[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 609

RIN 1901-AB21

Loan Guarantees for Projects that Employ Innovative Technologies

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

ACTION: Notice of Proposed Rulemaking and Opportunity for Comment.

SUMMARY: The Department of Energy (DOE or Department) today proposes policies and procedures applicable to DOE's loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005. Today's proposed rule, when final, also will further the President's Advanced Energy Initiative. Title XVII authorizes the Secretary of Energy 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." Title XVII also identifies ten categories of technologies that, if employed in commercial projects, are potentially eligible for a loan guarantee. A principal goal of Title XVII is to encourage commercial use in the United States of new or significantly improved energy-related technologies. DOE believes that accelerated commercial use of new and improved technologies will help sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply and economy for the United States.

DATES: Public comment on this proposed rule will be accepted until **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. A public meeting on the proposed rule will be held on Friday, June 15, 2007, from 9:00 a.m. to 4:30 p.m. in Washington, DC. Interested persons who wish to speak at the public meeting must telephone the DOE Loan Guarantee Program Office at (202) 586-8336 during the period Friday, June 1, through Tuesday, June 12, 2007, between the hours of 9 a.m. and 4:30 p.m. Interested persons also may request to speak by writing to Mr. Howard G. Borgstrom at the address given in the ADDRESSES section of this notice, or by sending an e-mail to lgprogram@hq.doe.gov. Such requests must be received by 4:30 p.m. on Tuesday, June 12, 2007. The Department also requests that persons wishing to speak submit a copy of their prepared statement to Mr. Borgstrom by 4:30 p.m. on June 12, 2007. See section III. of this notice for details concerning public comment procedures.

ADDRESSES: You may submit comments, identified by RIN 1901-AB21, by any of the following methods:

1. Federal eRulemaking Portal: http:/www.regulations.gov. Follow the instructions for submitting comments.

2. E-mail to lgprogram@hq.doe.gov. Include RIN 1901-AB21 in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.

3. Mail: Address written comments to Mr. Howard G. Borgstrom, Director, Business Operations Center, Office of the Chief Financial Officer, U.S. Department of

Energy, Mailstop CF-60, Room 4A-221, 1000 Independence Avenue, SW, Washington, DC 20585.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

The public meeting for this rulemaking will be held in Washington, DC at the Forrestal Building in Room GE-086 (Main Auditorium), 1000 Independence Avenue, SW, Washington, DC.

This Notice of Proposed Rulemaking, the public meeting transcript, and any comments that DOE receives are being made available on the website at: http://www.lgprogram.energy.gov/.

FOR FURTHER INFORMATION CONTACT:

The DOE Loan Guarantee Program Office, 1000 Independence Avenue, S.W., Washington, DC 20585-0121, (202) 586-8336, e-mail: lgprogram@hq.doe.gov; or Warren Belmar, Deputy General Counsel for Energy Policy, Office of the General Counsel, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0121, (202) 586-6758, e-mail: warren.belmar@hq.doe.gov; or Lawrence R. Oliver, Assistant General Counsel for Fossil Energy and Energy Efficiency, Office of the General Counsel, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0121, (202) 586-9521, e-mail: lawrence.oliver@hq.doe.gov.

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I. Introduction and Background

Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act) (42 U.S.C. 16511-16514) authorizes the Secretary of Energy (Secretary or DOE), after consultation with the Secretary of the Treasury, 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." Commercial technology is defined as "a technology in general use in the commercial marketplace" and "does not include a technology solely by use of the technology in a demonstration project funded by DOE." The following ten categories of projects are, by law, specifically made eligible for Title XVII loan guarantees:

1. Renewable energy systems;
2. Advanced fossil energy technology (including coal gasification meeting the criteria in paragraph 1703(d) of the Act);
3. Hydrogen fuel cell technology for residential, industrial, or transportation applications;
4. Advanced nuclear energy facilities;
5. Carbon capture and sequestration practices and technologies, including agricultural and forestry practices that store and sequester carbon;
6. Efficient electrical generation, transmission, and distribution technologies;
7. Efficient end-use energy technologies;

8. Production facilities for fuel efficient vehicles, including hybrid and advanced diesel vehicles;

9. Pollution control equipment; and

10. Refineries, meaning facilities at which crude oil is refined into gasoline.

This list of ten types of projects is a nonexclusive list of the types of projects that are eligible for Title XVII guarantees.

Today, DOE proposes regulations to establish generally applicable policies, procedures and requirements for the Title XVII loan guarantee program. These proposed regulations were referenced in the Guidelines for the program that DOE published on August 14, 2006 (Guidelines) (71 FR 46451). The Guidelines stated that they would only apply to the first Title XVII solicitation, which was issued contemporaneously with the Guidelines, and that all subsequent solicitations would be governed by regulations to be adopted by DOE at a later date.

In the first solicitation for Pre-Applications for "Federal Loan Guarantees for Projects that Employ Innovative Technologies in support of the Advanced Energy Initiative," DOE focused on technologies that would advance the President's Advanced Energy Initiative. Although this meant the first solicitation did not cover all types of projects that potentially may be eligible for loan guarantees under Title XVII, there is nothing in Title XVII that requires all solicitations implementing that program be open to every project arguably eligible for a guarantee under the statute. DOE has the ability to tailor specific solicitations to certain types of projects, based on programmatic objectives, loan guarantee authority that is available, and the availability of funds to implement the program, among other relevant criteria. DOE will seek to have a broad portfolio of large

and small projects, for a wide variety of technologies. For example, the Administration's 2008 Budget proposes that DOE may guarantee up to $4 billion in loans for central power generation facilities (for example, nuclear facilities or carbon sequestration optimized coal power plants); $4 billion in loans for projects that promote biofuels and clean transportation fuels; and $1 billion in loans for projects using new technologies for electric transmission facilities or renewable power generation systems. Precisely how any authorized loan guarantee authority would be allocated, however, ultimately would depend on the merits and benefits of particular project proposals and their compliance with statutory and regulatory requirements. The deadline for submission of Pre-Applications in response to the first solicitation was December 31, 2006, and DOE received 143 Pre-Applications.

On February 15, 2007, President Bush signed into law Public Law 110-5, the Revised Continuing Appropriations Resolution, 2007 (CR, or Public Law 110-5) which authorizes DOE to issue guarantees under the Title XVII program for loans in the "total principal amount, any part of which is to be guaranteed, of $4,000,000,000." This authorization provides DOE sufficient authority, under Title XVII and the Federal Credit Reform Act of 1990 (FCRA) (2 U.S.C. 661(a) et seq) to issue loan guarantees. Section 20320(b) of the CR further provides that no loan guarantees may be issued under the Title XVII program until DOE promulgates final regulations that include "programmatic, technical, and financial factors the Secretary [of Energy] will use to select projects for loan guarantees," "policies and procedures for selecting and monitoring lenders and loan performance," and "any other policies, procedures, or information necessary to implement Title XVII of the Energy Policy Act of 2005."

II. Discussion of Proposed Rule

The CR prohibits DOE from issuing any loan guarantees under the Title XVII program until the Department has issued final regulations that address a number of different matters. (P.L. 110-5, section 20320(b)). However, section 20320 does not state whether or to what extent those final regulations must apply to any matters pursuant to the first solicitation under the Title XVII program, which DOE issued on August 8, 2006, and in response to which Pre-Applications were due by December 31, 2006, several weeks prior to the enactment of Public Law 110-5.

In order to ensure that the Department complies with the CR but does not prejudice Pre-Applicants who responded to the first Title XVII solicitation, DOE proposes to specify, by regulation, that today's proposed rule, when final, shall not apply to the Pre-Applications, Applications, Conditional Commitments, and Loan Guarantee Agreements pursuant to the August 2006 solicitation. The only exceptions shall be with respect to the default, recordkeeping and audit requirements in sections 609.15 and 609.17, which Title XVII requires be established by regulation. However, the proposed regulations permit DOE and an Applicant to agree in a Loan Guarantee Agreement entered into pursuant to the first solicitation that additional provisions of the final rule shall apply to the particular project.

However, Pre-Applicants who responded to the first solicitation will not necessarily be permanently exempt from these regulations. If the Department does not accept their Pre-Application and invite them to submit an Application pursuant to that solicitation, then their participation in the program in response to any future solicitation will be fully subject to the requirements of the final regulations. Moreover, to provide clarity, the regulation provides that the exception from applicability of these regulations

applies only to those for whom the invitation to submit an Application is extended by the Department to a Pre-Applicant no later than December 31, 2007. The Department anticipates being able to invite selected Pre-Applicants to submit Applications in response to the first solicitation by that deadline, and perhaps well before that deadline. Pre-Applicants who are not being invited to submit an Application also will be notified that they have not been selected, and any further involvement by such Pre-Applicants in the Title XVII program will be subject to all requirements of the final regulations.

The Act authorizes the Secretary to make loan guarantees as an incentive for the use of new or improved technologies. Section 1702 of the Act 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 [as defined in regulations issued by the Secretary]; and (ii) have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project for which the loan guarantee was obtained." (42 U.S.C. 16512(g)(2)(c)) Section 1702(i) of the Act instructs the Secretary to prescribe regulations outlining record-keeping and audit requirements. This proposed rule sets forth application procedures, outlines terms and conditions for Loan Guarantee Agreements, and lists records and documents that project participants must keep. The proposed rule also sets forth other provisions that the CR requires DOE's regulations to address.

A. Technologies

A principal purpose of the Act's Title XVII loan guarantee program is to support projects in the United States that "employ new or significantly improved technologies as

compared to commercial technologies in service in the United States at the time the guarantee is issued." Such technologies are identified as "innovative technologies." Section 1701(1) of the Act defines "commercial technology" as "a technology in general use in the commercial marketplace." Section 1701(1) further states that a technology does not become a "commercial technology" solely because it is used in a demonstration project funded by DOE.

Because section 1702(d)(1) also requires a "reasonable prospect of repayment of the principal and interest" on all loans or other debt obligations issued to finance a project, technologies for project proposals must be mature enough to assure dependable commercial operations that generate sufficient revenues to service the project's debt. Therefore, projects that are solely research, development or demonstration projects (*i.e.*, a project designed exclusively for research and development or to demonstrate feasibility of a technology on any scale) should not be eligible for Title XVII loan guarantees, and DOE is proposing to make such research, development or demonstration projects ineligible for a loan guarantee under Title XVII. DOE believes that accelerated commercial use of new or improved technologies, as distinguished from research, development or demonstrations at any scale of technological feasibility, will help to sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply, and be able to earn revenues that give the projects a "reasonable prospect of repayment of the principal and interest" on its debt obligations. Accordingly, DOE's loan guarantee program is not intended for technologies in the research, development or demonstration stages.

Title XVII does not explain or define the phrase "new or significantly improved" in section 1703(a)(2). Nor does the Act explain or define the terms "general use" or "commercial marketplace" in section 1701(1), other than specifying that "commercial technology" does not include a technology merely because it is used in a DOE-funded demonstration project. Therefore, DOE must use its discretion and judgment to define these terms.

DOE believes that the phrase "new or significantly improved technology" is not readily susceptible to precise definition in these regulations. It is not possible to specify in advance precisely what should be considered "new" or what would constitute a "significant improvement" in a particular technology. Nonetheless, DOE does believe it is both possible and prudent to specify, in these regulations, parameters by which that determination will be made in particular cases in the future.

Webster's II New College Dictionary (1999) defines the term "new" to mean "[h]aving existed or been made for only a short time … [n]ever used before … [j]ust discovered, found, or learned …" or somewhat unhelpfully, "[n]ot yet old." The term "significant" is defined as "meaningful … [m]omentous … important," and the term "improve" or "improvement" is defined as "[t]o advance to a better quality or state … to increase the productivity or value … to make advantageous additions or changes." For purposes of the Title XVII program, moreover, it is important that a technology be new or significantly improved with respect to energy production, use, efficiency, or transportation, rather than with respect to other attributes. For example, a particular facility might have significantly improved aesthetic appeal in comparison to an older

facility, but DOE does not believe that type of improvement alone should qualify a facility for a Title XVII loan guarantee.

Thus, DOE proposes to define, by regulation, the term "new or significantly improved technologies" to mean technologies concerned with the production, consumption or transportation of energy, and that have either only recently been discovered or learned, or that involve or constitute meaningful and important improvements in the productivity or value of the technology. DOE requests comment on this definition.

Because Title XVII focuses on encouraging and incentivizing innovative technologies, the Title XVII loan guarantee program should only be open to projects that employ a technology that has been used in a very limited number of commercial projects or for only a limited period of time. Indeed, when read together, sections 1701 and 1703 of Title XVII prohibit DOE from issuing loan guarantees for projects that only use commercial technologies that already are in general use in the United States at the time the guarantee is issued. In section 609.2 of the proposed regulations, DOE is proposing two possible ways of interpreting "general use." First, DOE could interpret the term "general use" to mean that a technology has been ordered for, installed in, or used in a certain number of commercial projects in the United States. So, as one alternative, DOE proposes to state in its regulations that a technology would considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been ordered for, installed in, or used in five or more projects in the United States at the time the loan guarantee is issued. Allowing loan guarantees for up to five projects employing the same type of technology would allow use of these guarantees to introduce innovative

technologies to the commercial marketplace, but would also ensure that guarantees can only be issued for a limited number of projects before it will be up to the commercial marketplace to decide whether the economic and environmental benefits of a particular technology justify continued investments in it.

As a second alternative, DOE proposes to state in its regulations that a technology would be considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been in operation in a commercial project in the United States for a particular number of years. Under this alternative, there would be no numerical limit on the number of loan guarantees DOE could issue for a particular technology – it might be 50, 10, 5, 1 or even zero. Whether DOE could issue a guarantee would be determined in each case by whether the technology at issue had been in operation in a commercial project in the United States for a particular number of years, which DOE proposes to be five years. The five-year period would begin on the date that the technology is commissioned on the particular commercial project. DOE selected the period of five years because it believes that this period of time will allow a sufficient period for early commercial operation and for proving the viability of a technology in the commercial marketplace.

DOE requests comment on these alternative interpretations and approaches. DOE furthermore requests comment as to whether, regardless of which alternative is adopted in the final rule, the same definition should apply to all types of projects and technologies. For example, if the first alternative described above is adopted, should the relevant number of projects or technologies be the same for renewable energy systems, advanced nuclear energy facilities, pollution control equipment, and all other potentially

eligible technologies and projects? Or, should the number specified in DOE's regulations be different for different types of projects and technologies? Similarly, if the second alternative described above is adopted, should the time period be the same for all types of eligible projects and technologies? And if it should be different, why? Commenters who wish to express views on any of these issues are requested to supply specific information and data supporting their views.

The Department notes that regardless of the resolution of the issues discussed above, a project may be eligible for a Title XVII loan guarantee if it uses technology that has been used in any number of projects outside the United States and for any period of time outside the United States, so long as the technology is not in "general use" in the United States.

B. Project Costs

Proposed section 609.10, in accordance with section 1702(c) of the Act, provides that any loan guarantee issued by DOE may not exceed 80 percent of total Project Costs. Sections 609.2 and 609.12 of the proposed rule define "Project Costs" as those that are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning and shake down of an Eligible Project. Conversely, excluded costs cover initial research and development costs, the credit subsidy cost, any administrative fees paid subsequent to section 1702(h), and operating costs after the facility has been placed in service. These are costs associated with, and a condition of, receiving a federal loan guarantee. Furthermore, if theses costs were allowed, in the case of default, these costs would be shifted from the project sponsor to the federal taxpayer. DOE invites public comments on these issues.

C. Solicitation

Section 609.3 of the proposed regulations requires DOE to issue a solicitation to start the process that ultimately would culminate in the Department issuing a loan guarantee. This section also sets forth certain minimum requirements for each solicitation, including the fees that will be required of persons invited to submit Applications and criteria that the Department will use to weigh competing Pre-Applications, when Pre-Applications are requested, and Applications, and to make ultimate selections for loan guarantees.

Generally, DOE plans to solicit Pre-Applications only when Pre-Applications can minimize or reduce the financial burdens on Project Sponsors prior to a determination that a particular technology will likely not be sufficiently developed or mature to satisfy the minimum requirements for successful commercial operations. This approach would also reduce DOE's administrative costs incurred for detailed review of multiple full Applications in technology areas where most of the projects will likely not be ready for commercial operations.

The proposed regulations permit DOE to start the solicitation process by soliciting Pre-Applications, or by skipping the Pre-Application stage and soliciting Applications, because DOE believes a Pre-Application stage may be appropriate and necessary for some technologies and projects but perhaps not for others. Solicitations for Pre-Applications or Applications issued after promulgation of the final rule must address many important aspects of the application process, including the relevant period of time during which Pre-Applications or Applications for loan guarantees may be filed. Because each project will be unique and each loan guarantee potentially subjects the

Federal government to significant financial liability, DOE plans to engage in a rigorous review of a proposed project before determining whether it may be eligible for a Loan Guarantee Agreement and subsequently approving and issuing loan guarantees.

DOE does not intend to substantively review and evaluate Pre-Applications or Applications for any proposals that do not meet the specific requirements of the applicable solicitation. Likewise, only Applications invited by DOE or submitted in response to a solicitation will be considered for a Loan Guarantee Agreement. Consistent with section 20320(b) of P.L. 110-5, the proposed regulations require that programmatic, technical and financial factors to be used by DOE to select projects for loan guarantees. Section 609.7 satisfied this requirement.

D. Payment of the Credit Subsidy Cost

Section 1702(b) of the Act states that: "No guarantee shall be made unless (1) an appropriation for the cost has been made; or (2) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited the payment into the Treasury." (42 U.S.C. 16512) Therefore, either Congress must appropriate funds to cover the Credit Subsidy Cost of the Loan Guarantee or the Borrower must make payment to DOE of this cost. DOE has neither requested nor received appropriations to make partial or full payment of the Credit Subsidy Cost. However, section 20320(a) of P.L. 110-5 authorized DOE to accept Credit Subsidy Cost payments from Borrowers to pay the full subsidy costs of loan guarantees, and DOE's current intent is to implement the Title XVII program only through the self-pay authority of section 1702(b)(2) of the Act. Furthermore, DOE interprets section 1702(b) as not allowing for partial payment of the Credit Subsidy Cost by Borrower with the remainder covered by a Congressional

appropriation; section 1702(b) authorizes either an appropriation *or* payment of this cost *in full* by the Borrower. DOE proposes to memorialize this interpretation of section 1702(b) of the Act in section 609.9 of the regulations.

E. Assessment of Fees

In addition to the Credit Subsidy Cost, section 1702(h) also requires DOE to "charge and collect fees for guarantees" to cover the Administrative Cost of Issuing a Loan Guarantee. Proposed §§ 609.6, 609.8 and 609.10 provide that DOE shall collect fees for administrative expenses to cover all phases of an Eligible Project. As defined in proposed § 609.2, fees consist of the 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 the Loan Guarantee Agreement, including during construction, start-up, commissioning, shakedown, and the operational phases of an Eligible Project.

The Act, and section 1702(h) in particular, affords DOE discretion with respect to the fees it imposes to cover applicable administrative costs. For the first solicitation issued by DOE in August 2006, DOE elected not to impose fees in connection with the Pre-Application stage and reserved the right to charge an Application fee as part of the invitation to submit an Application. DOE proceeded in this manner so as not to unduly discourage potential project sponsors from submitting Pre-Applications. In the proposed

regulations, DOE is requiring that the payment of administrative fees start with the submission of an Application. If implemented by DOE in the final rule, this would mean that Project Sponsors who submit Pre-Applications and are denied further consideration will not be charged any fees for expenses incurred by DOE in reviewing their Pre-Application materials. In addition, Pre-Applicants that are invited to submit Applications but decline to do so will also not be charged a fee. DOE does anticipate incurring significant administrative expenses as part of its review of Pre-Applications, and Applications which, in the absence of Pre-Application and Application fees, would not be fully recouped by DOE. Under the proposed rule, the fees assessed to Borrowers who submit Applications and enter into Conditional Commitments will only cover the expenses attendant to that Borrower's project proposal and will not cover the costs incurred by DOE for reviewing other Pre-Applications that were denied further consideration. As stated above, section 1702(h) requires that DOE "charge and collect fees for guarantees . . . sufficient to cover applicable administrative expenses." DOE interprets this requirement as allowing it to charge and collect fees from the Applicant/Borrower to cover DOE's administrative expenses in connection with that particular Applicant/Borrower's project, or to charge and collect fees from Applicant/ Borrower to cover a proportionate share of DOE's administrative expenses for the entire loan guarantee program. In its proposed regulations, DOE adopts the former approach.

Proposed section 609.6 provides that the Applicant must pay a filing fee with the submission of an Application (First Fee). This First Fee must be in an amount sufficient to cover DOE's administrative expenses in connection with DOE's review and evaluation of a Pre-Application, if any, and the Application. A Second Fee (Second Fee) will be

collected when DOE and the Applicant execute a Term Sheet which constitutes a Conditional Commitment. This Second Fee must be an amount sufficient to cover DOE's administrative expenses during the Term Sheet through the closing phase.

At the closing and subsequent thereto, DOE will collect fees, as specified in the Conditional Commitment, for DOE's servicing and monitoring expenses throughout the term of the guaranteed loan (Third Fee). The Third Fee may be assessed and collected quarterly, annually, or more or less frequently, as determined by the Secretary, including one lump sum payment at the closing. The Third Fee may be a percentage of the amount of Guaranteed Obligations outstanding from time to time or specific dollar amounts based on DOE's actual and/or reasonably anticipated administrative expenses.

The First and Second Fees are not refundable and must be paid regardless of whether a Loan Guarantee Agreement is executed. The Third Fee is also not refundable and the amount and method of payment of the Third Fee will be specified in the Loan Guarantee Agreement. This will enable DOE to comply with the mandate of section 1702(h) of the Act to charge fees to cover DOE's administrative expenses "for guarantees" while also ensuring that Applicants act in good faith when submitting an Application and use their best efforts to meet all specified requirements of the Conditional Commitment. DOE invites public comments as to all aspects concerning the assessment of fees for the Department's administrative expenses.

F. Financial Structure

The Act does not impose any specific limitations on the financial structure of proposed projects, other than that the loan guarantee "shall not exceed an amount equal to 80 percent of the project cost of the facility that is the subject of the guarantee as

estimated at the time at which the guarantee is issued." (42 U.S.C. 16512(c)) However, section 1702(d)(1) provides: "No guarantee shall be made unless the Secretary determines that there is reasonable prospect of repayment of the principal and interest on the obligation by the Borrower." (42 U.S.C. 16512(d)(1)) DOE therefore must make repayment of debt a very high priority of the loan guarantee program and DOE is authorized to adopt policies to ensure that Borrowers and Eligible Lenders use their best efforts to ensure repayment of Guaranteed Obligations.

This view is bolstered by the mandate of section 1702(g)(2)(B), which requires that "with respect to any property acquired pursuant to a guarantee or related agreements, [the rights of the Secretary] shall be superior to the rights of any other person with respect to the property." DOE interprets this statutory provision to require that DOE possess a first lien priority in the assets of the project and other assets pledged as security. Because DOE believes it is not permitted by the Act to adopt a *pari passu* security structure, holders of the non-guaranteed portion of a loan or debt instrument will have a subordinate claim to DOE in the event of default.

To harmonize and balance the twin goals of issuing loan guarantees to encourage use of new or significantly improved technologies in Eligible Projects while limiting the financial exposure of the Federal government, DOE expressed a preference in the August 2006 Guidelines for guaranteeing no more than 80 percent of the total face amount of any single debt instrument. The Guidelines further provided that under no circumstances would DOE guarantee 100 percent of a loan or other debt obligation.

In today's rule, DOE is proposing to guarantee up to 90 percent of a particular debt instrument or loan obligation for an Eligible Project that can be guaranteed by a

Title XVII loan guarantee, so long as DOE's guarantees do not account for more than 80 percent of Project Costs. Furthermore, in connection with any loan guaranteed by DOE that may be participated, syndicated, traded, or otherwise sold on the secondary market, DOE is proposing to require that the guaranteed portion and the non-guaranteed portion of the debt instrument or loan be sold on a pro-rata basis. The guaranteed portion of the debt may not be "stripped" from the non-guaranteed portion, i.e. sold separately as an instrument fully guaranteed by the Federal government. DOE invites public comment on the 90 percent loan guarantee limitation and the prohibition on "stripping."

The primary purpose of the Title XVII loan guarantee program is to support projects using or employing "new or significantly improved technologies." These new technologies, by definition, have not been proven in commercial projects in the United States and therefore may present significant risks for Title XVII loan guarantees. DOE believes that the sum of Title XVII requirements suggest that a guarantee of up to 90% of the face value of a loan may be required to achieve program goals..

DOE intends to gain valuable experience from the first round of proposals submitted under the Guidelines, where some Pre-Applicants sought loan guarantees for 80% or less of their proposed debt instruments. In developing final regulations, DOE will take into account, among other things, the comments on this proposal, DOE's experience with the first round of proposals, and whether there are other methods of assuring that Eligible Lenders bear some of the financial risk exist while at the same time assuring that the objectives of the Title XVII program are accomplished. DOE requests public comment on the proposal to allow up to a 90 percent loan guarantee, the technology or circumstance that might warrant providing this level of guarantee, whether

Eligible Lenders will perform adequate due diligence in the absence of assuming some amount of risk, the applicability of practices employed by other Federal agencies to DOE's loan guarantee program, and whether DOE's proposal will facilitate the goal of offering loan guarantees to encourage early commercial use of innovative technologies.

DOE also will consider whether Project Sponsors have a significant financial commitment to the project. The Act does not mandate a specific equity contribution, but DOE is proposing to require that the Project Sponsors have a significant equity stake in a project. DOE solicits comments on the merits of adopting a minimum equity percentage requirement for projects.

In addition, DOE intends to consider whether a Project Sponsor will rely upon other government assistance (*e.g.*, grants, tax credits, other loan guarantees) to support financing, construction or operation of a project. DOE will manage the loan guarantee program in a manner that seeks to minimize support of projects that rely on multiple forms of significant Federal financial assistance; in general, DOE believes it is desirable that each project receive only one form of such assistance. Therefore, if an applicant is or will be receiving multiple forms of significant Federal financial assistance, that fact generally will be a negative factor when DOE evaluates loan guarantee applications. Nonetheless, the receipt of other forms of assistance will not disqualify a project from being eligible for a DOE loan guarantee, and DOE furthermore recognizes that in some situations -- such as, for example, with respect to the first new nuclear generating facilities, which may be eligible for risk insurance agreements, loan guarantees and tax credits -- multiple forms of federal assistance to the same project could advance important national energy policy priorities.

Finally, DOE is proposing to require with submission of Applications, a credit assessment for the project without a loan guarantee from a nationally recognized rating agency, where the size and estimated cost of the project justify such an assessment. Additionally, DOE is proposing to require not later than 30 days prior to closing, that Applicants provide a credit rating from a nationally recognized rating agency reflecting the Final Term Sheet for the project without a Federal guarantee. The Department requests comment as to whether it should establish a project size (dollar) threshold below which the Department would have authority to waive this credit rating requirement.

G. Eligible Lenders

In further support of DOE's objective to ensure full repayment of debt, consistent with section 20320(b)(2) of the CR, participating Eligible Lenders or other servicers must meet certain eligibility, monitoring, and performance requirements. These requirements, set forth in sections 609.2 and 609.11 of the proposed regulations, are intended to ensure that the Eligible Lender or other servicer has the financial wherewithal and appropriate experience and expertise to meet its fiduciary obligations in connection with the debt guaranteed by DOE. As provided in proposed section 609.11, Eligible Lenders or other servicers must exercise a high level of care and diligence in the review and evaluation of a project, and in enforcing the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement, and related documents, throughout the term of the Guaranteed Obligation. Moreover, as provided in proposed section 609.11, DOE also expects each Eligible Lender or other servicer to diligently perform its duties in the servicing and collection of the loan or other debt obligation as well as in

ensuring that the collateral package securing the loan remains uncompromised. Proposed section 609.11 requires the Eligible Lender or other servicer to provide to DOE regular, periodic financial reports on the status and condition of the loan or other debt obligation, consistent with the terms of the Loan Guarantee Agreement. The Eligible Lender or other servicer is required to notify DOE promptly if it becomes aware of any problems or irregularities concerning the project or the ability of the Borrower to make payment on the loan or other debt obligations.

H. FCRA

The Federal Credit Reform Act of 1990 (FCRA) provides that for any federal credit program, new direct loans and loan guarantees may not be made unless authority has been provided in appropriations Acts(s). See 2 U.S.C. 661c(b). Title XVII only authorizes future appropriations action. The Department does not understand section 1702(b) of the Act as constituting either budget authority or other authority to make any individual loan guarantee, as is required by FCRA. Thus, the Department reads the Act and FCRA in harmony, which means that while Title XVII authorizes DOE to carry out the loan guarantee program, the Department may not issue guarantees until it receives new budget authority or is otherwise provided authority to make guarantees in an appropriations Act. While DOE notes that the Government Accountability Office has expressed disagreement with this interpretation, the Department intends to follow its own interpretation of Title XVII and FCRA in carrying out this program.

On February 15, 2007, President Bush signed the CR into law. The CR provides DOE with the necessary authority, consistent with FCRA and Title XVII section 1702, to guarantee, in the aggregate, up to $4 billion in loans for Title XVII projects. The

authority to issue guarantees, however, was limited to Borrowers who pay the applicable Credit Subsidy Costs.

I. Default and Audit Provisions

Title XVII, sections 1702(g) and 1702(i), specifically require that DOE promulgate regulations to address default and audit requirements. (42 U.S.C. 16512(g), (i)) Sections 609.15 and 609.17, respectively, address these requirements. These provisions will apply to all loan guarantees issued under the Title XVII program, including those in response to the August 2006 Solicitation.

J. Tax Exempt Debt

Section 103(a) of the Internal Revenue Code (IRC), 26 U.S.C. 103(a), provides that "gross income" does not include interest on any state or local bond," with certain exceptions. Section 149(b) of the IRC, 26 U.S.C. 149(b), however, provides that the section 103(a) exclusion from gross income "shall not apply to a state or local bond if such bond is federally guaranteed." Section 149(b) in effect converts tax exempt debt to taxable debt when such debt is guaranteed by the Federal government. Accordingly, section 609.10 of today's proposed regulations prohibits DOE from directly or indirectly guaranteeing tax exempt obligations.

K. Full Faith and Credit

Section 609.14 of the proposed regulations provides that the full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations. It further provides that the guarantee shall be conclusive evidence that it has been properly obtained, that the underlying loan qualified for the guarantee, and that but for fraud or

material misrepresentation by the Holder, is presumed to be valid, legal and enforceable. Section 609.14 is consistent with the model provision set forth in OMB Circular A-129, "Policies for Federal Credit Programs and Non-Tax Receivables," as well as similar provisions in the regulations governing a number of other federal credit programs. The Department maintains a strong interest in ensuring that the debt incurred in order to finance innovative projects eligible for Title XVII loan guarantees can be financed and sold in secondary markets and requests comment on whether the language of section 609.14 needs to be modified in order to accomplish this goal, while at the same time ensuring that the Federal Government is not exposed to undue financial risk because of fraud or misrepresentation.

III. Public Comment Procedures

A. Written comments.

Interested persons are invited to participate in this proceeding by submitting data, views, and arguments. Written comments should be submitted to the address, and in the form, indicated in the ADDRESSES section of this Notice of Proposed Rulemaking. To help DOE review the comments, interested persons are asked to refer to specific proposed rule provisions, whenever possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it in accordance with the DOE's Freedom of Information regulations (10 CFR 1004.11). It is DOE's intention to honor requests for nondisclosure

of information by an Applicant or Project Sponsor to the extent permitted under applicable laws.

B. Public Meeting.

A public meeting will be held at the time, date, and place indicated in the DATES and ADDRESSES sections of this Notice of Proposed Rulemaking. Any person or representative of a group or class of persons who has an interest in this proposed rule may request an opportunity to make an oral presentation. A person wishing to speak must submit his or her request to make an oral presentation to the person and in the manner specified in the DATES section of this notice by 4:30 p.m. on the date specified for making such requests. The person should provide a daytime phone number where he or she can be reached. Each oral presentation will be limited to 20 minutes, unless the presiding official determines that the number of persons wishing to speak warrants a different amount of time. Persons making oral presentations are requested to bring 3 copies of their prepared statement to the meeting and submit them to the registration desk.

DOE reserves the right to select the persons who will speak. DOE also reserves the right to schedule speakers' presentations and to establish the procedures for conducting the meeting. A DOE official will be designated to preside at the meeting. The meeting will not be a judicial or evidentiary-type hearing, but will be conducted in accordance with 42 U.S.C. 7191. Any further procedural rules for the conduct of the meeting will be announced by the presiding official.

A transcript of the meeting will be made, and the entire record of this rulemaking will be retained by DOE and made available as provided in the ADDRESSES section of this Notice of Proposed Rulemaking.

IV. Regulatory Review

A. Executive Order 12866

Today's proposed 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 OMB.

B. National Environmental Policy Act

Through the issuance of this proposed 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 the proposed 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 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 loan guarantee rules under the Administrative Procedure Act (5 U.S.C. 553).

D. Paperwork Reduction Act

Proposed sections 609.4 and 609.6 provide that Pre-Applications and Applications for loan guarantees submitted to DOE in response to a solicitation must contain certain information. This information will be used by DOE to determine if a project sponsor who submits a Pre-Application will be invited to submit an Application for a loan guarantee; to determine if a project is eligible for a loan guarantee; and to evaluate Applications under criteria specified in the proposed rule. Proposed §609.17 provides that borrowers must submit to DOE annual project performance reports and audited financial statements along with other information. DOE will use this information to evaluate the progress of projects for which loan guarantees are issued. DOE has submitted this collection of information to the Office of Management and Budget for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and the procedures implementing that Act, 5 CFR 1320.1 et seq.

DOE estimates that the annual reporting and recordkeeping burden for this collection of information will be 13,000 hours per year at a total annual cost of $1,750,000. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Interested persons are invited to submit comments to OMB addressed to: Department of Energy Desk Officer, Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC, 20503. Persons submitting comments to OMB also are requested to send a copy to the DOE contact person at the address given in the ADDRESSES section of this notice. OMB is particularly interested in comments on: (1) the necessity of the proposed information collection requirements, including whether the information will have practical utility; (2) the accuracy of DOE's estimates of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be maintained; and (4) ways to minimize the burden of the requirements on respondents.

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 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, the 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. The proposed 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 proposed 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, the proposed 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 proposed 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.

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 May 10, 2007

James T. Campbell

James T. Campbell

Acting Chief Financial Officer

For the reasons stated in the Preamble, DOE proposes to amend chapter II of title 10 of the Code of Federal Regulations by adding a new part 609 as set forth below.

PART 609 – LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

Sec.

609.1 Purpose and Scope.
609.2 Definitions.
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609.5 Evaluation of Pre-Applications.
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609.8 Term Sheets and Conditional Commitments.
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609.10 Loan Guarantee Agreement.
609.11 Lender Eligibility, Monitoring and Performance Requirements.
609.12 Project Costs.
609.13 Principal and Interest Assistance Contract.
609.14 Full Faith and Credit and Incontestability.
609.15 Default, Demand, Payment, and Collateral Liquidation.
609.16 Perfection of Liens and Preservation of Collateral.
609.17 Audit and Access to Records.
609.18 Deviations.

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 Title XVII of the Energy Policy Act of 2005.

(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 Title XVII of the Energy Policy Act of 2005.

(c)(1) This part shall not apply to any Pre-Applications, Applications, Conditional Commitments or Loan Guarantee Agreements under the Guidelines issued by DOE on August 8, 2006, which were published in the Federal Register on August 14, 2006 (71 FR 46451) and the solicitation issued on August 8, 2006 under Title XVII of the Energy Policy Act of 2005, provided the Pre-Application is accepted under the Guidelines and an Application is invited pursuant to such Pre-Application no later than December 31, 2007.

(2) Notwithstanding paragraph (c)(1) of this section, §§ 609.15 and 609.17 shall apply to any Loan Guarantee Agreement entered into pursuant to or in response to DOE's August 8, 2006 solicitation.

(3) Notwithstanding paragraph (c)(1) of this section, DOE and any Applicant who submitted an Application under the August 8, 2006 solicitation may agree to make additional provisions of this part applicable to the particular project.

(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).

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 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, and the potentially higher costs of servicing and monitoring trouble loans.

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.

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, but does not include a technology solely by use of such technology in a demonstration project funded by DOE. A technology is in general use if it: [Alternative 1: has been ordered for, installed in, or used in five or more projects in the United States] [Alternative 2: has been in operation in a commercial project in the

United States for a period of five years, as measured beginning on the date the technology was commission on a project.]

Conditional Commitment means a Term Sheet offered by DOE and accepted by the Applicant, with the understanding of the parties that the Applicant thereafter satisfies all specified and precedent funding obligations, and all other contractual, statutory, regulatory or other requirements. A Conditional Commitment imposes no obligation on the Secretary to execute the Loan Guarantee Agreement.

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer and/or terminate 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:

(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 Fees paid to DOE pursuant to Section 1702(h) to cover the applicable administrative expenses for the loan guarantee are excluded from the calculation.

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.

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.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees 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.

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 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 has either only recently been discovered or learned, or that involves or constitutes one or more meaningful and important improvements in the productivity or value of the technology.

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 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 general terms and conditions under which DOE anticipates that it may guarantee payment of principal and accrued interest on specified loans or other debt obligations of a Borrower in connection with an Eligible Project. A Term Sheet is not a loan Guarantee Agreement and imposes no obligation on the Secretary to execute a Loan Guarantee Agreement.

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.

(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, 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. Only one Pre-Application may be submitted per project. 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;

(b) An executive summary briefly encapsulating the key project features and attributes of the proposed project;

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

(vi) 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; and

(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 loan a guarantee is sought.

(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:

(3) The amount of the Guaranteed Obligation as a percentage of total project debt; and as a percentage of that 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) A copy of a commitment letter from an Eligible Lender or other Holder expressing its commitment to provide 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;

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

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

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

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

(l) 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. DOE

will notify any Project Sponsor whose Pre-Application has been eliminated from further review under this subsection.

(c) If DOE deems a Pre-Application responsive, DOE will evaluate the commercial viability of the proposed project, the technology to be employed in the project, relevant experience of the principal(s) and the financial capability of the Project Sponsor (including personal and/or business credit information of the principal(s)) to 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.

(d) 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 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.

(e) 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 issue a loan guarantee for a project.

§ 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. There may be only one Applicant per project.

(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 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 the further commercial availability of the technology(ies) in the United States.

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

(7) A detailed estimate of the estimated 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;

(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 credit assessment, for the project without a loan guarantee from a nationally recognized rating agency, where the size and estimated cost of the project justify 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 Guarantee 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 Guarantee 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. 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 does not avoid, reduce, or sequester air pollutants or anthropogenics emissions of greenhouse gases;

(3) The project is not ready to be employed commercially in the United States, cannot be replicated, 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;

(4) 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 Section 609.11 of this part;

(5) The project is for demonstration, research , or development; or

(6) The applicant will not provide a significant 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 service in the United States, is ready to be employed commercially in the United States, can be replicated, yields a commercial 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 the extent that the new or significantly improved technology used in the project constitutes an important improvement in 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, and requested amount of Guaranteed Obligations 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 Applications;

(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 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;

(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 may determine, after review and evaluation of the Application, additional information requested and received by DOE, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, that it would be appropriate to offer 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 before DOE may enter into a Loan Guarantee Agreement.

(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. 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, but neither party is legally obligated to do so.

(d) 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 will set a closing date for the 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 any other contractual, statutory, regulatory or other requirements have been met. 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 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 section1702(h) of the Act, DOE has received from the Borrower the First and Second Fees and, if applicable, the Third fee 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 updated project financing information and a new final Term Sheet must be executed by DOE and the Applicant if the terms and conditions of the financing arrangements changed between execution of the Conditional Commitment and that date (Final Term Sheet).

(f) Not later than 30 days prior to closing, the applicant must provide a credit rating from a nationally recognized rating agency reflecting the Final Term Sheet for the project without a Federal guarantee.

(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) 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, 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 thereunder.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions, which must be specified in the Loan Guarantee Agreement, 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 that are in "general use" 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 and the loan guarantee is limited to no more than 90 percent of the total face value of the loans(s) or other debt obligation(s);

(4) The guaranteed portion of a loan, or any portion of the guaranteed portion of a loan, will not be separated from or "stripped" from the non-guaranteed portion of the loan, 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 Obligations 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;

(7) The loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations;

(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 physical assets necessary for any person or entity, including DOE, to complete, operate, convey, and dispose of the defaulted project;

(12) The interest rate on the guaranteed loan 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) The Guaranteed Obligation is not subordinate to any loan or other debt obligation and is in a first lien position on all assets of the project and all additional collateral pledged as security for the Guaranteed Obligations and other project debt;

(14) There is satisfactory evidence that Borrower and Eligible Lenders are willing, competent, and capable of performing the terms and conditions of the Guaranteed Obligation 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 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) 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 contains such other terms and conditions as DOE deems reasonable and necessary to protect the interest of the United States; and

(23) The Lender is an Eligible Lender, as defined in § 609.2 of this part, and meets DOE's lender eligibility, monitoring and performance criteria in § 609.11 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 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 and has superior rights in and to the property acquired from the recipient of the payment as provided in § 609.15 of this part.

(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 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 section 609.17 of this part.

(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 section 609.17 of this part.

(g) The Loan Guarantee Agreement must contain provisions related to the assignment or transfer of Guaranteed Obligations which provide that:

(1) The Eligible Lender must provide written notification to DOE prior to any assignment or transfer of any portion of a Guaranteed Obligation, or any pledge or other use of a Guaranteed Obligation as security, including but not limited to any derivatives transaction.

(2) An Eligible Lender or other Holder may assign or transfer a Guaranteed Obligation covered under the Loan Guarantee Agreement 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,

requirements monitoring, and reporting contained in the Loan Guarantee Agreement and these regulations if the transferring Eligible Lender was forming these functions. Any assignment or transfer, however, of the servicing, monitoring, and reporting functions must be approved by DOE.

§ 609.11 Lender Eligibility, Monitoring and Performance Requirements.

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

(1) Be a "qualified institutional buyer," as defined in 17 CFR 230.144A(a), including a qualified retirement plan, or governmental plan;

(2) 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);

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

(4) 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;

(5) 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

(6) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in other energy-related projects.

(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, and subsequently when performing the loan servicing duties during the term of the Loan Guarantee Agreement, the Eligible Lender or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating, disbursing and servicing a loan made by it 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.

(c) Even though DOE may rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own 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, but are not limited to:

(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 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 to cover the possibility of cost increases during the processing of the application and during construction; and

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

(12) Other necessary and reasonable costs approved by DOE; and

(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; and

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

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

§ 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) Borrower:

(1) is unable to meet 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 will 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 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). 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 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).

(d) No provision of this regulation shall be construed to preclude forbearance by the 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, such supporting documentation as may be reasonably 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, applicable law, the Act, and this part. 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 and shall have superior rights in and to the property acquired from 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.

(h) Where the Loan Guarantee Agreement so provides, the Eligible Lender or other Holder, or other servicer, as appropriate, and the Secretary may jointly agree to a plan of liquidation of the assets pledged to secure the Guaranteed Obligation.

(i) Where payment of the Guaranteed Obligation has been made and the Eligible Lender or other Holder or other servicer has not undertaken a plan of liquidation, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, 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 is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease the project facilities, or otherwise dispose of any property acquired pursuant to the Loan Guarantee Agreement or take any other necessary action which the Secretary deems

appropriate, 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 to recover costs incurred by 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 and DOE in effecting such recovery; second, to reimbursement of any amounts paid by 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) No action taken by the Eligible Lender or other Holder or other servicer in the liquidation 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, 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.

(m) 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 of 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 the Holder's interest in the project upon liquidation.

§ 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 other Holder or other servicer will take those actions necessary to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the guaranteed portion of the loan; and (2) upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary 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. 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 determines are required to preserve 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 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 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 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 should 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 (except environmental considerations and requirements) 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. Recommendation for any deviation shall be submitted in writing to DOE. Such recommendations must include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons in support thereof. Any deviation, however, that was not captured in the Credit Subsidy Cost will require either additional fees or discretionary appropriations.