DEPARTMENT OF ENERGY

10 CFR Part 950

RIN 1901–AB17

Standby Support for Certain Nuclear Plant Delays

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (Department) is adopting, with changes, the interim final rule published on May 15, 2006. This interim final rule established a new part to implement section 638 of the Energy Policy Act of 2005, which authorizes the Secretary of Energy to enter into Standby Support Contracts with sponsors of advanced nuclear power facilities to provide risk insurance for certain delays attributed to the regulatory process or litigation.

DATES: *Effective Date:* This final rule will become effective on September 11, 2006, except for §§ 950.10(b), 950.12(a) and 950.23 which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Department of Energy will publish a document in the **Federal Register** announcing the effective date of those sections.

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SUPPLEMENTARY INFORMATION:

I. Section 638 of the Energy Policy Act of 2005
II. Rulemaking History
III. Final Rule
A. Overview of the Rule
B. Section-by-Section Analysis
C. Cost Analysis of Standby Support Program
IV. Regulatory Review Requirements
A. Review Under Executive Order 12866
B. Review Under Executive Order 12988
C. Review Under Executive Order 13132
D. Review Under Executive Order 13175
E. Review Under the Regulatory Flexibility Act
F. Review Under the Paperwork Reduction Act
G. Review Under the National Environmental Policy Act
H. Review Under the Unfunded Mandates Reform Act
I. Review Under Executive Order 13211
J. Review Under the Treasury and General Government Appropriations Act 1999
K. Review Under the Treasury and General Government Appropriations Act 2001
L. Congressional Notification
V. Approval of the Office of Secretary

I. Section 638 of the Energy Policy Act of 2005

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (the Act) (Pub. L. 109–58, 119 Stat. 594). Section 638 of the Act addresses the President's proposal to reduce uncertainty in the licensing of advanced nuclear facilities. (42 U.S.C. 16014). The purpose of section 638 is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for such projects. Such insurance is intended to reduce certain regulatory and litigation risks for sponsors that are beyond their control in order to encourage investment in the construction of new advanced nuclear facilities. By providing insurance to cover certain of these risks, the Federal government can reduce the financial risk to project sponsors that invest in advanced nuclear facilities, which the Administration and Congress believe are necessary to promote a more diverse and secure supply of energy for the Nation.

Section 638 contains a number of provisions to establish the Standby Support Program (the ''Program''). These provisions are related to (1) the Secretary's authority to enter into contracts and details related to such contracts, (2) the establishment of funding accounts, (3) the funding of these accounts, (4) the types of regulatory and litigation delays Congress determined were to be covered by the Program, (5) the types of delays that Congress determined were to be excluded from coverage, (6) the maximum amount of coverage available for up to six advanced nuclear facilities with a distinction made for the initial two reactors and the subsequent four reactors, (7) the types of costs to be covered by the Program, (8) the requirements for a sponsor of an advanced nuclear facility, and (9) reporting requirements by the Nuclear Regulatory Commission (''Commission'').

Section 638(g) requires the Department to issue regulations to carry out section 638. This section directs the Secretary to issue an interim final rule within 270 days after enactment of the Act and to adopt final regulations within one year after enactment.

II. Rulemaking History

Prior to developing and issuing this final rule, the Department held a public workshop and published two **Federal Register** notices: a Notice of Inquiry (NOI) (70 FR 71107, November 25, 2005) and an interim final rule (71 FR 28200, May 15, 2006).

The NOI discussed the major topics related to section 638, including the types of sponsors and facilities covered, the Secretary's contracting authority, appropriations and funding accounts, covered and excluded delays, covered costs and requirements, and disagreements and dispute resolution. The NOI included a general request for comments and identified certain topics on which the Department specifically requested comments. Among other matters, the Department sought comment about how the statute could be implemented most effectively to achieve the objective of reducing the risks associated with certain delays in the advanced nuclear facility licensing process and thereby facilitate the expeditious construction and operation of new advanced nuclear facilities.

On December 15, 2005, the Department sponsored a public workshop to allow the public to provide oral comments about section 638 and the NOI. Over 60 people attended the public workshop. A transcript of the proceedings is posted at *www.nuclear.gov*. The Department received nine written comments on the NOI, including comments from the Commission, a nuclear energy trade association, several utilities and other potential sponsors, an economic consulting firm, and a public advocacy group. In addition to responding to the questions posed in the NOI, the commenters provided their general views on implementing section 638.

On May 6, 2006, the Department issued an interim final rule that established a new part 950 in Title 10 of the Code of Federal Regulations (CFR), *Standby Support for Certain Nuclear Plant Delays*. The rule includes five subparts that set forth the procedures, requirements and limitations for the award and administration of Standby Support Contracts that indemnify a project sponsor of certain costs that may be incurred due to a delay in full power operation of the sponsor's advanced nuclear facility.

Subpart A set forth the purpose, scope and applicability, and definitions of the regulation. Subpart B set forth provisions addressing the Standby Support Contract process, including the process whereby a sponsor and the Program Administrator[1] enter into a

[1] In this notice of final rulemaking, the Department distinguishes among the terms

Conditional Agreement prior to a Standby Support Contract, obligations of a sponsor prior to entering into a Conditional Agreement, the provisions of that Conditional Agreement, conditions precedent that must be satisfied prior to entering into a Standby Support Contract, funding issues related to the Standby Support Program, reconciliation of costs, and termination of a Conditional Agreement. Subpart B also addressed the provisions for each Standby Support Contract. These include general contract terms, such as the contract's purpose, the advanced nuclear facility that is the subject of the contract, the sponsor's contribution, the maximum aggregate compensation, the term of the contract, cancellation provisions, termination by sponsor, assignment, claims administration, and dispute resolution; and specific contract terms that implement section 638's provisions related to covered events, exclusions, covered delay, and covered costs. Subpart C set forth the claims administration process, including the submission of claims and payment of covered costs under a Standby Support Contract. Subpart D set forth provisions related to dispute resolution, including disputes involving covered events and disputes involving covered costs. In each case, subpart D provided a two-step process, first requiring non-binding mediation and then binding arbitration, if the parties cannot reach agreement. Subpart E set forth miscellaneous provisions about the Department's authority to monitor and audit a sponsor's activities and the public disclosure of information provided by a sponsor to the Department.

The Department received four written comments addressing the interim final rule, including comments from a nuclear industry trade association, two utilities, and a public advocacy group. In telephone communications and a meeting, interested persons provided verbal communications to Department representatives that addressed the same issues raised in written comments on the interim final rule. The Department responds to all the relevant comments in section III of the preamble to this final rule.

''Program Administrator,'' ''Claims Administrator,'' and ''Department.'' ''Program Administrator'' is used to identify situations in which a Department representative executes a Conditional Agreement or a Standby Support Contract; ''Claim Administrator'' is used to identify situations in which a Department representative administers the claims process; and ''Department'' is used to identify general statements of policy and situations involving more general matters such as funding and appropriations.

III. Final Rule

A. Overview

In today's final rule, the Department has largely adopted the provisions set forth in the interim final rule. The revised 10 CFR part 950 adopted by this final rule will become effective thirty days after the final rule's publication in the **Federal Register**. The changes between the interim final rule and the final rule will not have any effect, given that the Department anticipates that no sponsor will apply for a combined license until after the final rule takes effect later in 2006. In addition to some editorial and other non-substantive changes that modify and clarify the interim final rule, particularly in subparts C and D, the Department is making the following changes including:

- In section 950.3, the definition for ''litigation'' has been modified to include ''local courts;'' (See also 950.14(a)(4))
- In section 950.3, the definition for ''pre-operational hearing'' has been modified to state ''any Commission hearing, that is provided for in 10 CFR part 52, after issuance of the combined license that is provided for in 10 CFR part 52;'' (See also 950.14(a)(3))
- In section 950.11(b), the following clarifying sentence has been added: ''A sponsor may elect to allocate 100 percent of the coverage to either the Program Account or the Grant Account.''
- In section 950.11(c)(1), the following clarifying sentence has been added with respect to funding: ''Covered costs paid through the Program Account are backed by the full faith and credit of the United States;''
- In section 950.11(e), the provision addressing the process by which the anticipated contributions are specified in the Conditional Agreement has been clarified;
- In section 950.12(c), the provision on limitations to entering into a Standby Support Contract has been modified;
- In section 950.12(d), the following section has been added with respect to abandonment of a project and cancellation by the Department: ''(1) If the Program Administrator cancels a Standby Support Contract for abandonment pursuant to 950.13(f)(1), the Program Administrator may re-execute a Standby Support Contract with a sponsor other than a sponsor or that sponsor's assignee with whom the Department had a cancelled contract, provided that any such replacement Standby Support Contract is executed in accordance with the terms and conditions set forth in this part, and shall be deemed to be one of the subsequent four reactors under this part. (2) Not more than two Standby Support Contracts may be re-executed in situations involving abandonment and cancellation by the Program Administrator.''
- In section 950.13(f), the following has been added with respect to cancellation of a Standby Support Contract: ''(1) If the sponsor abandons construction, and the abandonment is not caused by a covered event or force majeure, the Program Administrator may cancel the Standby Support Contract by giving written notice thereof to the sponsor and the parties have no further rights or obligations under the contract.''
- In section 950.13(h), the following has been added with respect to assignment of payments: ''The Program Administrator shall permit the assignment of payment of covered costs with prior written notice to the Department.''
- In section 950.13(k), the following has been added with respect to reestimation under the Federal Credit Reform Act (FCRA) of 1990: ''The sponsor is neither responsible for any increase in loan costs, nor entitled to recoup fees for any decrease in loan costs, resulting from the re-estimation conducted pursuant to FCRA.''
- In section 950.14(b), certain types of excluded events have been deleted.
- In section 950.14, an additional section, 950.14(e), has been added to address adjustments to the inspections, tests, analysis and acceptance criteria (ITAAC) schedule.
- In section 950.20, the following has been added with respect to exclusions: ''the Department is required to establish an exclusion in accordance with 950.14(b).''
- Sections 950.21, 950.22, and 950.24 have been modified to add information reporting requirements and to clarify the Department's role in establishing an exclusion.
- Subpart D has been revised to specify that dispute resolution will be administered by the Civilian Board of Contract Appeals.

The preamble first provides a section-by-section response to the specific comments on the interim final rule and explains modifications from the interim final rule to the final rule. The preamble then provides a detailed discussion of the Standby Support Program's estimated costs.

B. Section-by-Section Analysis

Section 950.1—Purpose

In section 950.1 of the interim final rule, the Department stated that ''The

purpose of this part is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for certain delays attributed to the Nuclear Regulatory Commission regulatory process or to litigation.''

The public advocacy group commented that the Department should avoid using taxpayer funds to provide an expensive subsidy to the nuclear industry. Industry commenters stated that they believe the program should provide broad coverage and financial certainty.

The Department notes that Congress specifically authorized the Standby Support Program and provided explicit direction on calculating the premium for the insurance and allocating this premium between appropriated funds and funds from sponsors or other non-Federal sources. The Department has sought to ensure that, in implementing this authorization and direction, it put in place a Program that facilitates the construction and full power operation of new advanced nuclear facilities, protects taxpayer funds, reflects both the magnitude of the risk presented and the protection provided against that risk, and avoids undermining the safety of constructing advanced nuclear facilities. The Department continues to believe that the regulations developed by the Department are appropriate and necessary to effectuate section 638's objectives.

Multiple Incentive Programs

The Department requested comment on whether sponsors should be eligible to participate in multiple Federal Government loan guarantee or other programs intended to incentivize the construction and operation of nuclear facilities and, if so, whether clarification is needed on issues such as the amounts an entity can receive under more than one Federal program.

In response to the interim final rule, industry commenters stated that participation in the different programs established under the Act should not limit a project sponsor's eligibility for any of these programs, or the amounts that a sponsor can receive under them. Industry commenters stated that the objective of these incentives is to facilitate and encourage the construction and full power operation of new advanced nuclear facilities and that the programs are complementary, not exclusive. For example, commenters stated that the cost of any loan guarantee should be adjusted downward to reflect the reduced risk of default on the underlying debt obligation as a result of the Standby Support Program. The public advocacy group stated that the nuclear industry includes some of the country's wealthiest companies and should not be eligible for numerous subsidies for the same plant.

The Department has determined that the Act does not prohibit a sponsor from acquiring for a specific facility more than one, or even all, of the various forms of incentives provided under the Act. Therefore, in this final rule, the Department is not prohibiting a sponsor from being eligible for all of the incentive programs for which the Act makes it eligible.

Section 950.3—Definitions

Advanced nuclear facility. In the notice of interim final rulemaking, the Department took the definition of ''advanced nuclear facility'' verbatim from the Act. The Department further noted that there are likely no reactor designs that have been approved after December 31, 1993 that are ''substantially similar'' to designs that were certified before that date for which potential project sponsors have suggested interest. Nevertheless, the Department reserved the right to make a final determination if a project sponsor chooses a design that the Department has not anticipated.

The Department received two comments addressing this issue. The public advocacy group stated that companies should not be encouraged to apply for design certification at the same time as a combined license. In contrast, the industry trade association generally agreed with the definition in the interim final rule, yet requested that the Department clarify the use of the word ''approved,'' particularly with respect to what constitutes design approval. Industry further stated that under the Commission's rules in 10 CFR part 52, Commission design approval may be obtained in two ways. The design may be certified in a rulemaking proceeding, or the design may be approved in the combined licensing proceeding itself. The trade association stated that the Act does not address these two paths to design approval, and requested that the final rule state explicitly that either path to design approval is acceptable under the rule.

The Department agrees with the trade association's comment that the pathway for approval is subject to the Commission's rules under 10 CFR part 52, and that design approval may be obtained by either path. Nevertheless, the Department has determined that there is no reason to amplify or alter the statutorily specified definition. Consistent with section 638, the definition at section 950.3 states that an advanced nuclear facility must be approved by the Commission and makes no distinction as to when or how such approval is issued other then what is stated in section 638 (i.e., ''the approval is made after December 31, 1993.'') Although the Department agrees that sponsors should be encouraged to obtain design approval prior to filing a combined license application with the Commission, thereby expediting the combined license review process, such a stringent requirement is not mandated by the Act and is not necessary to support the purposes of the Standby Support Program.

Covered Event—Litigation. Section 638(c)(1)(B) refers to ''litigation that delays the commencement of full-power operations * * * '' In the interim final rule, the Department defined litigation to include only adjudication in State, federal, or tribal courts, including appeals of Commission decisions related to the combined license to such courts, and excluding administrative litigation that occurs at the Commission related to the combined license process. (See also section 950.14(a)(4) which addresses covered events.)

The Department received divergent comments on the definition of litigation. The public advocacy group expressed concern that the definition for litigation was overly expansive, claiming that it should cover only frivolous lawsuits; on the other hand, industry commenters believed it was not expansive enough. The public advocacy group disagreed with including in the definition appeals of Commission decisions to the courts and in including litigation involving safety or security issues. The industry commenters requested that administrative litigation that occurs at the Commission related to the combined license should not be excluded from the definition. The industry trade association stated that Congress did not intend to condition the coverage based on the type of litigation causing the delay or when such delay occurs. Further, the industry commenters objected to the Department's interpretation that only litigation resulting in a court order enjoining the sponsor's actions would be eligible as a covered delay.

As explained in the interim final rule, the Department has broad authority to interpret the terms in section 638, including the terms ''litigation'' and ''pre-operational hearing.'' After reviewing the comments in light of section 638, the Department has determined that it is appropriate to adopt the definition in the interim final, except for minor changes as discussed below.

Section 638(c) sets forth three types of events for coverage, which Congress terms ''Inclusions.'' These are (1) ITAAC-related delays, (2) pre-operational hearings, and (3) litigation. Based on this statutory delineation, the Department has determined that most of the requested changes to the definition set forth in the interim rule would be inappropriate and inconsistent with section 638. With respect to the public advocacy groups' request to include only frivolous lawsuits and to exclude appeals of Commission decisions to the courts, the Department has determined that such an interpretation would be inconsistent with the reference in section 638(c)(1)(B), without qualifications, to litigation that delays commencement of full power operation of the advanced nuclear facility. Obviously, litigation that is not ''frivolous'' has the potential to delay full operation of a facility. Moreover, what constitutes a ''frivolous'' lawsuit can itself be a question involving substantial uncertainty and the Department believes it would be counter to the purposes of section 638 to import this uncertainty into the Standby Support Program.

With respect to industry's specific requests, the Department has determined that most of them would likewise be inconsistent with the reference in section 638(c)(1)(B). Even if one assumes that the term ''litigation'' is ambiguous, the Department has determined that as a matter of policy, industry's suggested expansions of the term litigation are inappropriate, except for including litigation in local courts. Industry requested that the Department expand the definition of ''litigation'' to include any administrative litigation that occurs at the Commission related to the combined licensing process, and arbitration proceedings and orders. The Department reaffirms its previous determination that since section 638(c)(1)(A) covers the risk of pre-operational hearings and Commission review of ITAACs, the reference in section 638(c)(1)(B) to litigation should be interpreted to mean litigation outside the context of the Commission proceeding on the combined license. For the Department to adopt the industry's recommendation to interpret the term ''litigation'' even more broadly would effectively nullify these distinctions and undermine Congressional intent. The industry's recommended broad interpretation also likely would increase the risk that a covered event would occur and the insurance be triggered, thereby increasing (perhaps substantially) the premium for the risk insurance. The Department has determined that the better approach is to define each covered delay clearly and distinctly recognizing section 638's structure which delineates only certain delays that are eligible for cost recovery by categories, i.e., ITAAC-related delays, pre-operational hearings, and litigation.

With respect to the exclusionary language for administrative litigation at the Commission that is in the definition of litigation, this language is intended to clearly distinguish between proceedings that are conducted before the Commission from litigation that is conducted before a court of law. The Department could remove the exclusion language from the definition of litigation, but the effect would be the same. That is, a sponsor could be covered for delays associated with litigation that occurs in a court of law outside the context of the Commission, e.g., in state, federal, tribal or local courts. This definition of litigation precludes coverage for any form of proceeding that occurs before the Commission, whether or not the exclusion is expressly stated in the definition. Accordingly, the Department has determined that it would be inappropriate and unnecessary to remove the exclusion for other administrative litigation at the Commission.

Furthermore, the Department notes that by defining litigation to include only litigation in the courts, it is also excluding administrative litigation at federal or state agencies other than the Commission. As explained above, the Department interprets the Act to provide coverage for specific events. Even though proceedings at other federal or state agencies may be referred to as ''administrative litigation'' and may affect the sponsor's ability to construct or operate an advanced nuclear facility, the Department does not believe the language of the Act is properly interpreted to include those proceedings within the definition of litigation. Such an interpretation requested by the commenters would significantly expand the definition of litigation beyond the Act's objectives. As a consequence, it would also increase the cost of the risk insurance program. The Department notes, however, that such administrative proceedings may lead to court litigation and, as such, coverage for delays may be possible under the Standby Support Contract.

Similarly, the Department has determined that it would be inappropriate to expand the term litigation to cover ''arbitration'' which is defined as ''a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.'' *Black's Law Dictionary Eighth Edition* (2004). It is generally understood that such dispute resolution is outside of litigation and the court system. The Department's exclusion of arbitration from the definition of litigation is not intended to discourage parties from alternative forms of dispute resolution. Rather, the Department recognizes the value of arbitration, either to avoid litigation or as a mechanism to end litigation in court (in which case the arbitration would be encompassed by the litigation giving rise to the arbitration and thus, as a practical matter, would be covered), but believes that it is an overly broad view of the term litigation not within the coverage of section 638. The Department also notes that making the term more expansive would result in increased cost of the risk insurance and the program.

Covered events—Pre-operational Hearings. In the interim final rule, the Department defined pre-operational hearing to mean ''a hearing held pursuant to the Commission's regulation in 10 CFR 52.103.'' In the preamble of the interim final rule, the Department stated that it would be inappropriate and unnecessary to broaden the term to include all hearings taking place prior to operation or fuel load.

The industry trade association expressed its view that Congress did not intend to limit this coverage to only the hearing provided for in 10 CFR 52.103, but to any other hearings the Commission holds with respect to the part 52 licensing procedure and any Commission appeals or remands associated with the hearing. The industry trade association provided the example of hearings that may be requested, pursuant to 10 CFR 52.97, in the event a sponsor makes modifications, additions, or deletions to the combined license. It further stated that such a limitation would be contrary to Congress's intent to provide protection from delays resulting from the untested licensing process, and to remove this regulatory uncertainty as a barrier to the development of new nuclear power plants.

Based on further review, the Department has determined that it is appropriate to provide coverage for other types of Commission pre-operational hearings that occur after issuance of a combined license that are directly related to the part 52 proceeding on the combined license and are so referenced in the regulation. For

example, the Department notes that under part 52, the Commission addresses the situation where, prior to fuel load or initial operations, a party may petition to modify the terms or conditions of the combined license and in so doing may invoke procedures for a non-mandatory hearing. Thus, an expansion of the definition of pre-operational hearing to include such hearings is consistent with the language in section 638(c)(1). It is also consistent with the distinction in that section to provide coverage for two separate events: pre-operational hearings by the Commission and litigation. Based on these considerations, the Department has revised the definition for pre-operational hearing to state ''any hearing held by the Commission after issuance of the combined license that is provided for by part 52.''

However, the Department has determined that the Act's language should not be interpreted so broadly as to categorically include in the definition of pre-operational hearings any and all Commission appeals or remands associated with the hearing. The Act defines a covered delay as ''the conduct of pre-operational hearings by the Commission.'' Like the term litigation, the term pre-operational hearing is subject to interpretation. The Department has determined that as a matter of policy, the industry's suggested expansion of this definition is inappropriate. The Department recognizes that the outcome of a Commission hearing may result in additional proceedings, such as appeals and remands, which may in turn cause a delay in construction or operations. A similar outcome is also possible in the context of litigation. Nevertheless, the Department does not believe it is appropriate or necessary to define the terms pre-operational hearings or litigation to necessarily include those additional proceedings. Rather, the Department believes that it is appropriate to determine through the claims administration process whether based on the facts of the case any ensuing proceedings are part of, or the same as, the pre-operational hearing or litigation that is a covered event. The Department notes that such additional proceedings may fall within the category of an excluded event, e.g., events within the control of the sponsor.

Full power operation. In the interim final rule, the Department defined ''full power operation'' to mean the point at which the sponsor first synchronizes the advanced nuclear facility to the electrical grid. This is typically at a power level in the range of 10 to 25 percent.

Industry commenters stated that definition fails to recognize adequately that full-scale commercial operation could be delayed by judicial or administrative proceedings even after a new plant has reached 10–25 percent power levels. Industry commenters argued that what they viewed as by narrowly defining the term, the Department is attempting to shift that risk back to sponsors and their investors and lenders, which they viewed as impermissible. The industry trade association recommended that the definition of ''full-power operation'' include two triggers: (1) Power output level at or near 100 percent of its nameplate capacity and (2) the completion and resolution of any pending or ongoing hearings or litigation.

As explained in the interim final, the Department has determined that it has broad authority to interpret the terms in section 638, especially undefined terms such as ''full power operation.'' The Department concludes that the definition of full power operation in the interim final rule is appropriate, given that initial synchronization to the electric grid provides a clear, unambiguous point in time at which a new nuclear facility would have the ability to generate revenue. The Department views the industry's recommendation for power output at or near 100 percent as far too open-ended, given that a sponsor could make a business or operational decision to operate a facility at a level of less than 100 percent for a very long time or even permanently; there is no good reason why such a situation should result in long-term or permanent coverage for the reactor under the Program. The Department agrees that the sponsor should be eligible to submit claims for covered events prior to the resolution of pending or ongoing hearings or litigation, so long as full power operation has not commenced. Accordingly, the resolution of any pending or ongoing hearings or litigation is confined to those events that happen prior to first grid synchronization. Based on this analysis, the Department has determined that it would be inappropriate to modify the definition for full power operation.

Incremental Costs. In the interim final rule, the Department specified that ''incremental costs'' mean the incremental difference between: (1) The fair market price of power purchased to meet the contractual supply agreements that would have been met by the advanced nuclear facility but for a covered delay; and (2) the contractual price of power from the advanced nuclear facility subject to the delay.

The Department received two comments addressing this issue. The industry trade association commented that the concept of incremental costs is applicable to new nuclear power plants constructed as merchant power generators. However, it stated that a nuclear plant built by a regulated utility as part of its rate base may not have a contract to sell the output from the facility because the plant's output becomes part of general system supply. The trade association commented that if the nuclear plant start is delayed, a regulated utility may have to purchase power from the market to cover needs, or it may be able to supply that shortfall from general system supply. If it does purchase power, the provisions related to fair market price at section 950.25(2)(i) would apply. However, if the utility does not purchase replacement power from the market, the commenter requested that the regulations provide an alternative means to calculate the fair market price for covering demand from within its system.

The public advocacy group stated that the term ''fair market price of power'' needs further clarification within the regulations. Specifically, it requested that the Department make a distinction between ''merchant power plants,'' which are only selling into the ''market,'' and power plants that are in a utility's ''rate base'' and selling to retail customers under state regulation.

The Department has determined that it is neither necessary nor appropriate to create an alternative cost recovery mechanism for a sponsor that does not contract for replacement power from the market. Section 638 provided clear directions for mitigating a sponsor's delay cost for debt and contractual supply agreements. By allowing a sponsor to mitigate its cost of delay through one or both mechanisms, the Department believes that cost mitigation has been addressed for the scenarios highlighted by industry. In addition, the Department believes that the definition of ''fair market price'' stated in the interim final rule is sufficient and addresses potential gaming scenarios, given that the determination of the fair market price is the lower of two options: (A) The actual cost of the short-term supply contract for replacement power, purchased by the sponsor, during the period of delay, or (B) for each day of replacement power by its day-ahead weighted average index price in $/MWh at the hub geographically nearest to the advanced nuclear facility as posted on the previous day by the Intercontinental

Exchange (ICE) or an alternate electronic marketplace deemed reliable by the Department.

Sponsor. In the interim final rule, the Department defined ''sponsor'' to mean any person that has ''applied for'' a combined license and such application by the person has been docketed by the Commission. The Department believed that such a definition was necessary to ensure that an application was sufficient for docketing by the Commission.

The nuclear trade association requested that the term sponsor be expanded to address situations in which several entities apply for a combined license. Specifically, it requested that the term ''sponsor'' be defined in section 950.3 of the regulation to mean

''a person or persons whose application for a combined license for an advanced nuclear facility has been docketed by the Commission. Multiple applicants involved in the same advanced nuclear facility are considered a single sponsor. Where multiple applicants are involved, the applicant for authority to operate the advanced nuclear facility is designated the lead sponsor and acts as the sponsor for purposes of these regulations. The lead sponsor is responsible to the Department for providing information, making or receiving notices, and administering claims on behalf of the applicants. Applicants having an ownership share in the advanced nuclear facility share in the benefits and obligations of the Standby Support Agreement in pro rata proportion to their NRC licensed ownership in the advanced nuclear facility.''

The Department generally agrees with the goal of the comment that multiple sponsors should define their relationships and obligations. Nevertheless, the Department believes that it is inappropriate and unnecessary to specify by regulation such an arrangement, particularly since the term ''sponsor'' is expressly defined in section 638, and a sponsor or sponsors that have made such arrangements would qualify for coverage under the existing definition. The Department further notes that if such a definition were imposed by regulation, it would reduce the flexibility among potential sponsors. Accordingly, the Department has decided not to amend the definition for ''sponsor'' in section 950.3.

Subpart B—Standby Support Contract Process

Sections 950.10—Conditional Agreement

Section 638(b) authorizes the Secretary to enter into Standby Support Contracts with sponsors of advanced nuclear facilities. That subsection requires that sufficient funding be placed in designated Departmental accounts before a Standby Support Contract may be executed. In the interim final rule, the Department adopted a two-step process in which a Conditional Agreement can, for the qualifying sponsors, be converted into a Standby Support Contract at a later date, if the sponsor meets certain conditions and budgetary resources are provided. The Department noted that it has significant discretion to establish the procedures needed to manage the Standby Support Program, provided that they are consistent with section 638.

Industry commenters generally agreed with the two-step approach. In contrast, the public advocacy group asserted it was unnecessary and inappropriate. The Department continues to believe that such a two-step implementation process is appropriate because it allows the Department and potential sponsors to manage the difficult timing issues inherent in the federal appropriations process and business concerns in planning and financing a multi-billion dollar advanced nuclear facility.

In section 950.10(b)(1)–(5), the Department requires a sponsor to provide certain information to be eligible to enter into a Conditional Agreement. This includes an electronic copy of its complete combined license application docketed by the Commission, a summary schedule of the project, a detailed business plan, the sponsor's estimate of the amount and timing of payments for debt service and the estimated dollar amount to be allocated to the sponsor's covered costs.

The nuclear trade association stated that it was inappropriate for the Department to request what it termed project specific background information, claiming that this information had little or no bearing on calculating the budget score under FCRA.

The Department has determined that to ensure appropriate regulatory oversight of the Standby Support Program, it is necessary for the Department to request the information set forth in section 950.10(b)(1)–(5). Insurers of large construction projects typically obtain such information to establish due diligence. Absent such oversight, the Department would not be adequately fulfilling its responsibilities for overseeing a program with such potentially large payouts, particularly its responsibility to facilitate the full power operation of advanced nuclear facilities and to protect taxpayer funds. In addition, this information, along with other information, will assist the Department in determining the necessary amount of funding for a potential Standby Support Contract with the sponsor. Lastly, the Department believes that this information will assist the Department in refining estimated cash flows payouts in the event a claim is submitted and in estimating the full power operation schedules.

National Environmental Policy Act (NEPA)

In section 950.10(c), the Department set forth the bases upon which it will determine whether to enter into a Conditional Agreement. In the interim final rule, the Department noted that it will determine whether the Conditional Agreement may be issued consistent with applicable statutes or regulations, including the National Environmental Policy Act (NEPA). The Department anticipates that its environmental review under NEPA for the Conditional Agreement or Standby Support Contract would acknowledge or be based upon the NEPA review conducted by the Commission in relation to its review and approval of the sponsor's combined license application.

The industry commented that it generally supported the Department's position about NEPA review in the interim final rule. Nevertheless, it expressed concern that the Commission's NEPA review is likely to occur during the Commission's review of the combined license application, and therefore it is unlikely that a Commission NEPA review would have occurred at the time of the Conditional Agreement. Accordingly, it urges the Department to make a determination that entering into a Conditional Agreement is not a major federal action and does not trigger NEPA.

The Department believes that it is unlikely that a Commission NEPA review would have occurred at the time a Conditional Agreement is issued, and generally agrees that entering into a Conditional Agreement would not be a major federal action. The Department notes that prior to issuance of a combined license, which is a prerequisite for the Department to execute a Standby Support Contract, the Commission would have to complete its NEPA review of the proposed advanced nuclear facility.

Section 950.11 Terms and Conditions of the Conditional Agreement

In the interim final rule, the Department stated that a sponsor should know its funding needs prior to execution of the Standby Support Contract, and included sections 950.11 (b), (c) and (d) in the regulations to reflect the need for specificity, transparency and accuracy on funding of Standby Support Contracts prior to

execution. In particular, section 950.11(b) required each Conditional Agreement to include a provision specifying the amount of coverage to be allocated under the Program Account and Grant Accounts.

Industry commenters stated that the rule should explicitly indicate that a sponsor is not obligated to allocate coverage between the Program Account and Grant Account and may elect to allocate 100 percent of the coverage to either the Program Account or Grant Account.

The Department believes that the interim final rule permitted such an allocation of coverage, but agrees with the commenter that it would be appropriate to expressly state this in the regulatory text. Accordingly, the Department today amends section 950.11(b) to state that ''a sponsor may elect to allocate 100 percent of the coverage to either the Program Account or the Grant Account.'' The Department notes that industry made an identical comment with respect to 950.11(c)(1).

950.11(c) Funding

In section 950.11(c) of the interim final rule, the Department specified that each Conditional Agreement contain a provision that the Program Account or the Grant Account be funded in advance of the Department entering into a Standby Support Contract. After explaining the funding of these accounts under FCRA, the Department further explained in the preamble that it was within the Department's discretion to interpret section 638 as authorizing and providing that Standby Support Contracts are backed by the full faith and credit of the United States, even though section 638 did not include that precise phrase.

The industry group requested that the regulatory text include an unequivocal statement that payment of costs covered under the Program Account is backed by the full faith and credit of the United States. It argued that such a statement in the regulation was necessary for financing purposes.

The Department has modified section 950.11(c) to state that ''Covered costs paid through the Program Account are backed by the full faith and credit of the United States.'' The Department notes that it is making this modification to facilitate financing of advanced nuclear facilities, even though such an express statement is not actually required.

Also in section 950.11(c), the Department specifically addressed how the Standby Support Contracts will be funded. Among other things, that section states ''[u]nder no circumstances will the amount of the coverage for payments of principal and (sic) interest under a Standby Support Contract exceed 80 percent of the total of the financing guaranteed under that Contract.''

The industry trade association objected to the provision prohibiting payments to exceed 80 percent of the total financing. It expressed its view that this provision reflects the Office of Management and Budget (OMB) guidance in OMB Circular A–129, but that this guidance is merely ''discretionary.'' The commenter further stated that the Department's inclusion of this provision reflected ''chronic confusion in the May 15 Rule over whether the Standby Support Program Account is delay insurance or a loan guarantee program.''

The commenter is correct that this provision reflects the policy set forth in OMB Circular A–129, which provides guidance for all government programs covered by FCRA. The same policy that informed the 80 percent threshold in OMB Circular A–129 also informs the Department's determination and judgment that this threshold is appropriate for the Standby Support Program. Moreover, as noted in the preamble to the interim final rule, the Department views the coverage provided through the Program Account to be a loan guarantee for purposes of FCRA and thus backed by the full faith and credit of the United States; and therefore governed by the terms of Circular A–129. Insofar as the Department uses this analysis to explain why it is appropriate and permissible to extend the full faith and credit of the United States even though those words are not used in section 638, the Department believes it should be consistent with other policies applicable to implementing loan guarantee authorities, where appropriate.

950.11(d) Reconciliation

In section 950.11(d), the Department specified that ''Each Conditional Agreement shall include a provision that the sponsor shall provide no later than ninety (90) days prior to execution of a Standby Support Contract sufficient information for the Program Administrator to recalculate the loan costs and the incremental costs associated with the advanced nuclear facility, taking into account whether the sponsor's advanced nuclear facility is one of the initial two reactors or the subsequent four reactors.''

The industry trade association objected to this provision, claiming that the concept of re-calculating the loan cost was inappropriate. It requested that the Department and OMB establish a procedure through which the loan cost and insurance premium are fixed at the time of the Conditional Agreement consistent with FCRA. The commenter further recommended that any increase in loan cost come from permanent indefinite budget authority.

The Department has determined that cost reassessment is consistent with other programs that employ a two-step process for approval. The Department further notes that the government would be remiss in its duty to taxpayers if it did not reassess the costs, given that several years typically will elapse between signing a Conditional Agreement and a Standby Support Contract. Failure to make such a reassessment would not be consistent with FCRA and sound financial management practices. The Department further notes that the permanent indefinite budget authority is available only for reestimates of the loan cost covered by an existing Standby Support Contract, not for changes in cost prior to the execution of the Standby Support Contract. Once the Standby Support Contract has been executed, any re-estimation costs would be covered from the Treasury's permanent indefinite budget authority consistent with FCRA.

Limitations

In section 950.11(e) of the interim final rule, the Department specified situations in which the Conditional Agreement should no longer remain in effect. Specifically, if the amount of appropriated funds is not sufficient to fund the statutorily required costs, the sponsor was given the option to either (1) not execute a Standby Support Contract or (2) provide additional contributions to fund the total amount of coverage in either the Program Account, Grant Account, or both accounts as specified in the Conditional Agreement. The Department believed that these provisions take into account the change in circumstances that may occur between the time of the Conditional Agreement and the Standby Support Contract. The provision also provided a sponsor the option either to enter into a contract or forego that opportunity.

The industry trade association commented that in addition to the two options set forth in section 950.11(e), the sponsor should be given two more options: First, to hold open its right to execute a Standby Support Contract until such time as appropriated funds become available, either through the normal appropriations process or through reprogramming. Second, the trade association requested that a

sponsor should be entitled to elect a reduced level of coverage.

The Department has determined that the first option would reduce flexibility in executing a Standby Support Contract and administering the Standby Support Program. The Department believes that it would be counter to the goal of facilitating full power operation of advanced nuclear facilities to permit a sponsor to hold a contract while waiting for funds that Congress may never appropriate, particularly since a different sponsor may be willing to pay the cost and initiate construction of an advanced nuclear facility.

The Department has determined that the second option is consistent with the goal of facilitating full power operation, and that this goal can be achieved at a lower cost to the government. The Department has modified section 950.11(e)(2) to provide the sponsor with the option to elect a reduced level of coverage based on the amounts deposited in the Program Account and Grant Account. However, to protect the Department from any potential claims by a sponsor for the maximum amount of coverage available under section 638, the Department has also added language to this section to make it clear that the Department is not responsible or liable for any claims by the sponsor for additional coverage.

950.11(f) Termination of Conditional Agreement

In section 950.11(f) of the interim final rule, the Department set forth five situations in which a Conditional Agreement remains in effect until a certain event. For instance, 950.11(f)(4) stated that event was when ''The Program Administrator has entered into Standby Support Contracts that cover three different reactor designs, and the Conditional Agreement is for an advanced nuclear facility of a different reactor design than those covered under existing Standby Support Contracts; and 950.11(f)(5) stated ''The Program Administrator has entered into six Standby Support Contracts.''

The industry trade association stated that it generally had no objection to section 950.11(f), but that the situations under clauses (4) and (5) should accommodate the circumstances where an existing Standby Support Contract is terminated or cancelled. The commenter requested that these two provisions be modified with the phrase ''such Standby Support Contracts have expired in accordance with the stated term thereof pursuant to 10 CFR 950.13(e).''

The Department has concluded that it would be inappropriate to add this language to the regulations as suggested by the commenters. Nevertheless, as discussed further in relation to section 950.12(d) there are limited circumstances under which the Department would consider re-executing a Standby Support Contract; in such circumstances, not more than two Standby Support Contracts may be re-executed by the Program Administrator in situations involving abandonment and cancellation. In addition, in those limited circumstances and conditions, a sponsor or sponsors would be in a position to initiate the process under these regulations of executing a Conditional Agreement and becoming eligible for a Standby Support Contract.

Sections 950.12, 950.13 and 950.14—Standby Support Contract

In the interim final rule, the Department noted that it is sufficient to include the critical contract terms in a regulation rather than provide a sample contract. The Department stated that a sample contract was not necessary, given that a sponsor could appropriately evaluate the potential contract's effect on risk allocation and financing during the pre-contract discussions set forth in sections 950.10 and 950.11.

The industry trade association agreed with the Department that it is not necessary to provide a sample contract in the regulation; nevertheless, it requested that the Department expeditiously develop a standardized contract with formal stakeholder input. One utility favored including a contract in the regulation.

The Department has determined that it is not necessary to include a Standby Support Contract in the regulation for the reasons set forth in the interim final rule. After completing the rulemaking, the Department intends to develop a Standby Support Contract form consistent with 10 CFR part 950 and will consider whether to provide for public input.

Section 950.12—Standby Support Contract Conditions

Conditions Precedent

In section 950.12(a) of the interim final rule, the Department set forth nine conditions precedent that a sponsor must fulfill to be eligible to enter into a Standby Support Contract. Among these conditions that a sponsor must fulfill are ''[d]ocumented coverage of required insurance for the project'' (950.12(a)(5)), and ''a detailed systems-level construction schedule that includes a schedule identifying projected dates of construction, testing and full power operation of the advanced nuclear facility and which the Department will evaluate and approve.'' (950.12(a)(8)).

The industry trade association agreed that seven of the nine conditions precedent were appropriate. It nevertheless requested that the Department delete condition (5) related to documentation of required insurance coverage, claiming that such documentation is not relevant to Standby Support for covered delays. Similarly, the trade association requested that the Department delete condition (8) related to the systems-level construction schedule, claiming that this information is unnecessary to the Standby Support Program. It claimed that the Department's request for this information ''represents an unnecessary interjection of the Department into the construction process'' given that the construction schedule will be determined between sponsors, their contractors, and their lenders. The industry further requested that the Department should not evaluate or approve the construction schedule.

The Department has determined that to protect taxpayer funds and to ensure an appropriate level of regulatory oversight for a program with such potentially large payouts, it is appropriate to obtain the insurance information set forth in condition (5) and the construction schedule set forth in condition (8). The Department notes that both types of information are readily available to a sponsor, given that the sponsor must have this information to obtain financing from a lender and a combined license from the Commission. With respect to the construction schedule, this information has direct relevance to the timing of possible claims, e.g., projected timing of full-power operation. Consequently, this information is necessary for the effective administration of the Standby Support Contract even if, and particularly because, it is subject to change. Nevertheless, the Department agrees that it is not necessary for the Department to approve the construction schedule and thus has deleted this term in section 950.12(a). Further, the Department has revised condition (5) to state ''[d]ocumented coverage of insurance required for the project by the Commission and lenders.''

Funding and Limitations

In section 950.12(b) of the interim final rule, the Department specified that no later than thirty days prior to execution of the Standby Support Contract, funds in an amount sufficient to fully cover the loan costs or incremental costs as specified in the

Conditional Agreement shall be deposited in the Program Account or the Grant Account. The purpose of this provision is to ensure that the administration and funding of the Standby Support Program occurs in an efficient and orderly manner.

The industry trade association objected to the requirement that the funds need to be deposited 30 days in advance of the contract's execution. It requested that a sponsor be able to meet this condition simultaneous with closing on the financing.

The Department is required by section 638 to deposit the necessary funds in the Program Account or Grant Account before a contract is executed. While the Department appreciates the fact that a sponsor's financing arrangements may be complicated and a simultaneous closing would be desirable, the Department requires a certain amount of time prior to contract execution to ensure compliance with the requirements of the Act and coordination of the Department's administrative functions. Accordingly, the 30 day time period specified in the interim final rule is appropriate and necessary.

Cancellation by Abandonment

In its comments, the trade industry recommended the Department allow for Standby Support Contracts to ''roll over'' as an added incentive to advanced nuclear facility construction. In section 950.12 of the final rule, the Department has added a provision to address the situation where a sponsor may abandon a project and the Department may determine it is appropriate and consistent with the goal of the Standby Support Program to re-execute a contract. In accordance with this goal, any new contract under this provision would be deemed to replace a previously executed contract and therefore not exceed the mandate to facilitate the construction and operation of six new advanced nuclear reactor facilities.

Specifically, section 950.12(d) provides for the re-execution of a Standby Support Contract under certain conditions of abandonment pursuant to section 950.13(f)(1). The Department anticipates that situations involving abandonment are likely to be rare or non-existent given that a sponsor will have expended millions of dollars and cleared most of the regulatory and litigation hurdles once it has executed a Standby Support Contract and commenced construction. The Department has included language indicating that cancellation of a Standby Support Contract as a result of a sponsor's abandonment permits the Program Administrator to re-execute not more than two new Standby Support Contracts, provided that the new contract is executed in accordance with the terms and conditions of part 950 and such contracts are deemed to be one of the subsequent four reactors under part 950. That is, any new contract under this provision would be deemed to replace one of the subsequent four reactors, and thus would be eligible for coverage in the amounts provided for such reactors.

Section 950.13—Standby Support Contract: General Provisions

In section 950.13 of the interim final rule, the Department specified that each Standby Support Contract include provisions addressing basic contract terms, including the contract's purpose, covered facility, sponsor contribution, maximum aggregate compensation, the term, cancellation, termination by a sponsor, assignment, claims administration, and dispute resolution.

The industry group stated that it had no objection to most of these provisions, but nevertheless provided comment on four of these provisions: the cancellation provisions in (f), termination in (g), assignment in (h), and re-estimation in (k).

Cancellation

In section 950.13(f)(2), the Department set forth the bases upon which a Standby Support contract can be cancelled by stating that if a sponsor does not require continuing coverage under the contract that the sponsor may cancel the contract by giving written notice to the Program Administrator.

Industry commenters stated that they had no objection to section 950.13(f)(2); however, they commented that the Standby Support coverage should explicitly provide that in the event of cancellation by the Department, the sponsor, or as agreed by the parties, the Standby Support coverage should ''roll over'' both in terms of (1) making available the full 100 percent coverage to the first of the second four reactors in the event the contract that was cancelled was one of the first two contracts and (ii) making available a Standby Support Contract to the next project sponsor with a Conditional Agreement in the queue. (The commenter was of the mistaken belief that a potential sponsor that entered into a Conditional Agreement would have a higher priority in a ''queue;'' in fact, the Department is not creating a ''queue'' under the regulations.)

The Department has determined that Section 638(d) should be interpreted as not permitting a process that would allow a sponsor to cancel its contracts thereby allowing the contracts to ''roll over'' to a sponsor with an existing contract. This process could potentially create a total of six ''premium'' contracts (*i.e.*, contracts with coverage up to $500 million) going beyond the Act's cost and coverage limitation for the initial two reactors and subsequent four reactors. In addition, the purpose of risk insurance is to provide an incentive for sponsors to construct and operate new advanced nuclear power facilities. Once the Department and a sponsor have entered into a Standby Support Contract, the Department believes that it has provided the appropriate level of incentive and the proper amount of coverage. Accordingly, no additional coverage is needed, because a sponsor had decided to construct a new advanced nuclear facility.

However, the Department has determined that there could be situations where a sponsor is unwilling or unable to continue with the construction of a new nuclear plant and the Department may have to terminate the contract. In those instances, it may be prudent for the Department to re-execute a contract and it would be consistent with section 638 and its objectives for the Department to do so. Section 950.13(f) is modified to provide for the situation in which the Program Administrator may cancel a contract for abandonment of the project by the sponsor, where such abandonment is not caused by a covered event or force majeure.

Termination by Sponsor

Under section 950.13(g), if a sponsor elects to terminate a Standby Support Contract, the sponsor or any related party is prohibited from entering into another Standby Support Contract. The Department stated that such a provision is necessary to prohibit potential sponsors from ''gaming'' the Standby Support Program. Specifically, a sponsor could be on the verge of full power operation of an advanced nuclear facility, without the need to make any claims on the Standby Support Program. Absent this provision, the sponsor could terminate its initial Standby Support Contract and then enter into a new contract for a different facility.

The industry trade association objected to this provision, claiming that it is overbroad and may, among other things, penalize sponsors who own partial interests in different projects. The industry requested that the Department either delete 950.13(g) or limit the prohibition to situations in which a ''sponsor elects to terminate its

Standby Support Contract unless the sponsor has suspended, cancelled or terminated construction of the reactor covered by such contract.''

The Department has determined that it would be appropriate to modify section 950.13(g) to include the commenters requested limitation as modified; *i.e.*, ''sponsor elects to terminate its Standby Support Contract unless the sponsor has cancelled or terminated construction of the reactor covered by such contract.'' The Department did not include a provision where the sponsor may merely ''suspend'' construction as that situation does not avoid possible ''gaming'' of the system by a sponsor. By adding the additional language as stated, the Department believes that the regulations provide the appropriate balance between preventing a sponsor from ''gaming'' the Program, while allowing a sponsor to cancel or terminate a no longer viable Standby Support Contract. The Department notes that the Department and taxpayer funds are sufficiently protected, in a situation in which the entire reactor project is terminated.

Assignment

In section 950.13(h) of the interim final rule, the Department required each Standby Support Contract to include a provision specifying the assignment of a sponsor's rights and obligations under the Standby Support Contract. Specifically, this provision stated that the sponsor is permitted to assign the rights under the contract with the Secretary's prior approval. The sponsor must obtain this approval, in writing, prior to assigning such rights.

The industry trade association commented that the assignment provision should address two types of assignment: (1) Assignment of payments, and (2) assignment of the Standby Support Contract. As for the assignment of payments, it recommended that each Standby Support Contract allow the assignment of covered costs to the lenders of the project with notice, but without prior Department consent. The commenter claimed that assignment of payment is a necessary condition of debt financing. As for the assignment of the contract itself, including the rights and obligations under the contract, the industry trade association commented that the Standby Support Contract should be assignable without the requirement of prior Department consent to any license transferee approved by the Commission.

The Department has determined that the assignment of payments, without the Department's prior consent, is appropriate and consistent with standard financing arrangements for construction projects. The final rule is modified to permit an assignment of payments with prior notice to the Department to facilitate contract administration. However, the Department has determined that to ensure proper regulatory oversight, it is necessary for the Department to retain the provision requiring prior approval of any rights and obligations under the Standby Support Contract. The Department anticipates that it will consent to any license transferee approved by the Commission, but is not prepared at this point to abdicate to the Commission this responsibility under a program administered by the Department.

Reestimation

In section 950.13(k) of the interim final rule, the Department required each Standby Support Contract to include a provision specifying that consistent with FCRA, the sponsor provide all needed documentation to allow the Department to annually re-estimate the loan cost (as defined by FCRA) needed in the financing account under 2 U.S.C. 661a(7) funded by the Program Account.

The industry trade association did not object to the Department re-estimating the loan cost of the Standby Support Contract on an annual basis consistent with FCRA once the contract has been executed. However, the commenter requested that this provision should expressly state that any increase in loan cost resulting from the re-estimation shall be covered from the permanent indefinite budget authority that is available for this purpose. Under FCRA, any increase in loan costs resulting from the re-estimation would be covered by the Treasury general fund through permanent indefinite budget authority; similarly, any decrease in loan costs resulting from re-estimation would be paid to the Treasury general fund. To address any uncertainty, however, this section is modified to state that any changes in loan costs resulting from the re-estimation are neither the responsibility of, nor an entitlement to the sponsor.

Section 950.14—Covered Events, Exclusions, Covered Delay, and Covered Costs

In section 950.14 of the interim final rule, the Department set forth provisions related to situations in which the Secretary will pay ''covered costs.'' Among the situations expressly set forth in section 638(c)(1) are: (A) ''the failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria [ITAAC] established under the combined license or the conduct of preoperational hearings by the Commission. * * *'' or (B) ''litigation that delays the commencement of full-power operations. * * *''

Covered Events

In section 950.14(a) of the interim final rule, the Department explained that it is necessary to add the term ''covered event'' to reflect that not all events appearing to fall under section 638(c)(1) will warrant compensation. Compensation is dependent on whether a covered event in fact leads to a delay in full power operation. For instance, there may be a delay in the Commission staff's meeting the ITAAC review schedule for an individual ITAAC, but the delay does not actually cause a delay in full power operation, because other factors may have caused the delay. In addition, there may be a delay in meeting the ITAAC review schedule but the ITAAC-related delay may have no actual effect on a facility obtaining full power operation. The same may be true for delays attributable to a pre-operational hearing or litigation. A discussion relating to the pre-operational hearing and litigation are addressed in the definition section of this preamble.

ITAAC Delays.

In section 950.14(a)(1) of the interim final rule, the Department required each Standby Support Contract to include a provision setting forth a two-tier level of review for assessing whether an ITAAC-related delay should be considered a covered event.

In its comments, the industry trade association agreed with the two-tier approach for assessing whether an ITAAC-related delay should be considered a covered event. It further commented that the final rule should outline a process for the adjustment of the ITAAC review schedule, to which both parties must agree. The commenter then stated the ITAAC review schedule should not be changed without express approval by both the sponsor and the Department. In addition, it stated that the last agreed-upon ITAAC review schedule would remain in place and be used to determine covered events, until an updated schedule was established.

The Department agrees with the comment about the ITAAC review schedules. An additional section has been added to section 950.14 (950.14(e)) to address the process for adjustments to the ITAAC schedule.

Exclusions—Burden of Proof

Section 638(c)(2) expressly precludes the Secretary from paying costs resulting from three general causes: ''(A) the failure of the sponsor to take any action required by law or regulation; (B) events within the control of the sponsor; or (C) normal business risks.''

In section 950.14(b)(2) of the interim final rule, the Department set forth a non-exhaustive set of example exclusions, including situations involving the sponsor's failure to take action required by law or regulation, situations within the control of a sponsor, and normal business risks.

In addition to comments about specific exclusions listed in 950.14(b), the industry trade association provided general comments about causation and burden of proof. Specifically, the trade association stated that consistent with insurance law, it should be the responsibility of the Department to establish whether an exclusion is applicable to a given situation. It further recommended a specific regulatory provision to address causation. The commenter stated that clear standards and proper allocation will simplify contract administration, facilitate claims determinations, and minimize disputes.

The Department generally agrees with the comment recommending that the regulation more precisely address causation and burden of proof. With respect to establishing an exclusion, the industry trade association is correct that an insurer is typically responsible for establishing an exclusion. (See 7 Couch on Insurance 101:63 (3rd ed. 2005) which states ''[i]n keeping with the general rules of proof, any causation required to bring a loss within positive coverage terms of the [insurance] policy generally must be shown by the insured or person seeking coverage, while the insurer bears the burden of showing any causation necessary to bring the case within an exclusion for coverage.'') In recognition of this general standard applicable to insurance contracts, the Department is modifying section 950.20 as a matter of policy to provide that ''[a] sponsor is required to establish that there is a covered event, a covered delay and a covered cost; the Department is required to establish an exclusion in accordance with 950.14(b).''

Further, sections 950.21, 950.22 and 950.24 are also modified to clarify the Department's role in establishing an exclusion. The modifications in these sections clarify that the Department's role in establishing an exclusion is conditioned on the sponsor's cooperation in providing information to the Department. To insure the Department's ability to establish an exclusion is not unreasonably hampered by the sponsor, the Department is modifying section 950.22 to require the sponsor to provide to the Department information in its possession that is relevant to the Department's claim of an exclusion. For example, in the case where the Department claims a delay is an exclusion because it was ''within the sponsor's control,'' the Department may require the sponsor—the party likely in possession of the best available information—to provide relevant information to the Department in support of its claim for exclusion. Failure of a sponsor to provide the necessary and relevant information to the Department would be grounds for denial of the sponsor's claim for coverage. In addition, the Department is modifying section 950.21(b) to add a clause requiring the sponsor to certify their claim for covered costs, as well as certify the absence of an exclusion.

Exclusions

In section 950.14(b) of the interim final rule, the Department sets forth the statutory exclusions and provides examples of excluded events as requested by commenters in response to the NOI and public workshop. The Department has modified this section to clarify that the Standby Support Contracts shall include the statutory exclusions and, within those exclusions, provide example types of events that may constitute an exclusion. The industry trade association had no objection to most of the examples listed, but objected to certain provisions, including clauses (1)(ii), 1(iii) and (2)(iii) that state, respectively:

(1)''The failure of the sponsor to take any action required by law, regulation, or ordinance, but not limited to * * * (ii) The sponsor's re-performance of any inspections, tests, analyses or re-demonstration that acceptance criteria have been met due to Commission non-acceptance of the sponsor's submitted results of inspections, tests, analyses, and demonstration of acceptance criteria; [or]

(iii) Delays attributable to the sponsor's actions to redress any deficiencies in inspections, tests, analyses or acceptance criteria as a result of a Commission disapproval of fuel loading.''

The commenter stated that leaving these items as examples of excluded events could result in excluding coverage where the sponsor's actions may result from the Commission's failure to comply with the ITAAC schedule or other fault of the Commission, such as an inspector's non acceptance of ITAAC or an unwarranted Commission determination of deficiency. The commenter requested that the Department remove these items from the regulation, because they should be left to the claims administration process and not be a categorical exclusion.

The Department has determined that most of the examples provided of excluded types of events are appropriate as stated in the rule and that providing such examples is not an improper incursion into the claims administration process. The Department agrees with the comment that the claims administration process is the appropriate venue to assess the specific facts of a sponsor's claim of a covered event and the Claims Administrator's determination of an exclusion. The examples provided in the regulation are meant to provide guidance for the parties in that process; the judgment of the Claims Administrator on a particular claim necessarily will be based on the facts that underlie the claim.

The examples provided in subsection 950.14(b)(1) and (2) are consistent with the language and intent of the Act. The intent of section 638 is to provide coverage to a sponsor for specified events in the untested regulatory process that are not the result of the sponsor's failure to comply with laws and regulations or are beyond the sponsor's control. If a sponsor has not met its ITAAC, as determined by the Commission, and needs additional time to satisfy the Commission's expectations, then that delay is not covered under section 683 and no further inquiry is needed into whether or not the Commission's finding was ''warranted.'' Although not a stated example in the rule, the same reasoning would apply to any delay associated with a sponsor's need to redress some noncompliance with a law or regulation as determined by a court. Accordingly, the Department will not modify the rule to delete the examples provided of the type of events that may be exclusions.

The industry trade association also objected to the type of event in clause (3)(iv) which provides an exclusion for ''[n]ormal business risks, including but not limited to * * * (iv) Acts or decisions, including the failure to act or decide, of any person, group, organization, or government body (excluding those acts or decisions or failure to act or decide by the Commission that are covered events).'' The trade association requested that this clause be deleted, claiming that it was overly broad.

This clause is patterned after provisions in standard insurance

contracts covering the construction of large facilities. The Department continues to believe that it is necessary to continue its reference to acts or decisions by other government bodies like State and local governments, since such actions would be normal business risks faced by an entity constructing a large facility and go beyond the intended coverage under section 638 for Commission-related delays, even though they may be within coverage for litigation-related delays. To reiterate, however, this event is identified as an example of an event that would constitute a normal business risk to provide guidance to the parties. The ultimate determination of whether an event constitutes an exclusion in the context of a Standby Support Contract will be addressed through the claims administration process. Nevertheless, upon further review, the Department has determined that by including reference to ''any person, group or organization,'' the clause was overly broad. Accordingly, this provision is modified to delete that reference.

The industry trade association also objected to clause (3)(viii) which includes an exclusion for ''unrealistic and overly ambitious schedules set by the sponsor.'' It claimed that this exclusion was unnecessary and unwarranted, since it reasoned that this phrase is not referring to ITAAC schedules since those are approved by the Commission or Department. Further, it stated that any construction schedule would be determined by the sponsor and its contractors or lenders. The commenter concluded that whether a schedule is unrealistic or overly ambitious is not relevant to whether a covered event occurs.

The Department has determined that the exclusion for unrealistic or overly ambitious schedules is not appropriate. Any covered events attributable to ITAAC schedules are already covered under section 950.14(a)(1) and (2). Further, section 950.14(b)(2)(i) more appropriately addresses project planning and construction problems that are events within the control of the sponsor. In reconsidering the exclusion in 950.14(b)(3)(viii), the Department has determined that the phrase ''unrealistic and overly ambitious schedules set by the sponsor'' is ambiguous and would be difficult to apply. Accordingly, the Department has deleted this provision.

Lastly, the industry trade association took exception to the Department's covered event exclusion in (b)(2)(v) for litigation-related delays in those situations where a sponsor decides not to continue construction or attain full power operation unless such action is required by a court order. The industry trade association noted that in many cases litigation may cause numerous and substantial delays without a court order mandating the work stoppage. The industry trade association argues that the Department improperly categorically excluded such delays, and should allow the claims process to be used to determine whether or not the delay is covered.

The Department agrees that the exclusion language in the interim rule may be misinterpreted, and modified the rule to eliminate this type of exclusion and avoid unnecessary confusion. Nevertheless, the Department stresses that elimination of this provision does not relieve the sponsor of its substantial burden to prove that any litigation-related delay is a covered delay, and that the Department will look critically at a sponsor's claim that litigation without an order to stop activities was the cause of delay. The Department acknowledges that, even in the absence of a court order directly prohibiting construction or operational activities, pending litigation or court decisions may cause a sponsor to delay or suspend its activities thus delaying full power operation. However, depending on the nature of the litigation or court order, the decision whether to continue activities at risk or halt activities pending the outcome of the litigation is often a business decision largely within the sponsor's control. The Department does not believe it is appropriate to shift the burden or risk entailed in that decision to the standby support insurance program. Otherwise, the Department would create the perverse incentive for a sponsor to halt or delay activities unnecessarily because the costs of that delay would be covered by the insurance contract. On the other hand, the Department recognizes that in some cases, e.g., where the sponsor would breach a fiduciary duty if construction or operation activities are continued or there is an adverse decision against the Commission, a halt in the sponsor's construction or operations may be necessary and beyond the sponsor's control. As suggested by the commenters, the Department believes the appropriate forum to determine whether or not a litigation-related delay is a covered delay is the claims administration process.

Due Diligence

Section 638(e) specifies that any Standby Support Contract requires ''the sponsor to use due diligence to shorten, and to end, the delay covered by the contract.'' Section 950.14(c)(2) requires each Standby Support Contract to include a provision to require the sponsor to use due diligence to mitigate, shorten, and end covered delay under the contract and to demonstrate that to the Program Administrator. Similarly, section 950.23(b)(2)(iii) requires a sponsor to use due diligence to mitigate, shorten and end the covered delay and the associated costs.

The industry trade association commented that the due diligence requirement is consistent with a party's obligation under general principles of contract law to mitigate damages. Nevertheless, the commenter objected that a sponsor must demonstrate due diligence to the Program Administrator in demonstrating a covered delay. Rather, the commenter requested that due diligence only be considered when determining whether covered costs should be limited. This led the commenter to request deletion of the phrase ''demonstrated this to the Program Administrator.''

Upon further review, the Department has modified this section to delete the phrase ''demonstrated this to the Program Administrator.'' Removal of this phrase does not relieve the sponsor of its obligation under section 638 and part 950 to use due diligence to mitigate, shorten and end a covered delay. This requirement remains in the rule, and the sponsor's actions in that regard will be reviewed by the Claims Administrator in reaching a claim determination on covered costs pursuant to section 950.24. This allocation of responsibility is consistent with the plain language of section 638 that ''the sponsor [is] to use due diligence to shorten, and to end, the delay covered by the contract.''

Covered Costs

Section 638(d) provides for the coverage of costs that result from a delay during construction and in gaining approval for full power operation, specifically (A) principal or interest and (B) incremental cost of purchasing power to meet contractual agreements. In the interim final rule, the Department determined that it is appropriate to limit the concept of covered costs to those expressly set forth in paragraph (d)(5). Accordingly, under the Program Account, the Department will indemnify sponsors for the cost of principal or interest on the debt obligation for the period or duration of covered delay, less 180 days for one of the subsequent four reactors.

The public advocacy group agreed with the Department's determination to limit covered costs to the express terms of section 638. In contrast, industry

commenters requested that the Department expand coverage to operating and maintenance costs and other costs associated with delay in commercial operation, including costs of demobilization and remobilization, idle time costs incurred in respect of equipment and labor, increased general and administrative costs, and escalation costs for the completion of construction. The industry group even commented that additional costs associated with redesign or alterations should be covered, to the extent that litigation or changes in regulation resulted in a redesign.

The Department has determined that, consistent with its broad authority to interpret the terms ''covered costs'' and ''including'' in section 638(d)(5), it will limit these terms to the items specifically set forth in the statute. As the Department concluded in the interim final rule, it would be inappropriate to expand these terms, particularly given the statute's plain language and the fact that providing expanded coverage to a myriad of other costs might serve as a disincentive to a sponsor to complete a project in a timely fashion. The commenters provided no new information or justification to support a potentially dramatic expansion of coverage, which would have the effect of making the Standby Support Program significantly more expensive, without increasing the likelihood of meeting the statutory objectives of section 638, *i.e.*, the expeditious licensing, construction and full power operation of new nuclear facilities.

Subpart C—Claims Administration Process

Subpart C of the regulation sets forth the procedures and conditions to be followed by a sponsor for the submission of claims and the payment of covered costs under a Standby Support Contract.

The industry trade association generally supported the requirement that a sponsor has the burden of making a good-faith showing of a covered event, covered delay and covered cost. Further, it generally supported the two-step process for claims administration. The trade association made several suggestions related to the wording of Subpart C, including replacing the term ''appropriate'' with cross-references to other sections of the rule, suggesting timing changes such as that the Claims Administrator must ''make a determination on the covered event within 30 days,'' and several other recommendations that do not substantively enhance the rule and may serve to limit the Claims Administrator's ability to effectively administer the claims in a timely fashion.

The Department has determined that it is appropriate to retain most of the wording in subpart C of the interim final rule, which is based in large part on the Department of Treasury's *Terrorism Risk Insurance Program* at 31 CFR Part 50 (69 FR 39296, June 29, 2004). The Department notes that several of the requested changes would result in increased ambiguity or would not provide greater clarity, and thus would not serve the Department's goal of an efficient and effective claims administration process. For instance, the commenter requested deleting the phrase ''including an assessment of the sponsor's due diligence in mitigating or ending covered costs,'' in section 950.24(a)(2) as potentially duplicative or confusing even though this requirement is expressly set forth in section 638. Accordingly, the Department has determined that, aside from comments addressed in the next section, it would be inappropriate to adopt the industry group's other recommendations related to the claims process.

Burden of Proof on Claims

As discussed in connection with section 950.20, the Department agrees with the comment from the industry trade association that a sponsor bears the burden of proof on a covered event, a covered delay and a covered cost, and the Department bears the burden of proof of an exclusion from a covered event and whether a purported covered delay is the result of, or was contributed to, by the exclusion. The rule is modified in sections 950.20 through 950.24 to codify this expectation.

Determinations by the Claims Administrator

The industry trade association suggested several sections needed clarification based on their interpretation of the phrase ''appropriate'' in describing the Claims Administrator's determinations regarding covered events and covered costs. It noted that this language suggested the Claims Administrator could render a decision based on subjective factors outside the terms and conditions of the Standby Support Contract or the rule. This is a misinterpretation of the regulation's language. Nevertheless, to avoid the misinterpretation that the Claims Administrator would make determinations based solely on subjective judgment, subpart C of part 950 is modified in several places (e.g., 950.24 (a) and (d)) to replace the word ''appropriate'' with ''allowable'' to indicate the objective nature of the Claims Administrator's cost determinations based on the terms and conditions of the contract.

Timing of Covered Event Determinations and Payments

The industry trade association commented that notification of a covered event should be submitted ''no later than'' 30 days after the end of the covered event, and requested that ''the Department be willing to accept notice and begin paying claims as covered losses are incurred, while a covered event is ongoing.'' The rule is modified to allow notification of a covered event ''no later than'' 30 days after the end of the covered event. This change appropriately provides flexibility to the sponsor to submit notification of a covered event to the Claims Administrator at a time the sponsor deems appropriate, particularly where a covered event may be protracted. However, the Department does not believe it is appropriate to change the timing of the claims process for payment of covered costs. Sections 950.23 and 950.24 address the process and timing of claims for covered costs, and are premised on the fact that covered costs are not expected to be incurred until the time the sponsor was scheduled to attain full power operations. In other words, a covered event that occurs early in construction (e.g., in the first year of a five year construction schedule) would not be coincident in time with the obligation of the sponsor to pay covered costs such as principal or interest, as those costs would not be incurred until much later in time (e.g., in the fifth year after construction is complete).

The industry trade association also objected to what it viewed as an open-ended process in section 950.22(c) for the Claims Administrator to render a determination on a covered event with the option for the Administrator to determine that the claim ''requires further information.'' The Department believes it is important to provide this flexibility to the Claims Administrator and serves to facilitate a resolution of any issues between the Claims Administrator and the sponsor without resort to alternative dispute resolution. Consequently, the Department is not modifying the rule to address this objection.

Subpart D—Dispute Resolution Process

Covered Events and Covered Costs Dispute Resolution

In the interim final rule, the Department stated that claims should be resolved as effectively and efficiently as possible. Subpart D provides a two step dispute resolution process for resolving claims that first calls for mediation and then a Summary Binding Decision.

The industry trade association generally agreed with the concept of dispute resolution through a binding arbitration process as an appropriate and expeditious method of resolving disputes under the Standby Support Contract. However, the trade association objected to the use of the DOE Board of Contract Appeals (DOE Board) as the final arbiter of disputes, claiming that the Board is not independent from the Department, it does not have experience with insurance-type contracts, and it is not an appropriate venue for complex or novel cases such as a Standby Support Contract. Rather, industry preferred an independent, third-party arbitration process such as the American Arbitration Association (AAA) and its rules for commercial arbitration and expedited proceedings, which it claimed is familiar to industry and without which the industry stated a sponsor would be reluctant to agree to binding arbitration without the right of appeal to a court.

In response to the industry trade association's concern over lack of neutrality, that concern should be obviated with the establishment of the Civilian Board of Contract Appeals (Civilian Board) (Section 847 of the National Defense Authorization Act of Fiscal Year 2006, 41 U.S.C. 438). Effective January 6, 2007, Congress is establishing in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals (Civilian Board). The new Civilian Board will include any full time member of several other agency board of contract appeals in addition to the disbanded DOE Board. Thus, any concern that the Civilian Board is not independent of the Department is unfounded. The Civilian Board will provide a wide range of expertise from various agencies and departments throughout the government. It will also assume jurisdiction over any category of laws or disputes over which an agency board of contract appeals has jurisdiction. The Department believes that the Civilian Board will have the independence, expertise, and requisite procedures to ensure a fair and expeditious process for the resolution of disputes in the context of Standby Support Contracts. Moreover, the Standby Support Contracts will be new not only to the Department and the Civilian Board, but also to industry, the AAA, and any arbitrator. Accordingly, the existing rules of the AAA for commercial arbitration of complex cases are not any better suited to adjudication of claims under a Standby Support Contract than the similar procedures successfully employed by the Civilian Board to fairly and expeditiously resolve contract disputes involving the commercial sector and the federal government. The Department is confident that the Civilian Board and the dispute resolution procedures it follows are well suited to resolve any issues arising under the Standby Support Contracts; commenters have not demonstrated otherwise.

In response to the industry trade association's comment, the rule is modified in sections 950.31, 950.33 and 950.36 to clarify that the parties will jointly select the mediator that will preside over mediation of disputes.

C. Cost Analysis of the Standby Support Program

Industry commenters stated that it was critical for the Department inform potential sponsors about the cost of the insurance coverage. These commenters stated the nuclear industry cannot provide a reasoned determination of the value of the Program and the rule without knowing what the insurance contracts will cost. Accordingly, they requested the Department to establish a two-step calculation which they characterized as workable and credible to investors. Under the first step, the Department would establish a standard premium for the insurance contracts based on, and comparable to the premium charged by other government agencies and the private sector for comparable sovereign risk insurance. Under the second step, the Department would then establish a standard ''loan cost'' for the insurance contracts calculated under FCRA. To the extent the loan cost is higher than the premium amount, the Department would cover the difference through appropriations. The industry then stated that the Department ''appears to be moving in the opposite direction: There is no standard insurance premium, and the expected sponsor payment appears to be subject to a case-by-case, contract-by-contract determination dependent largely on the Department's success in obtaining appropriations.''

Although the Department understands the desire of industry commenters for certainty and relatively low contributions from industry, the Department cannot provide a definitive, standard premium for the six Standby Support Contracts available under section 638, or to commit to any specified amount of government appropriations that would be applied toward funding the Standby Support Contracts. The statutory language of section 638 provides the legal framework within which the Department must operate in establishing the regulations and contracts for the Standby Support Program. That framework requires the Department to calculate the loan costs for each Standby Support Contract consistent with FCRA, and to deposit amounts equivalent to that loan cost into the Program Account as a precondition to execution of a Standby Support Contract. Section 638 dictates that loan costs in the Program Account are the same as the cost of a loan guarantee under FCRA. While section 638 provides the possibility for government funding of a Standby Support Contract through appropriations, it does not allocate any amount of government appropriations to the contracts and it does not change existing law that prohibits the Department from obligating funds where funds are not appropriated for that purpose.

Given this statutory framework, the premium for coverage of principal or interest costs must be calculated in accordance with FCRA methodology, and the sponsor must provide the portion of the premium for which funds have not been appropriated. Thus, the Department cannot adopt the approach advanced by industry commenters. The Department, however, has revised the rule to give sponsors the ability to adjust coverage in accordance with the amount of the premium they are willing to pay. Specifically, section 950.11 permits a sponsor to specify in the Conditional Agreement, the amount of premium, (that is, its contributions to the Program Account and Grant Account) it anticipates paying when the Standby Support Contract is executed. Notwithstanding this provision, section 950.12 of the interim final rule required the sponsor to pay a premium equal to the difference between the amount of appropriated funds and the amount necessary to fully fund the Program Account and Grant Account. In the final rule, the Department has revised section 950.12 to permit a sponsor to pay the anticipated premium, with the option to pay additional amounts; provided that, if the combination of appropriated funds and payments from the sponsor is not sufficient to fully fund the Program

Account and Grant Account, the amount of coverage under the Standby Support Contract will be reduced to reflect the amount of funding deposited in the Accounts should the sponsor elect to enter into the Standby Support Contract.

In addition, in an effort to provide information now to potential sponsors about anticipated costs for the Standby Support Contracts, the Department is providing a description of the methodology it expects to follow in calculating the loan costs in accordance with FCRA, including four hypothetical examples of estimated loan costs. The hypothetical examples are a representative, but not comprehensive, sample of the project type, financing structure, coverage amount, or other factors that will inform the Department's loan cost estimates for particular projects. For each project, the Department will use the project-specific information provided by the project sponsor to develop an initial estimate at the time of the Conditional Agreement. Prior to entering into a Standby Support Contract, the loan cost estimate will be reevaluated and will determine the loan cost required by the Program Account in order to execute the Standby Support Contract. Loan costs are likely to change as the Department refines the assumptions used in the preliminary analysis and considers the extent to which other risks need to be taken into account. In particular, the preliminary analysis does not fully consider situations that may arise if the Commission does not adopt a realistic schedule for its actions or where there is an adverse decision that does not necessarily result in a stay, but nevertheless may provide a legitimate basis for a sponsor to delay actions. These discussions are detailed in this preamble in the Regulatory Review Requirements section on Executive Order 12866 (Section IV.A).

For each type of covered event (e.g., Commission delay and litigation delay), the Department's Program Account cost estimates will be based on three primary factors: first, the timing and amount of the debt service covered by the Standby Support Contract; second, the likelihood that a covered delay occurs; and third, the length of the covered delays. These factors are likely to vary across projects as they will likely have different financing structures—for example, investor-owned utilities, public utilities, cooperatives, or partnerships reflecting some combination would likely seek capital through different mechanisms. The risk of a covered event occurring and the length of the covered event will vary by the type of advanced nuclear facility, management experience, location, and a host of other factors.

Based on these factors, the Department will estimate cashflows to and from the government over the expected period of Standby Support Contract coverage and determine the present value of these expected cashflows, in accordance with FCRA, to determine the required loan cost.

In evaluating hypothetical examples for a 1,100 MWe reactor, the Department chose debt-to-equity financing structures of 80:20 and 50:50, which correspond to estimated all-in costs of $2.8 billion and $2.5 billion, respectively. The hypothetical examples adopt typical industry debt-to-equity financing structures and assume that the sponsor elects 100% of coverage through the Program Account. The Department notes that it is not possible at this time to provide the actual costs in the rule, given that more specific estimates of loan costs for individual projects can only be provided in conjunction with the issuance of a Conditional Agreement, based on the specifics of the project and coverage. Moreover, final loan costs must account for the actual terms of the debt to be guaranteed, and will be determined just prior to the execution of a Standby Support Contract, which is a time several years in the future.

The Department has determined that it would be inappropriate to adopt two specific industry recommendations. First, the Department has determined that it would be inappropriate to rely on the premium charged by other government agencies and the private sector for sovereign risk insurance such as OPIC. As explained in the interim final rule, sovereign risk insurance is significantly different than the Standby Support Program, given that the sovereign risk insurance pool is highly diversified both geographically and among projects. Further, with respect to the calculation methodology, the interim final rule's preamble discussion stated that ''the cost estimate for the Program Account will be calculated consistent with FCRA.'' In reaffirming this approach, the Department emphasizes that section 638(b)(2) expressly references FCRA. The industry's recommended approach is especially untenable given that OMB requires the FCRA analysis to be done consistent with OMB guidance in Circular A–11, and that any Department decision related to loan costs must ultimately be approved by OMB.

Second, the Department cannot specify in advance the premium to be paid by the sponsor that will result in full coverage, especially if the premium is set at an amount less than the amount that must be deposited into the Program Account and Grant Account. The Department notes that section 638 prohibits the Department from executing a Standby Support Contract until the Program Account and Grant Account, if applicable, are funded. Accordingly, it is impossible to provide commenters the cost certainty they desire at this time. In addition, the Department cannot commit to deposit Federal funds in the Program Account or Grant Account in the absence of appropriations for that purpose.

IV. Regulatory Review Requirements

A. Review Under Executive Order 12866

The Department has determined that today's regulatory action is a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), as amended by Executive Order 13258 (67 FR 9385, February 26, 2002). Accordingly, the Department submitted this final to the Office of Information and Regulatory Affairs of the Office of Management and Budget, which has completed its review under E.O. 12866.

This discussion assesses the potential costs and benefits of this rule. This regulation affects only those entities that voluntarily elect to apply for standby support and are selected to receive such standby support assistance. It imposes no direct costs on non-participants. The economic impact of this regulatory action is difficult to estimate because the exact nature and size of the projects to be assisted will not be known until specific project applicants come forward and because of the difficulty in predicting the scope, frequency or timing of the events that would be subject to payment of standby support. The Department has completed its analysis of the annual effect of the rule on the economy and determined that the rule likely would not have an overall effect on the economy that exceeds $100 million in any one year, and will therefore not be treated as an economically significant rulemaking.

In addition to the general effect on the economy, the Department notes that the rulemaking's direct costs are the amount of funds needed in the Program Account for the Federal government to extend Standby Support. For purposes of review under E.O. 12866, this final rule provides four hypothetical examples that demonstrate the general methodology used to determine an estimate of the subsidy cost for the Standby Support Program.

In the interim final rule, the Department noted the analysis on the Commission's ITAAC process from the Secretary of Energy Advisory Board, the Nuclear Energy Task Force (NETF) in July 2004 to ''assess the issues and determine the key factors that must be addressed if the Federal government and industry are to commit to the financing, construction, and deployment of new nuclear power generation plants to meet the nation's electric power demands in the 21st Century.'' NETF determined that the ITAAC process and the possibility of a hearing on satisfaction of the ITAAC ''may'' create regulatory disruption after substantial funds have been expended. Achieving the purpose of the revised regulatory process will be thwarted if the Commission does not keep the ITAAC process focused narrowly on those issues that must be subject to post-construction verification. NETF concluded that this new regulatory process which has not been tested in practice, poses a significant risk factor to generating companies. Similarly, the Department funded a report which defined critical risks and investment issues. (*Business Case for New Nuclear Power Plants: Bringing Public and Private Resources Together for Nuclear Energy,* July 2002, available at *http://www.nuclear.gov/home/bc/businesscase.html*). Its conclusions were similar to NETF's recommendations in that one of the critical risks with the construction of new nuclear power plants is the regulatory risk associated with the ITAAC process.

Congress passed section 638 after issuance of the NETF report. In so doing, Congress provided direction to the Department on the type of delays and costs that are to be covered under the Standby Support Program to facilitate construction and operation of advanced nuclear facilities. The Department is following the direction provided by Congress to structure the regulations governing the Standby Support Program.

The Department anticipates that the Standby Support Program will facilitate the construction of new nuclear facilities by decreasing the regulatory and litigation risks related to the combined license process. The program establishes a maximum of $500 million in insurance as the limit for each of the first two reactors covered and $250 million for each of the subsequent four reactors. Section 638 also establishes that the covered costs for principal or interest on the debt obligation of the advanced nuclear facility (i.e., loan costs) are to be calculated the same as the cost of a loan guarantee under FCRA and are to be deposited in the Program Account prior to contract execution. Under FCRA, the amount of budget authority necessary to support a Federal credit instrument depends upon the subsidy cost (i.e., the net present value of the estimated cash flow of payments by the government to cover the expected value of the principal or interest on any debt obligation of the owner of an advanced nuclear facility during covered delay). This subsidy cost reflects the loan costs in the Program Account, which in turn equates to the ''cost of a loan guarantee'' under section 502(5)(C) of FCRA. Under the Standby Support Program and FCRA, the Federal government is not authorized to extend credit assistance unless it has sufficient funds in the Program Account either in the form of budget authority or fees charged by the program to offset any potential losses. The funds deposited in the Program Account needed for the Standby Support Program will be contributed by private industry through a risk premium, in whole or in part, depending on appropriations. Loan costs may not be paid from the proceeds of debt guaranteed or funded by the Federal government.

Since the passage of the Act, the Department has conducted both qualitative and quantitative research to support four hypothetical examples that demonstrate the general methodology used to determine an estimate for the subsidy cost for the Standby Support Program. The qualitative research included interviewing experts at private firms and government agencies and determining the similarities and differences with their programs and the standby support insurance program. In particular, the Department met with or interviewed personnel at the Commission, OPIC, U.S. Export Import Bank, U.S. Department of Agriculture, and commercial insurers. The additional research included analyzing the Commission's case history and researching other federal agency loan programs. The following provides a discussion of the key assumptions used, risks considered, and the four hypothetical cost estimates developed by the Department.

Financial Assumptions of the Cost Estimate

The following information summarizes the key assumptions used in the Department's four hypothetical examples.

The Department reviewed other government insurance or loan programs to determine their cost structure and applicability to the Standby Support Program. Following its review, the Department concluded that the other government programs provide some valuable information but are sufficiently different from Standby Support that they cannot provide a direct basis for comparison. For example, the premiums of the OPIC insurance program are pooled together and if a default occurs, that pool is used to pay out the damages. This arrangement differs in critical ways from the Standby Support program. The USDA's Rural Utility Service Programs make and guarantee loans but the costs depend substantially on the credit quality of the borrowers. Moreover, the government has rights to the collateral pledged as part of the loan.

The Standby Support Program does not compare to these other programs in that: (1) The other programs insure many entities or individuals; and (2) the other programs evaluate applications and assess costs in part based on factors different than those present in this program. In the Standby Support Program, there are a limited number of applicants to pool premiums and the risks include actions by the Commission and litigation.

For financing, the Department assumed two different financing structures: 50:50 debt to equity (50:50 D/E) and 80:20 debt to equity (80:20 D/E). These two financial structures have been indicated by industry as the two most probable financing structures for new nuclear reactors. For each of these D/E structures, two scenarios were generated, one assuming level debt payments (constant principal and interest), the other assuming level principal payments (constant principal). The estimated all-in costs for a 1,100 MWe reactor were $2.5 billion and $2.8 billion for D/E financing structures of 50:50 and 80:20, respectively. The debt was assumed to have a 20 year amortization period. Exhibit 1, below, provides a summary of the financing assumptions used.

EXHIBIT 1.—FINANCING ASSUMPTIONS FOR 50:50 D/E AND 80:20 D/E STRUCTURES

Repayment Options	Level Debt Payments (Prin. + Int.)		Level Principal Payments	
Debt-to-Equity Financing Assumptions	50:50 D/E	80:20 D/E	50:50 D/E	80:20 D/E
Total All-in Costs	$2.5 Billion	$2.8 Billion	$2.5 Billion	$2.8 Billion
Construction Period	5 Years after COL	5 Years after COL	5 Years after COL	5 Years after COL
Debt Characteristics:				
Amortization Period	20 Years	20 Years	20 Years	20 Years
Interest Capitalization during Construction.	Yes	Yes	Yes	Yes
Interest Rate	7%	8%	7%	8%

Non-Financial Risks Affecting the Cost Estimate

When developing cost estimates, the Department will need to assess the non-financial risks of the Standby Support Program, which can be grouped into three categories: (1) Delays from Commission regulatory review (i.e., untimely review of ITAAC or conduct of pre-operational hearings); (2) delays from NRC-related litigation; and (3) delays from external events (non-NRC). This division groups the risks similarly, based on those risks that are within the Commission's control and those that are outside the Commission's control. The Department also assumed that the design certification and early site permit process have finality, meaning that virtually all issues have been resolved and risks of litigation after combined construction and operating license issuance (i.e., when Standby Support Contracts are in effect) is less than before issuance (i.e., when Standby Support Contracts are not in effect). The Department also assumed that ITAAC schedules will be set either by guidance from the Commission, or by agreement of the Department and sponsor, that the schedule for determination letters will be based on completed ITAAC packages, and that the sponsor would be permitted and expected to load fuel once all the ITAAC letters have been approved. The following provides additional background information, gathered by the Department, that helps to inform cost estimates.

Covered Costs From ITAAC and Pre-Operational Hearings

ITAAC Review. The Department is aware that it is difficult to predict the Commission's ability to conduct the ITAAC review process in a timely fashion, particularly since the Commission's new regulatory process under part 52 has not been tested and there are presently no schedules set by the Commission for ITAAC review. Nevertheless, in conducting its analysis the Department considered several sources of current and historical information including a review of the Commission's licensing process under part 52, a review of the Commission's ability to meet schedules in other proceedings, and interviews with the Commission staff. To estimate the frequency that an ITAAC review would not be completed on time and would cause a delay in full power operation, the Department conducted a two-step analysis based on the information gathered from its research.

The Department started out by trying to understand when ITAAC submissions would occur during the construction period. The Department's qualitative research indicated that 20 percent of ITAACs are expected to be submitted in the first four years of construction while the remaining 80 percent of ITAACs are expected to be submitted in the last year of construction. Nuclear professionals indicated that these first 20 percent of the ITAACs are for discrete, lower risk items that are likely not on the critical path for full power operation (in contrast to the last year ITAAC that are for entire systems more critical to full power operation). Hence, construction would most likely continue even if there was a delay in reviewing an ITAAC in the earlier years. As a result, the Department concluded that Commission review of the first 20 percent of ITAACs, whether on time or not, would have a negligible effect on the commencement of full power operation.

In addition, the Department reviewed the other 80 percent of the ITAAC to estimate the frequency and length of delay, and an estimated cost. To conduct this analysis, the Department evaluated the Commission's ability to meet schedules with respect to license renewals for existing nuclear facilities under 10 CFR part 54, its reviews of early site permits (ESPs) under part 52, and its design certification of the Westinghouse AP1000 nuclear power plant.

Under the license renewal process a licensee may apply to the Commission to renew its license as early as 20 years before expiration of its current license. The renewal process ensures that important systems, structures and components will continue to perform their intended functions during the 20-year period of extended operation.[2] To date, the Commission has successfully renewed the licenses for 43 reactors within schedule, with only minor deviations from established milestone dates (e.g., a few instances where schedule dates were missed by a day or two, and only 2 instances out of 40 where the delay was for more than 5 days).[3] The Department recognizes that in such cases, these are operating reactors and therefore may not necessarily be representative of newly constructed reactors.

Under part 52, the Commission can issue an early site permit (ESP) that addresses site safety issues, environmental protection issues, and emergency plans, independent of the review of a specific nuclear plant design or specific combined license application. An ESP is a partial construction permit, and is therefore subject to all procedural requirements in 10 CFR Part 2 applicable to construction permits. The permit is valid for 10 to 20 years and can be renewed for an additional 10 to 20 years. The Commission is currently reviewing three early site permit applications and to date the Commission has met all schedules for the three applications it has received.[4]

Third, the Commission review and design certification of Westinghouse's AP1000 nuclear power plant was issued on time.

Fourth, the Commission has stated that in order to meet estimated work activities, 350 new employees have been added in FY 2006. This new hiring of

[2] The process and requirements are codified in 10 CFR part 54 (*http://www.nrc.gov/reading-rm/doc-collections/cfr/part054/index.html.*

[3] Reactor license renewal schedules are available on the Commission's Web site at: *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*

[4] Reactor license renewal schedules are available on the Commission's Web site at: *http://www.nrc.gov/reactors/new-licensing/esp.html.*

staff provides some additional confidence that the Commission may be able to meet schedules for licensing reviews.

In addition to this research, the Department interviewed the Commission staff to better understand ITAAC review periods, and where delays related to ITAAC issues would result in a covered delay. The Commission's staff indicated that a 90 day review period would be a reasonable estimate for an average time period. Commission staff also noted the expectation that at the time a complete ITAAC is submitted, the Commission's field team would have already begun conducting ongoing inspections of the item under review and would have collected data that will make the final review efficient. Based on these interviews, the Department developed average delay estimates. Commission staff indicated that even though it is difficult to predict the implementation of an untested regulatory process, the Department's conclusions were generally reasonable based on the Commission's planning for the review process. The Department assumed that the longer the delay the greater the likelihood that the delay would affect full power operation and result in a covered cost.

Pre-operational Hearings. Lacking definitive data, the Department estimated that pre-operational hearings resulting in a Commission stay of construction or initial fuel load and causing a delay in full power operation are comparable to delays from untimely ITAAC review. Since the risk factors are similar, the Department evaluated the probability of delays due to both of these factors combined.

Covered Costs for Delays From Litigation

The Department reviewed historical information on litigation brought against the Commission, instances where a court ordered a stay or injunction, and the part 52 licensing process in general. First, the Department considered the likelihood of a delay occurring from litigation in which there was an adverse ruling against the Commission or there was a court order enjoining reactor construction or operation. Next, the Department estimated the expected length of a delay in full power operation in such a case.

The Department researched the history of judicial stays of Commission operating license authorizations. The Department's research uncovered three cases since 1973 in which the issuance of an operating license was stayed. The first case involved the Perry Nuclear Power Plant in Ohio in which the stay was for 40 days.[5] The second case involved the Limerick Nuclear Power Plant, which was stayed for 6 days.[6] The third case involved the Diablo Canyon Nuclear Power Plant, which was stayed for 75 days.[7] To the Commission staff's best knowledge, this information is correct and there are no other examples of judicial stays regarding the issuance of a new nuclear power plant operating license.[8] Given that about 123 operating licenses have been issued by the Commission, the Department estimates that the probability of a stay relative to the number of operating licenses issued is less than 3 percent. The Department recognizes, however, that for proposed new facilities, there may be specific facts and circumstances that could affect this possibility.

The Department also analyzed the history of judicial stays on new operating licenses as compared broadly to the history of all court cases in which the Commission was a party or there was an adverse decision for the Commission. The Department's research found, from 1973 through early 2006, the Commission was a party in 206 court cases involving regulatory or licensing matters. Of these 206 cases, the Department found approximately 39 cases in which the court ruled against the Commission. Of the 39 cases, only three cases resulted in a stay or injunction of operations (described above). While this suggests a very high success rate for litigation involving the Commission, the Department also recognizes that there may be some unforeseen factors that could affect the litigation risk given the new review process, and new technologies involved.

The Commission's more recent experience in court cases has been more successful. For the period starting in 1990, or around the time the Energy Policy Act of 1992 was enacted, the Commission was directed to streamline the nuclear reactor licensing process to alleviate long delays and obstacles in the process. The Department believes the Commission's more recent litigation history may be more indicative of future litigation. This is consistent with the Department's expectation that litigation risks that would be covered under a Standby Support Contract are reduced because coverage is initiated after issuance of the combined license, when decisions on early site permits or design certifications may already have been settled and are final. The Department recognizes that this more recent experience directly applies to license renewals rather than new construction; however, it indicates that the Commission has strengthened its review process. Since 1990, the Commission has been a party in 44 court cases. Of those 44 cases, only 2 cases were decided against the Commission and no cases resulted in a stay or injunction.

Another factor in estimating the cost of litigation is how long a delay caused by a stay or injunction would remain in effect. As noted earlier, the data available to analyze this is very limited in nature, only 3 cases, and only one of the cases is relevant to the analysis. The State of Ohio requested a stay against the Perry Nuclear Power Plant, challenging the adequacy of the evacuation plan and its formulation without adequate State participation. The Court of Appeals granted the State's request for a stay on the operating license of the plant that lasted for 45 days. While the stay itself was for 45 days, the Department used a more conservative estimate of 10 months for the effect of the stay—which covered the time of the stay as well as certain other activities necessary before the reactor could begin operations. The Department believes that a delay covered by a Standby Support Contract would occur in a similar manner. The Department recognizes that in specific cases, however, greater delays would be possible, *e.g.*, where a State or other entity provides early indication of its intent to challenge the operation of a reactor, or where a delay did not result in a stay but had such potential. In view of the absence of a statistically significant number of relevant judicial stay cases, the Department cannot conclusively predict the length of delay.

The four hypothetical examples are intended to provide the public with some indication of possible costs, under a specific set of assumptions and conditions, with a specified coverage level, debt financing structure, and interest rates. The examples also reflect specific assumptions regarding the non-financial risks of the Standby Support Program, which were described earlier: (1) delays from Commission regulatory review (i.e., untimely review of ITAAC or conduct of pre-operational hearings); (2) delays from NRC-related litigation; and (3) delays from external events (non-NRC). Both the financial and non-financial risk factors will likely differ for each project, so the costs below may not reflect the subsidy cost associated with a particular Standby Support contract. For the examples provided

[5] *State of Ohio* v. *NRC*, 812 F.2d 288 (6th Cir. 1986).

[6] *Limerick Ecology Action* v. *NRC*, No. 85–3431 (3d Cir. 1985) (unpublished order).

[7] *San Luis Obispo Mothers for Peace* v. *NRC*, No. 84–1410 (D.C. Cir) (unpublished order).

[8] Commission Response to Congress, July 2005.

below, dollar amounts are stated in millions.

Repayment options	Debt structure	Face value of debt	Maximum coverage	Interest rate (percent)	Hypothetical subsidy cost
Level Debt Payments (Prin. + Int)	50:50 D/E	$1,250	$500	7.0	$14
	80:20 D/E	2,250	500	8.0	21
Level Principal Payments	50:50 D/E	1,250	500	7.0	17
	80:20 D/E	2,250	500	8.0	27

While the Department has not prepared nor presented hypothetical subsidy costs for the $250 million Standby Support Contracts, the Department believes that the subsidy costs would likely be roughly half of the subsidy costs compared to a $500 million Standby Support Contract for the same project. The actual subsidy costs for any particular Standby Support Contract will vary based on the specific risks associated with the project and timing of such contract.

B. Review Under 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 4779, February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: Eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things: Clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under 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. The Department has completed the required review and determined that, to the extent permitted by law; this final rule meets the relevant standards of Executive Order 12988.

C. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 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.

Today's regulatory action has been determined not to be a ''policy that has federalism implications,'' that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under Executive Order 13132 (64 FR 43255, August 10, 1999). Accordingly, no ''federalism summary impact statement'' was prepared or subjected to review under the Executive Order by the Director of the Office of Management and Budget.

D. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' the Department may not issue a discretionary rule that has ''tribal implications'' and imposes substantial direct compliance costs on Indian tribal governments. The Department has determined that this final rule does not have such effects and concluded that Executive Order 13175 does not apply to this rule.

E. Reviews Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). Given that no general notice of proposed rulemaking is required, no regulatory flexibility analysis is required.

F. Review Under the Paperwork Reduction Act

Section 950.10(b) contains information collection requirements pertaining to eligibility; section 950.12(a) contains information collection requirements pertaining to fulfillment of conditions precedent to a Standby Support Contract; and section 950.23 contains information collection requirements pertaining to submission of claims for payment of covered costs under a Standby Support Contract. As indicated in the DATES section of this notice, these provisions will not become effective until the Office of Management and Budget (OMB) has approved them 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.* The Department has issued a notice seeking public comment under the Paperwork Reduction Act on the information collection requirements in these sections of today's rule. (71 FR 41788, July 24, 2006) After considering any public comments received in response to that notice, the Department will submit the proposed collection of information to OMB for approval pursuant to 44 U.S.C. 3507. An agency may not conduct, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. After OMB approves the information collection requirements, the Department will publish a notice in the **Federal Register** that announces the effective date and displays the OMB control number for these sections of the rule.

G. Review Under the National Environmental Policy Act

The Department has concluded that promulgation of these regulations fall into the class of actions that does not individually or cumulatively have a significant impact on the human environment as set forth in the Department regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule is covered under the categorical exclusion in paragraph A6 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.

H. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by states, tribal, or local governments, on the aggregate, or by the private sector, of $100 million 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 Department has determined that the rule published today does not contain any Federal mandates affecting states, tribal, or local governments, so these requirements do not apply.

I. Review Under Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. The Department has determined that the rule published today does not have a significant adverse effect on the supply, distribution, or use of energy and thus the requirement to prepare a Statement of Energy Effects does not apply.

J. Review Under the 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 rule that may affect family well-being. This rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, The Department has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review Under the 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 dissemination 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 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). The Department has reviewed today's final rule under the OMB and Department of Energy guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

L. Congressional Notification

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rulemaking.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 950

Government contracts, Nuclear safety.

Issued in Washington, DC on August 4, 2006.

Dennis R. Spurgeon,

Assistant Secretary, Office of Nuclear Energy.

■ Accordingly, the interim final rule published at 71 FR 28200 on May 15, 2006 which added a new part 950 to Title 10 of the Code of Federal Regulations, is adopted as a final rule with the following changes.

■ 1. Part 950 is revised to read as follows:

PART 950—STANDBY SUPPORT FOR CERTAIN NUCLEAR PLANT DELAYS

Subpart A General Provisions

Sec.

950.1 Purpose.
950.2 Scope and applicability.
950.3 Definitions.

Subpart B—Standby Support Contract Process

950.10 Conditional agreement.
950.11 Terms and conditions of the Conditional Agreement.
950.12 Standby Support Contract Conditions.
950.13 Standby Support Contract: General provisions.
950.14 Standby Support Contract: Covered events, exclusions, covered delay, and covered cost provisions.

Subpart C—Claims Administration Process

950.20 General provisions.
950.21 Notification of covered event.
950.22 Covered event determination.
950.23 Claims process for payment of covered costs.
950.24 Claims determination for covered costs.
950.25 Calculation of covered costs.
950.26 Adjustments to claim for payment of covered costs.
950.27 Conditions for payment of covered costs.
950.28 Payment of covered costs.

Subpart D—Dispute Resolution Process

950.30 General.
950.31 Covered event dispute resolution.
950.32 Final determination on covered events.
950.33 Covered costs dispute resolution.
950.34 Final claim determination.
950.35 Payment of final claim determination.
950.36 Other contract matters in dispute.
950.37 Final agreement or final decision.

Subpart E—Audit and Investigations and Other Provisions

950.40 General.
950.41 Monitoring/Auditing.
950.42 Disclosure.

Authority: 42 U.S.C. 2201, 42 U.S.C. 7101 *et seq.*, and 42 U.S.C. 16014

Subpart A—General Provisions

§ 950.1 Purpose.

The purpose of this part is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for certain delays attributed to the Nuclear Regulatory Commission regulatory process or to litigation.

§ 950.2 Scope and applicability.

This part sets forth the policies and procedures for the award and administration of Standby Support Contracts between the Department and sponsors of new advanced nuclear facilities.

§ 950.3 Definitions.

For the purposes of this part:

Act means the Energy Policy Act of 2005.

Advanced nuclear facility means any nuclear facility the reactor design for which is approved after December 31, 1993, by the Nuclear Regulatory Commission (and such design or a substantially similar design of comparable capacity was not approved on or before that date).

Available indemnification means $500 million with respect to the initial two reactors and $250 million with respect to the subsequent four reactors.

Claims administrator means the official in the Department of Energy responsible for the administration of the Standby Support Contracts, including the responsibility to approve or disapprove claims submitted by a sponsor for payment of covered costs under the Standby Support Contract.

Combined license means a combined construction and operating license (COL) for an advanced nuclear facility issued by the Commission.

Commencement of construction means the point in time when a sponsor initiates the pouring of safety-related concrete for the reactor building.

Commission means the Nuclear Regulatory Commission (NRC).

Conditional Agreement means a contractual agreement between the Department and a sponsor under which the Department will execute a Standby Support Contract with the sponsor if and only if the sponsor is one of the first six sponsors to satisfy the conditions precedent to execution of a Standby Support Contract, and if funding and other applicable contractual, statutory and regulatory requirements are satisfied.

Construction means the construction activities related to the advanced nuclear facility encompassed in the time period after commencement of construction and before the initiation of fuel load for the advanced nuclear facility.

Covered cost means:

(1) Principal or interest on any debt obligation financing an advanced nuclear facility (but excluding charges due to a borrower's failure to meet a debt obligation unrelated to the delay); and

(2) Incremental costs that are incurred as a result of covered delay.

Covered delay means a delay in the attainment of full power operation of an advanced nuclear facility caused by a covered event, as defined by this section.

Covered event means an event that may result in a covered delay due to:

(1) The failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses and acceptance criteria established under the combined license;

(2) The conduct of pre-operational hearings by the Commission for the advanced nuclear facility; or

(3) Litigation that delays the commencement of full power operations of the advanced nuclear facility.

Department means the United States Department of Energy.

Full power operation means the point at which the sponsor first synchronizes the advanced nuclear facility to the electrical grid.

Grant account means the account established by the Secretary that receives appropriations or non-Federal funds in an amount sufficient to cover the amount of incremental costs for which indemnification is available under a Standby Support Contract.

Incremental costs means the incremental difference between:

(1) The fair market price of power purchased to meet the contractual supply agreements that would have been met by the advanced nuclear facility but for a covered delay; and

(2) The contractual price of power from the advanced nuclear facility subject to the delay.

Initial two reactors means the first two reactors covered by Standby Support Contracts that receive a combined license and commence construction.

Litigation means adjudication in Federal, State, local or tribal courts, including appeals of Commission decisions related to the combined license process to such courts, but excluding administrative litigation that occurs at the Commission related to the combined license process.

Loan cost means the net present value of the estimated cash flows of:

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

(2) Payments to the government including origination and other fees, penalties and recoveries, as outlined under the Federal Credit Reform Act of 1990.

Pre-operational hearing means any Commission hearing that is provided for in 10 CFR part 52, after issuance of the combined license.

Program account means the account established by the Secretary that receives appropriations or loan guarantee fees in an amount sufficient to cover the loan costs.

Program administrator means the Department official authorized by the Secretary to represent the Department in the administration and management of the Standby Support Program, including negotiating with and entering into a Conditional Agreement or a Standby Support Contract with a sponsor.

Related party means the sponsor's parent company, a subsidiary of the sponsor, or a subsidiary of the parent company of the sponsor.

Secretary means the Secretary of Energy or a designee.

Sponsor means a person whose application for a combined license for an advanced nuclear facility has been docketed by the Commission.

Standby Support Contract means the contract that, when entered into by a sponsor and the Program Administrator pursuant to section 638 of the Energy Policy Act of 2005 after satisfaction of the conditions in § 950.12 and any other applicable contractual, statutory and regulatory requirements, establishes the obligation of the Department to compensate covered costs in the event of a covered delay subject to the terms and conditions specified in the Standby Support Contract.

Standby Support Program means the program established by section 638 of the Act as administered by the Department of Energy.

Subsequent four reactors means the next four reactors covered by Standby Support Contracts, after the initial two reactors, which receive a combined license and commence construction.

System-level construction schedule means an electronic critical path method schedule identifying the dates and durations of plant systems installation (but excluding details of components or parts installation), sequences and interrelationships, and milestone dates from commencement of construction through full power operation, using software acceptable to the Department.

Subpart B—Standby Support Contract Process

§ 950.10 Conditional agreement.

(a) *Purpose.* The Department and a sponsor may enter into a Conditional Agreement. The Department will enter into a Standby Support Contract with the first six sponsors to satisfy the specified conditions precedent for a Standby Support Contract if and only if all funding and other contractual, statutory and regulatory requirements have been satisfied.

(b) *Eligibility.* A sponsor is eligible to enter into a Conditional Agreement with the Program Administrator after the sponsor has submitted to the Department the following information but before the sponsor receives approval of the combined license application from the Commission:

(1) An electronic copy of the combined license application docketed by the Commission pursuant to 10 CFR part 52, and if applicable, an electronic copy of the design certification or early site permit, or environmental report referenced or included with the sponsor's combined license application;

(2) A summary schedule identifying the projected dates of construction, testing, and full power operation;

(3) A detailed business plan that includes intended financing for the

project including the credit structure and all sources and uses of funds for the project, the most recent private credit rating or other similar credit analysis for project related covered financing, and the projected cash flows for all debt obligations of the advanced nuclear facility which would be covered under the Standby Support Contract;

(4) The sponsor's estimate of the amount and timing of the Standby Support payments for debt service under covered delays; and

(5) The estimated dollar amount to be allocated to the sponsor's covered costs for principal or interest on the debt obligation of the advanced nuclear facility and for incremental costs, including whether these amounts would be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors.

(c) The Program Administrator shall enter into a Conditional Agreement with a sponsor upon a determination by the Department that the sponsor is eligible for a Conditional Agreement, the information provided by the sponsor under paragraph (b) of this section is accurate and complete, and the Conditional Agreement is consistent with applicable laws and regulations.

§ 950.11 Terms and conditions of the Conditional Agreement.

(a) *General.* Each Conditional Agreement shall include a provision specifying that the Program Administrator and the sponsor will enter into a Standby Support Contract provided that the sponsor is one of the first six sponsors to fulfill the conditions precedent specified in § 950.12, subject to certain funding requirements and limitations specified in § 950.12 and any other applicable contractual, statutory and regulatory requirements.

(b) *Allocation of Coverage.* Each Conditional Agreement shall include a provision specifying the amount of coverage to be allocated under the Standby Support Contract to cover principal or interest costs and to cover incremental costs, including a provision on whether the allocation shall be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors, subject to paragraphs (c) and (d) of this section. A sponsor may elect to allocate 100 percent of the coverage to either the Program Account or the Grant Account.

(c) *Funding.* Each Conditional Agreement shall contain a provision that the Program Account or Grant Account shall be funded in advance of execution of the Standby Support Contract and in the following manner, subject to the conditions of paragraphs (d) and (e) of this section. Under no circumstances will the amount of the coverage for payments of principal or interest under a Standby Support Contract exceed 80 percent of the total of the financing guaranteed under that Contract.

(1) The Program Account shall receive funds appropriated to the Department, loan guarantee fees, or a combination of appropriated funds and loan guarantee fees that are in an amount equal to the loan costs associated with the amount of principal or interest covered by the available indemnification. Loan costs may not be paid from the proceeds of debt guaranteed or funded by the Federal government. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Program Account to be contributed by appropriated funds to the Department, by the sponsor, by a non-federal source, or by a combination of these funding sources. Covered costs paid through the Program Account are backed by the full faith and credit of the United States.

(2) The Grant Account shall receive funds appropriated to the Department, funds from a sponsor, funds from a non-Federal source, or a combination of appropriated funds and funds from the sponsor or other non-Federal source, in an amount equal to the incremental costs. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Grant Account to be contributed by appropriated funds to the Department, by the sponsor, by a non-Federal source, or by a combination of these funding sources.

(d) *Reconciliation.* Each Conditional Agreement shall include a provision that the sponsor shall provide no later than ninety (90) days prior to execution of a Standby Support Contract sufficient information for the Program Administrator to recalculate the loan costs and the incremental costs associated with the advanced nuclear facility, taking into account whether the sponsor's advanced nuclear facility is one of the initial two reactors or the subsequent four reactors.

(e) *Limitations.* Each Conditional Agreement shall contain a provision that limits the Department's contribution of Federal funding to the Program Account or the Grant Account to only those amounts, if any, that are appropriated to the Department in advance of the Standby Support Contract for the purpose of funding the Program Account or Grant Account. In the event the amount of appropriated funds to the Department for deposit in the Program Account or Grant Account is not sufficient to result in an amount equal to the full amount of the loan costs or incremental costs resulting from the allocation of coverage under the Conditional Agreement pursuant to 950.11(b), the sponsor shall no later than sixty (60) days prior to execution of the Standby Support Contract:

(1) Notify the Department that it shall not execute a Standby Support Contract; or

(2) Notify the Department that it shall provide the anticipated contributions to the Program Account or Grant Account as specified in the Conditional Agreement pursuant to 950.11(c)(1). The sponsor shall have the option to provide additional funds to the Program Account or Grant Account up to the amount equal to the full amount of loan costs or incremental costs. In the event the sponsor does not provide sufficient additional funds to fund the Program Account or the Grant Account in an amount equal to the full amount of loan costs or incremental costs, then the amounts of coverage available under the Standby Support Contract shall be reduced to reflect the amounts deposited in the Program Account or Grant Account. If the sponsor elects less than the full amount of coverage available under the law, then the sponsor shall not have recourse against, and the Department is not liable for, any claims for an amount of covered costs in excess of that reduced amount of coverage or the amount deposited in the Grant Account upon execution of the Standby Support Contract, notwithstanding any other provision of law.

(f) *Termination of Conditional Agreements.* Each Conditional Agreement shall include a provision that the Conditional Agreement remains in effect until such time as:

(1) The sponsor enters into a Standby Support Contract with the Program Administrator;

(2) The sponsor has commenced construction on an advanced nuclear facility and has not entered into a Standby Support Contract with the Program Administrator within thirty (30) days after commencement of construction;

(3) The sponsor notifies the Program Administrator in writing that it wishes to terminate the Conditional Agreement, thereby extinguishing any rights or obligations it may have under the Conditional Agreement;

(4) The Program Administrator has entered into Standby Support Contracts that cover three different reactor designs, and the Conditional Agreement is for an advanced nuclear facility of a

different reactor design than those covered under existing Standby Support Contracts; or

(5) The Program Administrator has entered into six Standby Support Contracts.

§ 950.12 Standby Support Contract Conditions.

(a) *Conditions Precedent.* If Program Administrator has not entered into six Standby Support Contracts, the Program Administrator shall enter into a Standby Support Contract with the sponsor, consistent with applicable statutes and regulations and subject to the conditions set forth in paragraphs (b) and (c) of this section, upon a determination by the Department that all the conditions precedent to a Standby Support Contract have been fulfilled, including that the sponsor has:

(1) A Conditional Agreement with the Department, consistent with this subpart;

(2) A combined license issued by the Commission;

(3) Documentation that it possesses all Federal, State, or local permits required by law to commence construction;

(4) Documentation that it has commenced construction of the advanced nuclear facility;

(5) Documented coverage of insurance required for the project by the Commission and lenders;

(6) Paid any required fees into the Program Account and the Grant Account, as set forth in the Conditional Agreement and paragraph (b) of this section;

(7) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, the sponsor's detailed schedule for completing the inspections, tests, analyses and acceptance criteria in the combined license and informing the Commission that the acceptance criteria have been met; and the sponsor's proposed schedule for review of such inspections, tests, analyses and acceptance criteria by the Commission, consistent with § 950.14(a) of this part and which the Department will evaluate and approve; and

(8) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, a detailed systems-level construction schedule that includes a schedule identifying projected dates of construction, testing and full power operation of the advanced nuclear facility.

(9) Provided to the Program Administrator, no later than ninety (90) days prior to the execution of the contract, a detailed and up-to-date plan of financing for the project including the credit structure and all sources and uses of funds for the project, and the projected cash flows for all debt obligations of the advanced nuclear facility.

(b) *Funding.* No later than thirty (30) days prior to execution of the contract, and consistent with section 638(b)(2)(C), funds in amounts determined pursuant to § 950.11(e) have been made available and shall be deposited in the Program Account or the Grant Account respectively.

(c) *Limitations.* The Department shall not enter into a Standby Support Contract, if:

(1) *Program Account.* The contract provides coverage of principal or interest costs for which the loan costs exceed the amount of funds deposited in the Program Account; or

(2) *Grant Account.* The contract provides coverage of incremental costs that exceed the amount of funds deposited in the Grant Account.

(d) *Cancellation by Abandonment.*

(1) If the Program Administrator cancels a Standby Support Contract for abandonment pursuant to 950.13(f)(1), the Program Administrator may re-execute a Standby Support Contract with a sponsor other than a sponsor or that sponsor's assignee with whom the Department had a cancelled contract, provided that such replacement Standby Support Contract is executed in accordance with the terms and conditions set forth in this part, and shall be deemed to be one of the subsequent four reactors under this part.

(2) Not more than two Standby Support Contracts may be re-executed in situations involving abandonment and cancellation by the Program Administrator.

§ 950.13 Standby Support Contract: General provisions.

(a) *Purpose.* Each Standby Support Contract shall include a provision setting forth an agreement between the parties in which the Department shall provide compensation for covered costs incurred by a sponsor for covered events that result in a covered delay of full power operation of an advanced nuclear facility.

(b) *Covered facility.* Each Standby Support Contract shall include a provision of coverage only for an advanced nuclear facility which is not a federal entity. Each Standby Support Contract shall also include a provision to specify the advanced nuclear facility to be covered, along with the reactor design, and the location of the advanced nuclear facility.

(c) *Sponsor contribution.* Each Standby Support Contract shall include a provision to specify the amount that a sponsor has contributed to funding each type of account.

(d) *Maximum compensation.* Each Standby Support Contract shall include a provision to specify that the Program Administrator shall not pay compensation under the contract:

(1) In an aggregate amount that exceeds the amount of coverage up to $500 million each for the initial two reactors or up to $250 million each for the subsequent four reactors;

(2) In an amount for principal or interest costs for which the loan costs exceed the amount deposited in the Program Account; and

(3) In an amount for incremental costs that exceed the amount deposited in the Grant Account.

(e) *Term.* Each Standby Support Contract shall include a provision to specify the date at which the contract commences as well as the term of the contract. The contract shall enter into force on the date it has been signed by both the sponsor and the Program Administrator. Subject to the cancellation provisions set forth in paragraph (f) of this section, the contract shall terminate when all claims have been paid up to the full amounts to be covered under the Standby Support Contract, or all disputes involving claims under the contract have been resolved in accordance with subpart D of this part.

(f) *Cancellation provisions.* Each Standby Support Contract shall provide for cancellation in the following circumstances:

(1) If the sponsor abandons construction, and the abandonment is not caused by a covered event or force majeure, the Program Administrator may cancel the Standby Support Contract by giving written notice thereof to the sponsor and the parties have no further rights or obligations under the contract.

(2) If the sponsor does not require continuing coverage under the contract, the sponsor may cancel the Standby Support Contract by giving written notice thereof to the Program Administrator and the parties have no further rights or obligations under the contract.

(3) For such other cause as agreed to by the parties.

(g) *Termination by sponsor.* Each Standby Support Contract shall include a provision that prohibits a sponsor or any related party from executing another Standby Support Contract, if the sponsor elects to terminate its original existing Standby Support Contract,

unless the sponsor has cancelled or terminated construction of the reactor covered by its original existing Standby Support Contract.

(h) *Assignment.* Each Standby Support Contract shall include a provision on assignment of a sponsor's rights and obligations under the contract and assignment of payment of covered costs. The Program Administrator shall permit the assignment of payment of covered costs with prior written notice to the Department. The Program Administrator shall permit assignment of rights and obligations under the contract with the Department's prior approval. The sponsor may not assign its rights and obligations under the contract without the prior written approval of the Program Administrator and any attempt to do so is null and void.

(i) *Claims administration.* Each Standby Support Contract shall include a provision to specify a mechanism for administering claims pursuant to the procedures set forth in subpart C of this part.

(j) *Dispute resolution.* Consistent with the Administrative Dispute Resolution Act, each Standby Support Contract shall include a provision to specify a mechanism for resolving disputes pursuant to the procedures set forth in subpart D of this part.

(k) *Re-estimation.* Consistent with the Federal Credit Reform Act (FCRA) of 1990, the sponsor shall provide all needed documentation as required in § 950.12 to allow the Department to annually re-estimate the loan cost needed in the financing account as that term is used in 2 U.S.C. 661a(7) and funded by the Program Account. ''The sponsor is neither responsible for any increase in loan costs, nor entitled to recoup fees for any decrease in loan costs, resulting from the re-estimation conducted pursuant to FCRA.

§ 950.14 Standby Support Contract: Covered events, exclusions, covered delay and covered cost provisions.

(a) *Covered events.* Subject to the exclusions set forth in paragraph (b) of this section, each Standby Support Contract shall include a provision setting forth the type of events that are covered events under the contract. The type of events shall include:

(1) The Commission's failure to review the sponsor's inspections, tests, analyses and acceptance criteria in accordance with the Commission's rules, guidance, audit procedures, or formal opinions, in the case where the Commission has in place any rules, guidance, audit procedures or formal opinions setting schedules for its review of inspections, tests, analyses, and acceptance criteria under a combined license or the sponsor's combined license;

(2) The Commission's failure to review the sponsor's inspections, tests, analyses, and acceptance criteria on the schedule for such review proposed by the sponsor, subject to the Department's review and approval of such schedule, including review of any informal guidance or opinion of the Commission that has been provided to the sponsor or the Department, in the case where the Commission has not provided any rules, guidance, audit procedures or formal Commission opinions setting schedules for review of inspections, tests, analyses and acceptance criteria under a combined license, or under the sponsor's combined license;

(3) The conduct of pre-operational Commission hearings, that are provided for in 10 CFR part 52, after issuance of the combined license; and

(4) Litigation in State, Federal, local, or tribal courts, including appeals of Commission decisions related to an application for a combined license to such courts., and excluding administrative litigation that occurs at the Commission related to the combined license.

(b) *Exclusions.* Each Standby Support Contract shall include a provision setting forth the exclusions from covered costs under the contract, and for which any associated delay in the attainment of full power operations is not a covered delay. The exclusions are:

(1) The failure of the sponsor to take any action required by law, regulation, or ordinance, including but not limited to the following types of events:

(i) The sponsor's failure to comply with environmental laws or regulations such as those related to pollution abatement or human health and the environment;

(ii) The sponsor's re-performance of any inspections, tests, analyses or re-demonstration that acceptance criteria have been met due to Commission non-acceptance of the sponsor's submitted results of inspections, tests, analyses, and demonstration of acceptance criteria;

(iii) Delays attributable to the sponsor's actions to redress any deficiencies in inspections, tests, analyses or acceptance criteria as a result of a Commission disapproval of fuel loading; or

(2) Events within the control of the sponsor, including but not limited to delays attributable to the following types of events:

(i) Project planning and construction problems;

(ii) Labor-management disputes;

(iii) The sponsor's failure to perform inspections, tests, analyses and to demonstrate acceptance criteria are met or failure to inform the Commission of the successful completion of inspections, tests, analyses and demonstration of meeting acceptance criteria in accordance with its schedule; or

(iv) The lack of adequate funding for construction and testing of the advanced nuclear facility.

(3) Normal business risks, including but not limited to the following types of events:

(i) Delays attributable to force majeure events such as a strike or the failure of power or other utility services supplied to the location, or natural events such as severe weather, earthquake, landslide, mudslide, volcanic eruption, other earth movement, or flood;

(ii) Government action meaning the seizure or destruction of property by order of governmental authority;

(iii) War or military action;

(iv) Acts or decisions, including the failure to act or decide, of any government body (excluding those acts or decisions or failure to act or decide by the Commission that are covered events);

(v) Supplier or subcontractor delays in performance;

(vi) Litigation, whether initiated by the sponsor or another party, that is not a covered event under paragraph (a) of this section; or

(vii) Failure to timely obtain regulatory permits or approvals that are not covered events under paragraph (a) of this section.

(c) *Covered delay.* Each Standby Support Contract shall include a provision for the payment of covered costs, in accordance with the procedures in subpart C of this part for the payment of covered costs, if a covered event(s) is determined to be the cause of delay in attainment of full power operation, provided that:

(1) Under Standby Support Contracts for the subsequent four reactors, covered delay may occur only after the initial 180-day period of delay, and

(2) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract.

(d) *Covered costs.* Each Standby Support Contract shall include a provision to specify the type of costs for which the Department shall provide payment to a sponsor for covered delay in accordance with the procedures set forth in subparts C and D of this part. The types of costs shall be limited to

either or both, dependent upon the terms of the contract:

(1) The principal or interest on which the loan costs for the Program Account was calculated; and

(2) The incremental costs on which funding for the Grant Account was calculated.

(e) *ITAAC Schedule.* Each Standby Support Contract shall provide for adjustments to the ITAAC review schedule when the parties deem necessary, in the case where the Commission has not provided any rules, guidance, audit procedures or formal Commission opinions setting schedules for review of inspections, tests, analyses and acceptance criteria under a combined license, upon review and approval by the Department and the sponsor. Adjustments to the ITAAC review schedule must be in writing, expressly approved by the Department and the sponsor, and remain in effective for determining covered events unless and until a subsequently issued ITAAC review schedule is approved by the parties.

Subpart C—Claims Administration Process

§ 950.20 General provisions.

The parties shall include provisions in the Standby Support Contract to specify the procedures and conditions set forth in this subpart for the submission of claims and the payment of covered costs under the Standby Support Contract. A sponsor is required to establish that there is a covered event, a covered delay and a covered cost; the Department is required to establish an exclusion in accordance with § 950.14(b).

§ 950.21 Notification of covered event.

(a) A sponsor shall submit in writing to the Claims Administrator a notification that a covered event has occurred that has delayed the schedule for construction or testing and that may cause covered delay. The sponsor shall submit the notification to the Claims Administrator no later than thirty (30) days of the end of the covered event and contain the following information:

(1) A description and explanation of the covered event, including supporting documentation of the event;

(2) The duration of the delay in the schedule for construction, testing and full power operation, and the schedule for inspections, tests, analyses and acceptance criteria, if applicable;

(3) The sponsor's projection of the duration of covered delay;

(4) A revised schedule for construction, testing and full power operation, including the dates of system level construction or testing that had been conducted prior to the event; and

(5) A revised inspections, tests, analyses, and acceptance criteria schedule, if applicable, including the dates of Commission review of inspections, tests, analyses, and acceptance criteria that had been conducted prior to the event.

(b) An authorized representative of the sponsor shall sign the notification of a covered event, certify the notification is made in good faith and the covered event is not an exclusion as specified in § 950.14(b), and represent that the supporting information is accurate and complete to the sponsor's knowledge and belief.

§ 950.22 Covered event determination.

(a) *Completeness review.* Upon notification of a covered event from the sponsor, the Claims Administrator shall review the notification for completeness within thirty (30) days of receipt. If the notification is not complete, the Claims Administrator shall return the notification within thirty (30) days of receipt and specify the incomplete information for submission by the sponsor to the Claims Administrator in time for a determination by the Claims Administrator in accordance with paragraph (c) of this section.

(b) *Covered Event Determination.* The Claims Administrator shall review the notification and supporting information to determine whether there is agreement by the Claims Administrator with the sponsor's representation of the event as a covered event (Covered Event Determination) based on a review of the contract conditions for covered events and exclusions.

(1) If the Claims Administrator believes the event is an exclusion as set forth in § 950.14(b), the Claims Administrator shall request within 30 days of receipt of the notification of a covered event information in the sponsor's possession that is relevant to the exclusion. The sponsor shall provide the requested information to the Administrator within 20 days of receipt of the Administrator's request.

(2) The sponsor's failure to provide the requested information in a complete or timely manner constitutes a basis for the Claims Administrator to disagree with the sponsor's covered event notification as provided in paragraph (c) of this section, and to deny a claim for covered costs related to the exclusion as provided in § 950.24 of this part.

(c) *Timing.* The Claims Administrator shall notify the sponsor within sixty (60) days of receipt of the notification whether the Administrator agrees with the sponsor's representation, disagrees with the representation, requires further information, or is an exclusion. If the sponsor disagrees with the Covered Event Determination, the parties shall resolve the dispute in accordance with the procedures set forth in subpart D of this part.

§ 950.23 Claims process for payment of covered costs.

(a) *General.* No more than 120 days of when a sponsor was scheduled to attain full power operation and expects it will incur covered costs, the sponsor may make a claim upon the Department for the payment of its covered costs under the Standby Support Contract. The sponsor shall file a Certification of Covered Costs and thereafter such Supplementary Certifications of Covered Costs as may be necessary to receive payment under the Standby Support Contract for covered costs.

(b) *Certification of Covered Costs.* The Certification of Covered Costs shall include the following:

(1) A Claim Report, including the information specified in paragraph (c) of this section;

(2) A certification by the sponsor that:

(i) The covered costs listed on the Claim Report filed pursuant to this section are losses to be incurred by the sponsor;

(ii) The claims for the covered costs were processed in accordance with appropriate business practices and the procedures specified in this subpart; and

(iii) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract.

(c) *Claim Report.* For purposes of this part, a ''Claim Report'' is a report of information about a sponsor's underlying claims that, in the aggregate, constitute the sponsor's covered costs. The Claim Report shall include, but is not limited to:

(1) Detailed information substantiating the duration of the covered delay;

(2) Detailed information about the covered costs associated with covered delay, including as applicable:

(i) The amount of payment for principal or interest during the covered delay, including the relevant dates of payment, amounts of payment and any other information deemed relevant by the Department, and the name of the holder of the debt, if the debt obligation is held by a Federal agency; or

(ii) The underlying payment during the covered delay related to the incremental cost of purchasing power to

meet contractual agreements, including any documentation deemed relevant by the Department to calculate the fair market price of power.

(d) *Supplementary Certification of Covered Cost.* If the total amount of the covered costs due to a sponsor under the Standby Support Contract has not been determined at the time the Certification of Covered Costs has been filed, the sponsor shall file monthly, or on a schedule otherwise determined by the Claims Administrator, Supplementary Certifications of Covered Costs updating the amount of the covered costs owed to the sponsor. Supplementary Certifications of Covered Costs shall include a Claim Report and a certification as described in this section.

(e) *Supplementary information.* In addition to the information required in paragraphs (b) and (c) of this section, the Claims Administrator may request such additional supporting documentation as required to ascertain the allowable covered costs sustained by a sponsor.

§ 950.24 Claims determination for covered costs.

(a) No later than thirty (30) days from the sponsor's submission of a Certification of Covered Costs, the Claims Administrator shall issue a Claim Determination identifying those claimed costs deemed to be allowable based on an evaluation of:

(1) The duration of covered delay, taking into account contributory or concurrent delays resulting from exclusions from coverage as established by the Claims Administrator in accordance with § 950.22;

(2) The covered costs associated with covered delay, including an assessment of the sponsor's due diligence in mitigating or ending covered costs, as set forth in § 950.23;

(3) Any adjustments to the covered costs, as set forth in § 950.26; and

(4) Other information as necessary and appropriate.

(b) The Claim Determination shall state the Claims Administrator's determination that the claim shall be paid in full, paid in an adjusted amount as deemed allowable by the Claims Administrator, or rejected in full.

(c) Should the Claims Administrator conclude that the sponsor has not supplied the required information in the Certification of Covered Costs or any supporting documentation sufficient to allow reasonable verification of the duration of the covered delay or covered costs, the Claims Administrator shall so inform the sponsor and specify the nature of additional documentation requested, in time for the sponsor to supply supplemental documentation and for the Claims Administrator to issue the Claim Determination.

(d) Should the Claims Administrator find that any claimed covered costs are not allowable or otherwise should be considered excluded costs under the Standby Support Contract, the Claims Administrator shall identify such costs and state the reason(s) for that decision in writing. A determination by the Claims Administrator that an event is an exclusion or that the sponsor has not provided complete or timely information relevant to the exclusion as specified in § 950.22 shall provide a basis for the Claims Administrator to find covered costs are not allowable. If the parties cannot agree on the covered costs, they shall resolve the dispute in accordance with the requirements in subpart D of this part.

§ 950.25 Calculation of covered costs.

(a) The Claims Administrator shall calculate the allowable amount of the covered costs claimed in the Certification of Covered Costs as follows:

(1) *Costs covered through Program Account.* The principal or interest on any debt obligation financing the advanced nuclear facility for the duration of covered delay to the extent the debt obligation was included in the calculation of the loan cost; and

(2) *Costs covered by Grant Account.* The incremental costs calculated for the duration of the covered delay. In calculating the incremental cost of power, the Claims Administrator shall consider:

(i) *Fair Market Price.* The fair market price may be determined by the lower of the two options: The actual cost of the short-term supply contract for replacement power, purchased by the sponsor, during the period of delay, or for each day of replacement power by its day-ahead weighted average index price in $/MWh at the hub geographically nearest to the advanced nuclear facility as posted on the previous day by the Intercontinental Exchange (ICE) or an alternate electronic marketplace deemed reliable by the Department. The daily MWh assumed to be covered is no more than its nameplate capacity multiplied by 24 hours; multiplied by the capacity-weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included. In addition, the Claims Administrator may consider "fair market price" from other published indices or prices at regional trading hubs and bilateral contracts for similar delivered firm power products and the costs incurred, including acquisition costs, to move the power to the contract-specified point of delivery, as well as the provisions of the covered contract regarding replacement power costs for delivery default; and

(ii) *Contractual price of power.* The contractual price of power shall be determined as the daily weighted average price in equivalent $/MWh under a contractual supply agreement(s) for delivery of firm power that the sponsor entered into prior to any covered event. The daily MWh assumed to be covered is no more than the advanced nuclear facility's nameplate capacity multiplied by 24 hours; multiplied by the capacity-weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included.

§ 950.26 Adjustments to claim for payment of covered costs.

(a) *Aggregate amount of covered costs.* The sponsor's aggregate amount of covered costs shall be reduced by any amounts that are determined to be either excluded or not covered.

(b) *Amount of Department share of covered costs.* The Department share of covered costs shall be adjusted as follows:

(1) *No excess recoveries.* The share of covered costs paid by the Department to a sponsor shall not be greater than the limitations set forth in § 950.27(d).

(2) *Reduction of amount payable.* The share of covered costs paid by the Department shall be reduced by the appropriate amount consistent with the following:

(i) *Excluded claims.* The Department shall ensure that no payment shall be made for costs resulting from events that are not covered under the contract as specified in § 950.14; and

(ii) *Sponsor due diligence.* Each sponsor shall ensure and demonstrate that it uses due diligence to mitigate, shorten, and to end the covered delay and associated costs covered by the Standby Support Contract.

§ 950.27 Conditions for payment of covered costs.

(a) *General.* The Department shall pay the covered costs associated with a Standby Support Contract in accordance with the Claim Determination issued by the Claims Administrator under § 950.24 or the Final Claim Determination under § 950.34, provided that:

(1) Neither the sponsor's claim for covered costs nor any other document submitted to support the underlying claim is fraudulent, collusive, made in bad faith, dishonest or otherwise designed to circumvent the purposes of the Act and regulations;

(2) The losses submitted for payment are within the scope of coverage issued by the Department under the terms and conditions of the Standby Support Contract as specified in subpart B of this part; and

(3) The procedures specified in this subpart have been followed and all conditions for payment have been met.

(b) *Adjustments to Payments.* In the event of fraud or miscalculation, the Department may subsequently adjust, including an adjustment obligating the sponsor to repay any payment made under paragraph (a) of this section.

(c) *Suspension of payment for covered costs.* If the Department paid or is paying covered costs under paragraph (a) of this section, and subsequently makes a determination that a sponsor has failed to meet any of the requirements for payment specified in paragraph (a) of this section for a particular covered cost, the Department may suspend payment of covered costs pending investigation and audit of the sponsor's covered costs.

(d) *Amount payable.* The Department's share of compensation for the initial two reactors is 100 percent of the covered costs of covered delay but not more than the coverage in the contract or $500 million per contract, whichever is less; and for the subsequent four reactors, not more than 50 percent of the covered costs of the covered delay but not more than the coverage in the contract or $250 million per contract, whichever is less. The Department's share of compensation for the subsequent four reactors is further limited in that the payment is for covered costs of a covered delay that occurs after the initial 180-day period of covered delay.

§ 950.28 Payment of covered costs.

(a) *General.* The Department shall pay to a sponsor covered costs in accordance with this subpart and the terms of the Standby Support Contract. Payment shall be made in such installments and on such conditions as the Department determines appropriate. Any overpayments by the Department of the covered costs shall be offset from future payments to the sponsor or returned by the sponsor to the Department within forty-five (45) days. If there is a dispute, then the Department shall pay the undisputed costs and defer payment of the disputed portion upon resolution of the dispute in accordance with the procedures in subpart D of this part. If the covered costs include principal or interest owed on a loan made or guaranteed by a Federal agency, the Department shall instead pay that Federal agency the covered costs, rather than the sponsor.

(b) *Timing of Payment.* The sponsor may receive payment of covered costs when:

(1) The Department has approved payment of the covered cost as specified in this subpart; and

(2) The sponsor has incurred and is obligated to pay the costs for which payment is requested.

(c) *Payment process.* The covered costs shall be paid to the sponsor designated on the Certification of Covered Costs required by § 950.23, or to the sponsor's assignee as permitted by § 950.13(h). A sponsor that requests payment of the covered costs must receive payment through electronic funds transfer.

Subpart D—Dispute Resolution Process

§ 950.30 General.

The parties, i.e., the sponsor and the Department, shall include provisions in the Standby Support Contract that specify the procedures set forth in this subpart for the resolution of disputes under a Standby Support Contract. Sections 950.31 and 950.32 address disputes involving covered events; §§ 950.33 and 950.34 address disputes involving covered costs; and §§ 950.36 and 950.37 address disputes involving other contract matters.

§ 950.31 Covered event dispute resolution.

(a) If a sponsor disagrees with the Covered Event Determination rendered in accordance with § 950.22 and cannot resolve the dispute informally with the Claims Administrator, then the disagreement is subject to resolution as follows:

(1) A sponsor shall, within thirty (30) days of receipt of the Covered Event Determination, deliver to the Claims Administrator written notice of a sponsor's rebuttal which sets forth reasons for its disagreement, including any expert opinion obtained by the sponsor.

(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Determination on Covered Events.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediation.

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section and the sponsor elects to continue pursuing the claim, the sponsor shall within ten (10) days submit any remaining issues in controversy to the Civilian Board of Contract Appeals (Civilian Board) or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Civilian Board's Summary Binding Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties agree that the decision of the Civilian Board constitutes a Final Determination on Covered Events.

§ 950.32 Final determination on covered events.

(a) If the parties reach a Final Determination on Covered Events through mediation, or Summary Binding Decision as set forth in this subpart, the Final Determination on Covered Events is a final settlement of the issue, made by the sponsor and the Program Administrator. The sponsor, and the Department, may rely on, and neither may challenge, the Final Determination on Covered Events in any future Certification of Covered Costs related to the covered event that was the subject of that Initial Determination.

(b) The parties agree that no appeal shall be taken or further review sought, and that the Final Determination on Covered Events is final, conclusive, non-appealable and may not be set aside, except for fraud.

§ 950.33 Covered costs dispute resolution.

(a) If a sponsor disagrees with the Claim Determination rendered in accordance with § 950.24 and cannot resolve the dispute informally with the Claims Administrator, then the parties agree that any dispute must be resolved as follows:

(1) A sponsor shall, within thirty (30) days of receipt of the Claim Determination, deliver to the Claims Administrator in writing notice of and reasons for its disagreement (Sponsor's Rebuttal), including any expert opinion obtained by the sponsor.

(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties have fifteen (15) days to informally and in good faith participate in mediation to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Claim Determination.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediator(s).

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section, any remaining issues in controversy shall be submitted by the sponsor within ten (10) days to the Civilian Board or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Board's Summary Binding Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties agree that the decision of the Civilian Board shall constitute a Final Claim Determination.

§ 950.34 Final claim determination.

(a) If the parties reach a Final Claim Determination through mediation, or Summary Binding Decision as set forth in this subpart, the Final Claim Determination is a final settlement of the issue, made by the sponsor and the Program Administrator.

(b) The parties agree that no appeal shall be taken or further review sought and that the Final Claim Determination is final, conclusive, non-appealable, and may not be set aside, except for fraud.

§ 950.35 Payment of final claim determination.

Once a Final Claim Determination is reached by the methods set forth in this subpart, the parties intend that such a Final Claim Determination shall constitute a final settlement of the claim and the sponsor may immediately present to the Department a Final Claim Determination for payment.

§ 950.36 Other contract matters in dispute.

(a) If the parties disagree over terms or conditions of the Standby Support Contract other than disagreements related to covered events or covered costs, then the parties shall engage in informal dispute resolution as follows:

(1) The parties shall engage in good faith efforts to resolve the dispute after written notification by one party to the other that there is a contract matter in dispute.

(2) If the parties cannot reach a resolution of the matter in disagreement within thirty (30) days of the written notification of the matter in dispute, then the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Agreement on the matter in dispute.

(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediation.

(b) If the parties cannot resolve the disagreement through mediation under the timeframe established in paragraph (a)(2) of this section and either party elects to continue pursuing the disagreement, that party shall within ten (10) days submit any remaining issues in controversy to the Civilian Board or its successor, for resolution by an Administrative Judge of the Civilian Board utilizing the Civilian Board's Summary Binding Decision procedure. The parties shall abide by the procedures of the Civilian Board for Summary Binding Decision. The parties shall agree that the decision of the Civilian Board constitutes a Final Decision on the matter in dispute.

§ 950.37 Final agreement or final decision.

(a) If the parties reach a Final Agreement on a contract matter in dispute through mediation, or a Final Decision on a contract matter in dispute through a Summary Binding Decision as set forth in this subpart, the Final Agreement or Final Decision is a final settlement of the contract matter in dispute, made by the sponsor and the Program Administrator.

(b) The parties agree that no appeal shall be taken or further review sought, and that the Final Agreement or Final Decision is final, conclusive, non-appealable and may not be set aside, except for fraud.

Subpart E—Audit and Investigations and Other Provisions

§ 950.40 General.

The parties shall include a provision in the Standby Support Contract that specifies the procedures in this subpart for the monitoring, auditing and disclosure of information under a Standby Support Contract.

§ 950.41 Monitoring/Auditing.

The Department has the right to audit any and all costs associated with the Standby Support Contracts. Auditors who are employees of the United States government, who are designated by the Secretary of Energy or by the Comptroller General of the United States, shall have access to, and the right to examine, at the sponsor's site or elsewhere, any pertinent documents and records of a sponsor at reasonable times under reasonable circumstances. The Secretary may direct the sponsor to submit to an audit by a public accountant or equivalent acceptable to the Secretary.

§ 950.42 Disclosure.

Information received from a sponsor by the Department may be available to the public subject to the provision of 5 U.S.C. 552, 18 U.S.C. 1905 and 10 CFR part 1004; provided that:

(a) Subject to the requirements of law, information such as trade secrets, commercial and financial information that a sponsor submits to the Department in writing shall not be disclosed without prior notice to the sponsor in accordance with Department regulations concerning the public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information.

(b) Upon a showing satisfactory to the Program Administrator that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information, the Department may not disclose such information.

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