

Safe Harbor Provided with Respect to Cash Grants for Energy Property

Under the American Recovery and Reinvestment Act of 2009 (“ARRA”), the Department of the Treasury (“Treasury”) offers grants to specified energy property in lieu of tax credits. The grants, which are effectively refundable tax credits, are available to taxpayers who place in service specified energy property in 2009 or 2010, or who begin construction in 2009 or 2010 and complete construction by a specified “credit termination date” (this date differs based on the type of energy property; see the attached table). Recent guidance has clarified when construction begins, for purposes of the grant process.

Previous guidance had explained that construction begins when physical work of a “significant nature” begins. The previous guidance had provided no bright line for when this occurred, but did provide a standard. Work performed both by the applicant and for the applicant by other persons under a binding written contract is taken into account under the previous guidance. Both on- and off-site work are considered; the previous guidance gives the example of a wind facility, where on-site work might begin with excavation for the foundation, and off-site work might begin if components for the wind turbine are produced off-site. Physical work of a significant nature does not include preliminary activities such as planning, designing, securing financing, test-drilling of a geothermal deposit or to determine soil condition, or excavation to contour the land (as distinguished from excavation for footings and foundations).

The new guidance is quite helpful because it creates a safe harbor in determining when physical work of a significant nature has begun, thereby providing increased certainty for applicants. An applicant may treat physical work of a significant nature as beginning when more than 5 percent of the total cost of the property has been paid or incurred, and may not treat physical work of a significant nature as having begun until more than 5 percent of the total cost of the property has been paid or incurred by the applicant. Notably, when property is manufactured, constructed, or produced for the applicant by another person under a binding written contract that is entered into prior to manufacture, construction, or production of the property, the cost of property under the contract is treated as paid or incurred either 1) when the property is provided to the applicant, or 2) before the property is provided to the applicant, when costs are paid or incurred with respect to the property by such other person. If the property includes both self-constructed components and components constructed under contract, those costs are combined in determining whether 5 percent of total costs have been incurred or paid. Only costs that can be included in the basis of the property are taken into account in determining whether such 5 percent of total costs threshold has been satisfied.

Grants will be equal to either 10 percent or 30 percent of the tax basis of the property, depending on the type of energy property (see attached Table 1). If an applicant qualifies, payment is made 60 days from the later of the date the application is completed or the date the property is placed in service. Applicants who receive the grants are not eligible for the production or investment tax credits (under Sections 45 and 48 of the Internal Revenue Code, respectively); in addition, credits previously allowed under Section 48 with respect to expenditures on the property will be recaptured.

For property placed in service in 2009 or 2010, applications must be submitted after the property has been placed in service and before October 1, 2011. For property not placed in service in 2009 or 2010, but for which construction commences in 2009 or 2010, applications must be submitted after construction commences but before October 1, 2011.

Percent of Basis Eligible for Grant

Specified Energy Property	Credit Termination Date	Applicable Percentage of Eligible Cost Basis
Large Wind	Jan 1, 2013	30%
Closed-Loop Biomass Facility	Jan 1, 2014	30%
Open-loop Biomass Facility	Jan 1, 2014	30%
Geothermal (under IRC § 45)	Jan 1, 2014	30%
Landfill Gas Facility	Jan 1, 2014	30%
Trash Facility	Jan 1, 2014	30%
Qualified Hydropower Facility	Jan 1, 2014	30%
Marine & Hydrokinetic	Jan 1, 2014	30%
Solar	Jan 1, 2017	30%
Geothermal (under IRC § 48)	Jan 1, 2017	10% ¹
Fuel Cells	Jan 1, 2017	30% ²
Microturbines	Jan 1, 2017	10% ³
Combined Heat & Power	Jan 1, 2017	10%
Small Wind	Jan 1, 2017	30%
Geothermal Heat Pumps	Jan 1, 2017	10%

¹ Geothermal Property that meets the definitions of qualified property in both § 45 and § 48 is allowed either the 30 percent credit or the 10 percent credit, but not both.

² For fuel cell property, the maximum amount of the payment may not exceed an amount equal to \$1,500 for each 0.5 kilowatt of capacity.

³ For microturbine property, the maximum amount of the payment may not exceed an amount equal to \$200 for each kilowatt of capacity.

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