases;

(2) To what extent the new or significantly improved technology to be employed in the project, as compared to Commercial Technology in general use in the United States, is ready to be employed commercially in the United States, can be replicated, yields a commercially viable project or service in the use proposed in the project, has potential to be employed in other commercial projects in the United States, and is or will be available for further commercial use in the United States;

(3) To what extent the new or significantly improved technology used in the project constitutes an important improvement in technology, as compared to Commercial Technology, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace;

(4) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements are reasonable relative to the nature and scope of the project;

(5) The total amount and nature of the Eligible Project Costs and the extent to which Project Costs are funded by Guaranteed Obligations;

(6) The likelihood that the project will be ready for full commercial operations in the time frame stated in the Application;

(7) The amount of equity commitment to the project by the Applicant and other principals involved in the project;

(8) Whether there is sufficient evidence that the Applicant will diligently pursue the project, including initiating and completing the project in a timely manner;

(9) Whether and to what extent the Applicant will rely upon other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project and how such assistance will impact the project;

(10) The feasibility of the project and likelihood that the project will produce sufficient revenues to service the project's debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(11) The levels of safeguards provided to the Federal government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(12) The Applicant's capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience;

(13) The ability of the applicant to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(14) The levels of market, regulatory, legal, financial, technological, and other risks associated with the project and their appropriateness for a loan guarantee provided by DOE;

(15) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the project; and

(16) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation.

(d) If DOE determines that a project may be suitable for a loan guarantee, DOE will notify the Applicant and Eligible Lender or other Holder in writing and provide them with a Term Sheet. If DOE reviews an Application and decides not to proceed further with the issuance of a Term Sheet, DOE will inform the Applicant in writing of the reason(s) for denial.

§ 609.8 Term sheets and conditional commitments.

(a) DOE, after review and evaluation of the Application, additional information requested and received by DOE, potentially including a preliminary credit rating or credit assessment, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, may offer to an Applicant and the Eligible Lender or other Holder detailed terms and conditions that must be met, including terms and conditions that must be met by the Applicant and the Eligible Lender or other Holder.

(b) The terms and conditions required by DOE will be expressed in a written Term Sheet signed by a Contracting Officer and addressed to the Applicant and the Eligible Lender or other Holder, where appropriate. The Term Sheet will request that the Project Sponsor and the Eligible Lender or other Holder express agreement with the terms and conditions contained in the Term Sheet by signing the Term Sheet in the designated place. Each person signing the Term Sheet must be a duly authorized official or officer of the Applicant and Eligible Lender or other Holder. The Term Sheet will include an expiration date on which the terms offered will expire unless the Contracting Officer agrees in writing to extend the expiration date.

(c) The Applicant and/or the Eligible Lender or other Holder may respond to the Term Sheet offer in writing or may request discussions or meetings on the terms and conditions contained in the Term Sheet, including requests for clarifications or revisions. When DOE, the Applicant, and the Eligible Lender or other Holder agree on all of the final terms and conditions and all parties sign the Term Sheet, the Term Sheet becomes a Conditional Commitment. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) DOE's obligations under each Conditional Commitment are conditional upon statutory authority having been provided in advance of the execution of the Loan Guarantee Agreement sufficient under FCRA and Title XVII for DOE to execute the Loan Guarantee Agreement, and either an appropriation has been made or a borrower has paid into the Treasury sufficient funds to cover the full Credit Subsidy Cost for the loan guarantee that

is the subject of the Conditional Commitment.

(e) The Applicant is required to pay fees to DOE to cover the Administrative Cost of Issuing a Loan Guarantee for the period of the Term Sheet through the closing of the Loan Guarantee Agreement (Second Fee).

§ 609.9 Closing on the Loan Guarantee Agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) By the closing date, the Applicant and the Eligible Lender or other Holder must have satisfied all of the detailed terms and conditions contained in the Conditional Commitment and other related documents and all other contractual, statutory, and regulatory requirements. If the Applicant and the Eligible Lender or other Holder has not satisfied all such terms and conditions by the closing date, the Secretary may, in his/her sole discretion, set a new closing date or terminate the Conditional Commitment.

(c) In order to enter into a Loan Guarantee Agreement at closing:

(1) DOE must have received authority in an appropriations act for the loan guarantee; and

(2) All other applicable statutory, regulatory, or other requirements must be fulfilled.

(d) Prior to, or on, the closing date, DOE will ensure that:

(1) Pursuant to section 1702(b) of the Act, DOE has received payment of the Credit Subsidy Cost of the loan guarantee, as defined in § 609.2 of this part from *either* (but not from a combination) of the following:

(i) A Congressional appropriation of funds; or

(ii) A payment from the Borrower.

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Borrower the First and Second Fees and, if applicable, the Third fee, or portions thereof, for the Administrative Cost of Issuing the Loan Guarantee, as specified in the Loan Guarantee Agreement;

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the loan guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States; and

(6) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by a Contracting Officer and all other applicable contractual, statutory, and regulatory requirements are satisfied.

(e) Not later than the period approved in writing by the Contracting Officer, which may not be less than 30 days prior to the closing date, the Applicant must provide in writing updated project financing information if the terms and conditions of the financing arrangements changed between execution of the Conditional Commitment and that date. The Conditional Commitment must be updated to reflect the revised terms and conditions.

(f) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less than $25 million, the Secretary may, on a case-by-case basis, require a credit rating. If a rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

(g) Changes in the terms and conditions of the financing arrangements will affect the Credit Subsidy Cost for the Loan Guarantee Agreement. DOE may postpone the expected closing date pursuant to any changes submitted under paragraph (e) and (f) of this section. In addition, DOE may choose to terminate the Conditional Commitment.

§ 609.10 Loan Guarantee Agreement.

(a) Only a Loan Guarantee Agreement executed by a duly authorized DOE Contracting Officer can contractually obligate DOE to guarantee loans or other debt obligations.

(b) DOE is not bound by oral representations made during the Pre-Application stage, if Pre-Applications were solicited, or Application stage, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for Credit Subsidy Costs, administrative fees, or other fees charged by or paid to DOE relating to the Title XVII program or any loan guarantee there under.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions are satisfied:

(1) The project qualifies as an Eligible Project under the Act and is not a research, development, or demonstration project or a project that employs Commercial Technologies in service in the United States;

(2) The project will be constructed and operated in the United States, the employment of the new or significantly improved technology in the project has the potential to be replicated in other commercial projects in the United States, and this technology is or is likely to be available in the United States for further commercial application;

(3) The face value of the debt guaranteed by DOE is limited to no more than 80 percent of total Project Costs;

(4)(i) Where DOE guarantees 100 percent of the Guaranteed Obligation, the loan shall be funded by the Federal Financing Bank;

(ii) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market;

(iii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(5) The Borrower and other principals involved in the project have made or will make a significant equity investment in the project;

(6) The Borrower is obligated to make full repayment of the principal and interest on the Guaranteed Obligation and other project debt over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the project's major physical assets, as calculated in accordance with generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligation must be repaid on a pro-rata basis, and may not be repaid on a shorter or faster amortization schedule than the guaranteed portion. Any project-related financing or credit arrangement (other than the Guaranteed Obligation) may have a shorter or faster amortization schedule than the Guaranteed Obligation if DOE determines that the resulting financing structure of the project—

(i) Allocates to DOE a reasonably proportionate share of the default risk, in light of—

(A) DOE's share of the total project financing,

(B) Risk allocation among the credit providers, and

(C) Internal and external credit enhancements; and

(ii) Is appropriate to assure reasonable prospect of repayment of the principal of and interest on the DOE Guaranteed Obligation and to protect the interests of the United States in the case of default;

(7) The loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(8) The amount of the loan guaranteed, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(9) There is a reasonable prospect of repayment by Borrower of the principal of and interest on the Guaranteed Obligations and other project debt;

(10) The Borrower has pledged project assets and other collateral or surety, including non project-related assets, determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations;

(11) The Loan Guarantee Agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default, including ensuring availability of all the intellectual property rights, technical data including software, and technology necessary for any person or entity selected, including DOE, to complete, operate, convey, and dispose of the defaulted project;

(12) The interest rate on any Guaranteed Obligation is determined by DOE, after consultation with the Treasury Department, to be reasonable, taking into account the range of interest rates prevailing in the private sector for similar obligations of comparable risk guaranteed by the Federal government;

(13) Any Guaranteed Obligation is not subordinate to any loan or other debt obligation;

(14) There is satisfactory evidence that Borrower and Eligible Lenders or other Holders are willing, competent, and capable of performing the terms and conditions of the Guaranteed Obligations and other debt obligation and the Loan Guarantee Agreement, and will diligently pursue the project;

(15) The Borrower has made the initial (or total) payment of fees for the Administrative Cost of Issuing a Loan Guarantee for the construction and operational phases of the project (Third Fee), as specified in the Conditional Commitment;

(16) The Eligible Lender, other Holder or servicer has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligation;

(17) If Borrower is to make payment in full for the Credit Subsidy Cost of the loan guarantee pursuant to section 1702(b)(2) of the Act, such payment must be received by DOE prior to, or at the time of, closing;

(18) DOE or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(19) DOE, the Eligible Lender, or other Holder and Borrower have reached an agreement as to the information that will be made available to DOE and the information that will be made publicly available;

(20) The prospective Borrower has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;

(21) The Borrower has no delinquent Federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate Federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;

(22) The Loan Guarantee Agreement and related agreements contain such other terms and conditions as DOE deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the Guaranteed Obligation, and (ii) such collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements as, in each case, DOE deems reasonable and necessary to protect the interests of the United States; and

(23)(i) The Lender is an Eligible Lender, as defined in § 609.2 of this part, and meets DOE's lender eligibility and performance requirement contained in §§ 609.11 (a) and (b) of this part; and

(ii) The servicer meets the servicing performance requirements of § 609.11(c) of this part.

(e) The Loan Guarantee Agreement must provide that, in the event of a default by the Borrower:

(1) Interest accrues on the Guaranteed Obligations at the rate stated in the Loan Guarantee Agreement or Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when debt is funded through the Federal Financing Bank, DOE is not required to pay any premium, default penalties, or prepayment penalties;

(2) Upon payment of the Guaranteed Obligations by DOE, DOE is subrogated to the rights of the Holders of the debt, including all related liens, security, and collateral rights;

(3) The Eligible Lender or other servicer acting on DOE's behalf is obligated to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligations;

(4) The holder of pledged collateral is obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default by the Borrower on the Guaranteed Obligations;

(f) The Loan Guarantee Agreement must contain audit provisions which provide, in substance, as follows:

(1) The Eligible Lender or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project as required in § 609.17 of this part; and

(2) DOE and the Comptroller General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, as applicable. Examination of records may be made during the regular business hours of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, or at any other time mutually convenient as required in § 609.17 of this part.

(g)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.11 of this part. Such Eligible Lender to which a Guaranteed Obligation is assigned or transferred, is required to fulfill all servicing, monitoring, and reporting requirements contained in the Loan Guarantee Agreement and these regulations if the transferring Eligible Lender was performing these functions and transfer such functions to the new Eligible Lender. Any assignment or transfer, however, of the servicing, monitoring, and reporting functions

must be approved by DOE in writing in advance of such assignment.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the guarantees shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guarantee Obligations. These duties usually will be performed by the servicer. Any contractual agent approved by the Secretary to perform this function cannot transfer or assign this responsibility without the prior written consent of the Secretary.

§ 609.11 Lender eligibility and servicing requirements.

(a) An Eligible Lender shall meet the following requirements:

(1) Not be debarred or suspended from participation in a Federal government contract (under 48 CFR part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR Part 180);

(2) Not be delinquent on any Federal debt or loan;

(3) Be legally authorized to enter into loan guarantee transactions authorized by the Act and these regulations and is in good standing with DOE and other Federal agency loan guarantee programs;

(4) Be able to demonstrate, or has access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and

(5) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience; or

(6) Be the Federal Financing Bank.

(b) When performing its duties to review and evaluate a proposed Eligible Project prior to the submission of a Pre-Application or Application, as appropriate, by the Project Sponsor through the execution of a Loan Guarantee Agreement, the Eligible Lender or DOE if loans are funded by the Federal Financing Bank, shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(c) The servicing duties shall be performed by the Eligible Lender, DOE or other servicer if approved by the Secretary. When performing the servicing duties the Eligible Lender, DOE or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement and related documents;

(2) During the operational phase, monitoring and servicing the Debt Obligations and collection of the outstanding principal and accrued interest as well as ensuring that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) As specified by DOE, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or other debt obligations.

(d) With regard to partial guarantees, even though DOE may in part rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own independent monitoring and review of the Eligible Project.

§ 609.12 Project Costs.

(a) Before entering into a Loan Guarantee Agreement, DOE shall determine the estimated Project Costs for the project that is the subject of the agreement. To assist the Department in making that determination, the Applicant must estimate, calculate and record all such costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the project in accordance with generally accepted accounting principles and practices. Among other things, the Applicant must calculate the sum of necessary, reasonable and customary costs that it has paid and expects to pay, which are directly related to the project, including costs for escalation and contingencies, to estimate the total Project Costs.

(b) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility; and materials, labor, services, travel and transportation for facility design, construction, startup, commissioning and shakedown;

(3) Costs of equipment purchases;

(4) Costs to provide equipment, facilities, and services related to safety and environmental protection;

(5) Financial and legal services costs, including other professional services and fees necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) The cost of issuing project debt, such as fees, transaction and legal costs and other normal charges imposed by Eligible Lenders and other Holders;

(7) Costs of necessary and appropriate insurance and bonds of all types;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the project;

(10) A reasonable contingency reserve for cost overruns during construction; and

(11) Capitalized interest necessary to meet market requirements, reasonably required reserve funds and other carrying costs during construction; and

(12) Other necessary and reasonable costs.

(c) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying the innovative energy or environmental technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the project, as determined by DOE, including but not limited to the cost of hedging instruments;

(7) Expenses incurred after startup, commissioning, and shakedown before the facility has been placed in service;

(8) Borrower-paid Credit Subsidy Costs and Administrative Costs of Issuing a Loan Guarantee; and

(9) Operating costs.

§ 609.13 Principal and interest assistance contract.

With respect to the guaranteed portion of any Guaranteed Obligation, and subject to the availability of appropriations, DOE may enter into a contract to pay Holders, for and on behalf of Borrower, from funds appropriated for that purpose, the principal and interest charges that become due and payable on the unpaid balance of the guaranteed portion of the Guaranteed Obligation, if DOE finds that:

(a) The Borrower:

(1) Is unable to make the payments and is not in default; and

(2) Will, and is financially able to, continue to make the scheduled payments on the remaining portion of the principal and interest due under the non-guaranteed portion of the debt obligation, if any, and other debt obligations of the project, or an agreement, approved by DOE, has otherwise been reached in order to avoid a payment default on non-guaranteed debt.

(b) It is in the public interest to permit Borrower to continue to pursue the purposes of the project;

(c) In paying the principal and interest, the Federal government expects a probable net benefit to the Government will be greater than that which would result in the event of a default;

(d) The payment authorized is no greater than the amount of principal and interest that Borrower is obligated to pay under the terms of the Loan Guarantee Agreement; and

(e) Borrower agrees to reimburse DOE for the payment (including interest) on terms and conditions that are satisfactory to DOE and executes all written contracts required by DOE for such purpose.

§ 609.14 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations issued in accordance with this part with respect to principal and interest. Such guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such guarantee; and that, but for fraud or material misrepresentation by the Holder, such guarantee will be presumed to be valid, legal, and enforceable.

§ 609.15 Default, demand, payment, and collateral liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as ''Holder''), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and, subject to the terms of any applicable Intercreditor Agreement, may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements. In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may, subject to the terms of any applicable Intercreditor Agreement, cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements.

(d) No provision of this regulation shall be construed to preclude forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower.

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, the supporting documentation specified in the Loan Guarantee Agreement and any other supporting documentation as may reasonably be required to justify such demand.

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government.

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights to the extent held by the Holder.

(h) Where the Loan Guarantee Agreement or any applicable Intercreditor Agreement so provides, the Eligible Lender or other Holder, or other agent or servicer, as appropriate, and the Secretary may jointly agree to a work-out strategy and/or a plan of liquidation of the assets pledged to secure the Guaranteed Obligation and other applicable debt.

(i) Where payment of the Guaranteed Obligation has been made (or at any such earlier time as may be permitted by applicable agreements), the Secretary, acting through the U.S. Attorney General, in accordance with the rights received through subrogation or other applicable agreements, subject to any applicable Intercreditor Agreement, may

seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.

(j) If the Secretary (or an agent acting for the benefit of the Secretary) is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease such assets, or otherwise dispose of any such assets or take any other necessary action which the Secretary deems appropriate (and consistent with any applicable Intercreditor Agreement), in order that the original goals and objectives of the project will, to the extent possible, be realized.

(k) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Loan Guarantee Agreement and any applicable Intercreditor Agreement to recover costs incurred by, and other amounts owed to, the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General, DOE and any agent acting for the benefit of DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE, and to pay any other amounts owed to DOE, as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.

(l) If there was a partial guarantee by DOE of the Guaranteed Obligation or if any other creditors are secured by a lien on collateral pledged to secure the Guaranteed Obligation, the proceeds received by the collateral agent or other responsible party as a result of any liquidation or sale of, collection from or other realization on any such collateral may, if so agreed in advance or unless otherwise agreed in the applicable agreements, be applied as follows (with any money distributed to the Federal Government to be further distributed according to § 609.15(k)):

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation or sale, collection or other realization (including without limitation any fees and expenses that the Attorney General of the United States is lawfully entitled to claim in connection with such action);

(2) Second, distributed among the Holders of the Guaranteed Obligation (including DOE, as subrogee) and the other creditors entitled to share in such proceeds on no greater than a pro rata share basis; and

(3) Third, as otherwise provided in the applicable agreement or agreements.

(m) No action taken by the Eligible Lender or other Holder or other agent or servicer in respect of any pledged assets will affect the rights of any party, including the Secretary, having an interest in the loan or other debt obligations, to pursue, jointly or severally, to the extent provided in the Loan Guarantee Agreement or other applicable agreement, legal action against the Borrower or other liable parties, for any deficiencies owing on the balance of the Guaranteed Obligations or other debt obligations after application of the proceeds received upon liquidation.

(n) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation or sale of, collection from or other realization on the collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(o) Nothing in this part precludes the Secretary from purchasing any Holder's or other person's interest in the project upon liquidation or sale of, collection from or other realization on the collateral.

§ 609.16 Perfection of liens and preservation of collateral.

(a) The Loan Guarantee Agreement and other documents related thereto shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where the loan is funded by the Federal Financing Bank, or other Holder or other agent or servicer will take those actions necessary or appropriate to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the Guaranteed Obligation; and

(2) Upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.15, no party may waive or relinquish, without the consent of the Secretary, any collateral securing the Guaranteed Obligation to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as the Secretary (subject to any applicable Intercreditor Agreement) determines are required or appropriate to care for, preserve, protect or maintain the collateral. The cost of such contracts may be charged to the Borrower.

§ 609.17 Audit and access to records.

(a) The Loan Guarantee Agreement and related documents shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the project as is necessary, including the Pre-Application, Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

(b) The Secretary may from time to time audit any or all items of costs included as Project Costs in statements or certificates submitted to the Secretary or the servicer or otherwise, and may exclude or reduce the amount of any item which the Secretary determines to be unnecessary or excessive, or otherwise not to be an item of Project Costs. The Borrower will make available to the Secretary all books and records and other data available to the Borrower in order to permit the Secretary to carry out such audits. The Borrower will represent that it has within its rights access to all financial and operational records and data relating to Project Costs, and agrees that it will, upon request by the Secretary, exercise such rights in order to make such financial and operational records and data available to the Secretary. In exercising its rights hereunder, the Secretary may utilize employees of other Federal agencies, independent accountants, or other persons.

§ 609.18 Deviations.

To the extent that such requirements are not specified by the Act or other applicable statutes, DOE may authorize deviations on an individual request basis from the requirements of this part upon a finding that such deviation is essential to program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government. DOE will consult with OMB and the Secretary of the Treasury before DOE grants any deviation that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents. Any deviation, however, that was not captured in the Credit Subsidy Cost will require either additional fees or discretionary appropriations. A recommendation for any deviation shall be submitted in writing to DOE. Such recommendation must include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons in support thereof.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE302; Special Conditions No. 23–242–SC]

Special Conditions: Embraer S.A. Model EMB–505; Flight Performance, Flight Characteristics, High Speed Conditions, and Operating Limitations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Embraer S.A. Model EMB–505 airplane. The EMB 505 is an all-new, high-performance, sweep wing, twin turbofan powered aircraft. This airplane will have a novel or unusual design feature(s) which include turbofan engines, aft engine location, new avionics, a trimmable horizontal tail, and performance characteristics inherent in this type of airplane that were not envisioned by the existing regulations. In addition, this airplane is a jet airplane being certificated in the commuter category by exemption. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 25, 2009.

We must receive your comments by January 4, 2010.

ADDRESSES: Mail two copies of your comments to: Federal Aviation Administration, Regional Counsel, ACE–7, Attn: Rules Docket No. CE302, 901 Locust, Kansas City, Missouri 64106. You may deliver two copies to the Regional Counsel at the above address. Mark your comments: Docket No. CE302. You may inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: J. Lowell Foster, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; 816–329–4125, fax 816–329–4090.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You may inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on these special conditions, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On October 9, 2006, Embraer S.A. applied for a type certificate for their new Model EMB–505. The Model EMB–505 is a commuter category, low-winged monoplane with ''T'' tailed vertical and horizontal stabilizers, retractable tricycle type landing gear and twin turbofan engines mounted on the aircraft fuselage. Its design characteristics include a predominance of metallic construction. The maximum takeoff weight is 17,967 pounds, the V_{MO}/M_{MO} is 320 KCAS/M 0.78 and maximum altitude is 45,000 feet.

For the past decade, the Federal Aviation Administration (FAA) has applied special conditions to jets. The