

## Treasury Issues Guidance for Cash Grant In Lieu of Energy Tax Credit

July 10, 2009

On July 9, the U.S. Department of the Treasury (the Treasury) issued guidance that outlined the procedures for obtaining cash grants in lieu of claiming investment tax credits or production tax credits for specified renewable energy property. The American Recovery and Reinvestment Act of 2009 (ARRA), enacted on February 17, 2009, permits eligible taxpayers to elect to receive a cash grant from the Treasury in an amount equal to the investment tax credit (ITC) that otherwise could be claimed for the property, providing the property is placed in service in 2009 or 2010, or construction begins in 2009 or 2010 and the property is placed in service by a specified date (i.e., before January 1, 2013, 2014, or 2017, depending on the type of property).

The cash grant is equal to 30% of the cost of depreciable wind, closed-loop biomass, open-loop biomass, specified geothermal, landfill gas, trash combustion hydropower, marine and hydrokinetic, fuel cell, solar and small wind property, and 10% of the cost of other specified geothermal, qualified microturbine, combined heat and power system, and geothermal heat pump property. ARRA directs the Treasury to pay the grant within 60 days of the later of the date of an application for the grant or the placed-in-service date.

The Treasury will accept grant applications beginning on August 1, 2009 through October 1, 2011 for property that has been placed in service in 2009 or 2010. The Treasury will also accept grant applications for property for which construction has begun in 2009 or 2010, which generally is when physical work of a significant nature has begun by the applicant. The Treasury guidance includes a safe harbor that treats construction as having begun if the applicant has incurred more than 5% of the total cost of the property (excluding the cost of any land and preliminary activities such as planning or designing, securing financing, exploring, or researching). If an applicant has a written contract with another person to construct the property, construction begins when physical work of a significant nature begins under the contract. A contract is only considered binding if it is enforceable under state law and complies with certain other requirements relating to limitations on damages and cancellation. Applicants who apply after construction begins but before the placed-in-service date must submit supplemental information within 90 days of the placed-in-service date. The Treasury will make payment to qualified applicants or a third-party assignee of the qualified applicant within 60 days of receiving the supplemental information.

**Application Form.** A sample application can be found online at <http://www.treasury.gov/recovery/1603.shtml>. An applicant must have a Data Universal Numbering System (DUNS) number in order to submit an application. If the applicant does not have a DUNS number, one may be requested by calling the toll-free DUNS number request line at 1.866.705.5711.

The applicant must also register with the Central Contractor Registration (CCR) at [www.ccr.gov/startregistration.aspx](http://www.ccr.gov/startregistration.aspx). Applicants wishing to assign their payment to a third party must submit a Notice of Assignment, which will include the assignee's DUNS number. The assignee will also be required to register with the CCR.

**Required Documentation.** Applicants must submit the following supporting documentation to demonstrate that the property is eligible for the cash grant:

- Final engineering design documents, stamped by a licensed professional engineer.
- Certain additional documentation, depending on the type of energy property. The guidance also sets forth applicable limitations with respect to each type of energy property. For instance, grant applications for open-loop biomass facilities, marine and hydrokinetic renewable energy facilities, fuel cell, microturbine, combined heat and power system, and small wind energy property will need to be accompanied by documentation demonstrating that the property is designed to have a nameplate capacity that meets the required minimums and maximums under other provisions of the Internal Revenue Code. Fuel cell and microturbine property must have documentation that confirms the property is designed to meet the electricity-only generation efficiency requirements. Incremental hydropower production projects will need Federal Energy Regulatory Commission certification.
- A commissioning report provided by the project engineer, equipment vendor, or independent third party, certifying that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose, including proof that the 5% safe harbor is met if it is being relied upon.
- An interconnection agreement for those properties interconnected with a utility.
- If the property is under construction and not yet in service, the applicant must include paid invoices, financial documents, or binding contracts demonstrating that the property is in the process of construction.
- If the property is leased, a leasing agreement with the lessor must be included with the application.
- Documentation supporting the cost basis being claimed for the property, which must include a detailed breakdown of all costs included in the basis. Other supporting documentation, such as contracts, copies of invoices, and proof of payment need not be supplied with the application, but must be kept available to provide to Treasury upon request. If the property has a cost basis in excess of \$500,000, an independent accountant's certification of the accuracy of all costs is required.

**Substantive Guidance.** The Treasury guidance issued on July 9, 2009 also addressed certain substantive issues that may arise in connection with the cash grant program, including:

- While the cash grant program is not available to certain owners of specified energy property, including governmental entities, tax-exempt entities, cooperative electric companies, and certain flow-through entities with tax-exempt entities as partners or indirect owners, the guidance confirms that a tax-exempt entity may form a "C" corporation (often called a "blocker corporation") to hold its interest and thereby qualify for the cash grant.

- For purposes of determining when construction begins or when property is placed in service, all components of property are treated as a single unit if the components are functionally interdependent. For example, on a wind farm, the wind turbine, its tower, and its supporting pad are a single unit of property, and the control system is a separate unit of property. An owner of multiple units of property may elect to treat them as a single unit of property. For instance, the wind farm owner may elect to treat as a single unit a wind farm that consists of 50 turbines, their associated towers, their supporting pads, the computer system that monitors and controls the turbines, and any associated power condition equipment. In addition, a wind farm owner could develop a project in phases: if 40 turbines of a planned 50-turbine project are placed in service, an otherwise eligible applicant would be eligible for a payment based on the first 40 turbines.
- For purposes of determining whether the original use of the property begins with the applicant, up to 20% of the total cost of the facility may consist of used parts.
- The special sale-leaseback rule for ITC purposes also applies for cash-grant purposes. Thus, a developer may first place the property in service, and then sell the property and lease it back within three months of the placed-in-service date, and the owner-lessor will be treated as the original user and as placing the property in service when it is first used by the lessee under the lease.
- A lessor who is eligible to receive a cash grant may elect to pass the cash grant through to the lessee. Under such an election, the lessee is treated as having purchased the property for its fair market value. In return, the lessee must include ratably in gross income over the five-year recapture period an amount equal to 50% of the cash grant.
- All or a portion of the cash grant must be repaid to the Treasury in the event that any interest in the property or in any flow-through entity that directly or indirectly owns an interest in the property is sold to any person or entity that is ineligible to participate in the cash grant program (a disqualified person). On the other hand, there is no recapture if an interest in the property is sold to a person or entity that is an eligible participant, so long as the purchaser agrees to be jointly liable with the applicant if the property is later sold to a disqualified person.
- An applicant is not required to post a bond as a condition of its receipt of the cash grant, and receipt of payment does not create a lien on the property in favor of the United States. However, an obligation to repay funds to the Treasury pursuant to a recapture event is a debt obligation to the United States enforceable by the Department of Justice. Such a debt is not considered a tax liability.
- Except with respect to lessees who claim cash grants, a cash grant with respect to specified energy property is not includible in taxable income. The basis of the property must be reduced by an amount equal to 50% of the payment.
- The eligible basis of property for purposes of the cash grant is limited to the cost of the facility attributable to a qualifying activity. This limitation, however, does not reduce the eligible basis of a facility that qualifies as a modification of an existing facility. For example, eligible basis would include the entire cost of modifications to an existing facility to use closed-loop biomass to co-fire with coal, with other biomass, or with both provided the modification has been approved under the Biomass Power for Rural Development Program or is part of a pilot project of the Commodity Credit Corporation (as described in 65 Fed. Reg. 63052).

During the Media Briefing Conference Call that took place on July 9, Michael Mundaca, Acting Assistant Secretary for Tax Policy at the Treasury stressed that while the program is estimated to cost \$3 billion, there is no limit on the number of grants that will be awarded through the program. The application process is not competitive and all eligible applicants will receive cash grants. Mr. Mundaca also indicated that the cash grant will be paid to the applicant within 60 days after the receipt of such taxpayer's completed application in an effort to stimulate and inject capital into the energy community as quickly as possible. Mr. Mundaca was joined by Matt Rogers, Senior Advisor for Recovery Act Implementation at the Department of Energy.

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