

WSGR ALERT

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TREASURY DEPARTMENT POSTS APPLICATION FOR DETERMINATION OF BEGINNING OF CONSTRUCTION

The Treasury Department recently released a form to be used to obtain a determination that the construction of "specified energy property" began during 2009 or 2010 (and thus that the property may qualify for a cash grant under Section 1603 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, even though it will be placed in service after December 31, 2010). Treasury previously issued guidance on the cash grant program, including a set of frequently asked questions (FAQs) regarding the beginning of construction. The previous guidance stated that Treasury would provide a response to a grant application submitted to demonstrate that construction has begun, but did not provide a form of application specifically for that purpose. The grant application form previously issued by Treasury contained instructions for submitting an application to demonstrate that construction began in 2009 or 2010, but the new form is tailored to determine whether construction has begun.

Please visit <http://www.ustreas.gov/recovery/1603.shtml> to access Treasury's guidance on the grant program, as well as the FAQs on the beginning of construction. In addition, please visit <https://treas1603.nrel.gov/> to register and access the new application form.

Background

The grant program allows owners and certain lessees of specific types of renewable energy property to receive a cash grant of, generally, 30 percent of the cost of the property in lieu of claiming certain tax credits with respect to the property. Grants are available for property placed in service in 2009 or 2010, and for property placed in service after 2010 (and

before the expiration date of the credit available for the property) so long as construction of the property began in 2009 or 2010. The new form issued by Treasury is used to apply for a determination that construction of the property began in a timely manner. In light of the December 31, 2010, deadline, Treasury will try to respond promptly to these applications.

Beginning of Construction

General. There are two ways to establish that construction began in 2009 or 2010: (i) demonstrating that "physical work of a significant nature" (on-site or off-site) began during 2009 or 2010 or (ii) meeting a safe harbor that requires that more than 5 percent of the basis of the specified energy property was paid (in the case of a cash-method applicant) or incurred (in the case of an accrual-method applicant) during 2009 or 2010. Those claiming that construction began under the "physical work" test in 2009 or 2010 also should be prepared to demonstrate that the activity took place under a continuous program of construction.

"Physical Work of a Significant Nature"

Both on-site work and off-site work are considered to determine whether physical work of a significant nature has occurred. Generally, any physical work on the specified energy property will qualify. For example, in the case of a wind turbine, on-site physical work of a significant nature can begin by laying the foundation for the wind turbine. In addition, laying the foundation for one wind turbine that is part of a larger wind farm can be sufficient activity to begin construction of the entire wind farm. If the property is to be

assembled on-site from components manufactured off-site, physical work of a significant nature begins when the manufacture of the components begins at the off-site location. However, physical work of a significant nature does not include "preliminary activities" like planning or designing, securing financing, clearing a site, obtaining permits, erecting a fence, or excavation to change the contour of the land (as distinguished from excavation for footings and foundations).

For an applicant that manufactures, constructs, or produces property for use in the applicant's trade or business (or for its production of income), the work performed by the applicant is taken into account to determine when physical work of a significant nature begins. If qualifying property is manufactured, constructed, or produced for the applicant by another person under a binding written contract, such work is taken into account to determine when physical work of a significant nature begins (provided the work is performed after the binding written contract is entered into). Treasury's earlier guidance sets forth the requirements for a contract to be considered "binding" for this purpose.

Safe Harbor

Under the safe harbor, an applicant may treat physical work of a significant nature as beginning when the applicant incurs (in the case of an accrual-basis applicant) or pays (in the case of a cash-basis applicant) more than 5 percent 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).

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Treasury Department Posts Application . . .

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In the case of an accrual-basis applicant, the economic-performance rules of Section 461(h) of the Internal Revenue Code apply, which created some uncertainty as to when an accrual-method taxpayer had incurred an amount for purposes of the safe harbor. Treasury resolved much of this uncertainty in March 2010, when it revised the safe harbor, and in June 2010, when it released the set of FAQs. When property is being manufactured by another person, costs generally are treated as paid or incurred either (i) when property is provided to the applicant or (ii) for periods before property is provided to the applicant, when costs are paid or incurred by the other person (i.e., the manufacturer). Allowing costs paid or incurred by the manufacturer to be counted toward the safe harbor was a very favorable modification, because the applicant might not have paid or incurred costs for the property before it is delivered.

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