

Guidance on Applications for Payments for Specified Energy Property in Lieu of Tax Credits

The American Recovery and Reinvestment Act of 2009 (“ARRA”), passed in February 2009, created a cash grant program for qualified renewable energy facilities. Entities placing these facilities in service may receive cash grants of up to 30 percent of the tax basis of the property. ARRA vested authority over the program with the Department of the Treasury (“Treasury”). There is no statutory cap on program benefits. These grants are in lieu of investment tax credits, and use of a Treasury grant precludes a facility from being eligible for the production tax credit or the investment tax credit. On July 9, 2009, Treasury released application guidance and related documentation, including a sample application. Links to these documents on the Treasury website are included below. Treasury is not accepting applications at this time, but is expected to in the near future.

Grant Program Eligibility Requirements

To qualify, an applicant must own or lease the property, originally place the property in service, and may not be a government entity, tax-exempt entity, cooperative electric organization, or in a partnership with any of the foregoing. However, non-qualified entities are permitted by the guidance to take advantage of the grants by setting up a “blocker” entity.

Eligible facilities for the grant program include wind, geothermal, biomass, landfill gas, trash combustion, hydroelectric, solar, and hydrokinetic/marine (tidal). To qualify for the grant, a facility must be placed in service either: (i) during 2009-10; or (ii) prior to the end of 2012 for wind, 2016 for solar, and 2013 for all other eligible technologies, *provided* that construction of any qualifying facility begins in 2009-10. Eligible facilities are limited to specified energy property, which is tangible property, integral to the facility, for which depreciation is allowable. The guidance specifies that to be integral to the facility, the property must be used directly as a part of the qualified facility, essential to the completeness of the activity performed in that facility, and located at the site of the qualified facility.

The beginning of construction is defined in the guidance as when any physical work of a significant nature begins on the facility. The guidance establishes a safe-harbor when the applicant incurs five percent of the total cost of the property (excluding the cost of the land and preliminary activities such as planning and designing, securing financing, exploring, or researching). The guidance gives specific examples of physical work of a significant nature for wind property as excavation of the foundation or the setting of anchor bolts.

Individual components of a larger property are considered a single unit if they are functionally independent (*e.g.*, on a wind farm, each electricity generating wind turbine consists of a separate unit comprised of the turbine, associated tower, and supporting pad). However, the owner of multiple units on a single site may elect to treat the units as a single unit. No property that began construction prior to January 1, 2009 may be included in this aggregate single unit. In the event that not all property qualifies in the single unit, the non-qualified property will be excluded from the grant without causing the remaining property to be disqualified, allowing the grant on the tax basis of the qualified property.

The original use of the property must begin with the applicant. For this determination, the guidance utilizes the “80-20” test. Under this test, 20 percent of the cost of the facility may be used parts without disqualifying the facility from the cash grant program.

A lessee may obtain the grant upon execution of a written agreement with the lessor waiving the lessor’s rights to receive any grant payments, among other requirements. This election by the lessor is irrevocable. Further, the lessee must agree to include 50 percent of the grant amount ratably in its gross income over five years. Sale-leaseback transactions are explicitly permitted if the following conditions are satisfied: (i) the lessee originally places the property in service; (ii) the property is leased to the lessee within three months of the placed in service date; and (iii) the lessee and the lessor cannot make an election to preclude application of the sale-leaseback rules.

Application Procedures

Applications may only be submitted after the eligible property is under construction or already placed in service. Regardless of when the property will be placed in service, the absolute deadline for applications is October 1, 2011.

Applications consist of a signed and complete application, supporting documentation, a signed terms and conditions addendum, and complete payment information. Supporting documentation is required to prove when the facility was placed in service or began construction, and may include stamped engineering design documents, a third party commissioning report, or interconnection agreements. An application must include a detailed cost breakdown supporting the tax basis claimed. If the tax basis claimed is in excess of \$500,000, the guidance requires an independent accountant’s certification attesting to the accuracy of all costs claimed.

Timeline for Funding

If Treasury determines an application does not qualify for payment, the applicant will be notified and will have 21 days to submit additional information. Failure to meet this time frame will result in denial of the application.

If the property has been placed in service at the time of the application, Treasury shall make payments within 60 days of receipt of a completed application. For applications submitted while the property is under construction, Treasury will notify the applicant whether all eligibility requirements have been met. Upon completion of construction, the applicant has 90 days to submit supplemental information necessary for a final Treasury determination. Treasury is to make payments within 60 days of receipt of this supplemental information. When Treasury approves an application, it will send a notice to the applicant. Payment will be via electronic funds transfer and within five days of the date of notice.

Any grant will be subject to recapture for five years in the event of sale of the subject property to a non-qualified entity or if the subject property ceases to qualify under the Treasury regulations and ARRA. The amount subject to recapture is 100 percent reduced by 20 percent each successive year for the five-year period. Sale of the property will not result in recapture if the property continues to qualify as eligible energy property and the purchaser agrees to be jointly liable to Treasury for the recapture amount. The applicant will remain jointly liable for the recapture amount. Temporary cessation of energy production will not result in recapture if resumption of production is intended at the time of cessation. Permanent cessation of production will require recapture, except in the instance of a natural disaster.

For further information, please see the following documents on the Treasury website:

[Guidance](#)

[Terms and Conditions](#)

[Sample Application](#)

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