

**Payments for Specified Energy Property in Lieu of Tax Credits**  
**under the**  
**AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**



**U.S. Treasury Department**  
**Office of the Fiscal Assistant Secretary**  
**July 2009/ Revised March 2010/**  
**Revised January 2011**

**Payments for Specified Energy Property in Lieu of Tax Credits  
under the  
American Recovery and Reinvestment Act of 2009**

**Program Guidance**

Under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (Section 1603), the United States Department of the Treasury (Treasury) makes payments to eligible persons who place in service specified energy property and apply for such payments. The purpose of the payment is to reimburse eligible applicants for a portion of the expense of such property. Eligible property under this program includes only property used in a trade or business or held for the production of income. Nonbusiness energy property described in section 25C of the Internal Revenue Code (IRC) and residential energy efficient property described in section 25D of the IRC do not qualify for payments under this program but may qualify for tax credits under those provisions.

By receiving payments for property under section 1603, applicants are electing to forego tax credits under sections 48 and 45 of the IRC with respect to such property for the taxable year in which the payment is made or any subsequent taxable year. Applicants must agree to the terms and conditions applicable to the Section 1603 program.

This guidance establishes the procedures for applying for payments under the Section 1603 program and is intended to clarify the eligibility requirements under the program. Treasury welcomes questions about the program and the application process at [1603Questions@do.treas.gov](mailto:1603Questions@do.treas.gov).

**I. Overview**

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (Public Law 111-5). The purpose of the Recovery Act is to preserve and create jobs and promote economic recovery in the near term and to invest in infrastructure that will provide long-term economic benefits. Section 707 of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 amends the Act to extend, for one year, certain program deadlines.

Section 1603 of the Act's tax title, the American Recovery and Reinvestment Tax Act, appropriates funds for payments to persons who place in service specified energy property during 2009, 2010, or 2011 or after 2011 if construction began on the property during 2009, 2010, or 2011 and the property is placed in service by a certain date known as the credit termination date (described more fully below in the Property and Payment Eligibility section). Treasury will make Section 1603 payments to qualified applicants in an amount generally equal to 10% or 30% of the basis of the property, depending on the type of property. Applications will be reviewed and payments made within 60 days from the later of the date of the complete

application or the date the property is placed in service. Applicants who receive payments for property under Section 1603 are not eligible for the production or investment tax credit under sections 45 and 48 of the IRC with respect to the same property for the taxable year of the payment or subsequent years. In addition, any credit under section 48 previously allowed with respect to progress expenditures for the property will be recaptured.

It is expected that the Section 1603 program will temporarily fill the gap created by the diminished investor demand for tax credits. In this way, the near term goal of creating and retaining jobs is achieved, as well as the long-term benefit of expanding the use of clean and renewable energy and decreasing our dependency on non-renewable energy sources.

## **II. Application Procedures**

Applicants interested in receiving payments under Section 1603 may submit an application on-line by going to [www.treasury.gov/recovery](http://www.treasury.gov/recovery). Applications may only be submitted after the property to which the application relates is placed in service, or is under construction. A completed application will include the signed and complete application form; supporting documentation; signed Terms and Conditions; and complete payment information. All applications must be received before the statutory deadline of October 1, 2012.

For property placed in service in 2009, 2010, or 2011 applications must be submitted after the property has been placed in service and before October 1, 2012. Treasury will review the applications and make payment to qualified applicants within 60 days from the date the completed application is received by Treasury.

For property not placed in service in 2009, 2010, or 2011 but for which construction began in 2009, 2010, or 2011, applications must be submitted after construction commences but before October 1, 2012. If the property has been placed in service at the time of the application, Treasury will make payments to qualified applicants within 60 days from the date the completed application is received. For property not yet placed in service at the time of the application, Treasury will review such applications and notify the applicant if all eligibility requirements that can be determined prior to the property being placed in service have been met. If so notified, applicants must then submit, within 90 days after the date the property is placed in service, supplemental information sufficient for Treasury to make a final determination. Treasury will conduct a final review of the application at that time and make payment to qualified applicants within 60 days after the supplemental information is received by Treasury. Instructions provided on the application will indicate which portions of the application must be completed at the time the application is initially submitted and which portions must be completed at the time the application is supplemented.

If an applicant is applying for Section 1603 payments for multiple units of property that are treated as a single, larger unit of property (see Section IV. D. below), all such units may be included in a single application.

The application form requests, among other identifying data elements, the applicant's Data Universal Numbering System (DUNS) number from Dun and Bradstreet. If the applicant does

not already have a DUNS number, it may request one at no cost by calling the dedicated toll-free DUNS Number request line at 1-866-705-5711.

Applicants must also register with the Central Contractor Registration (CCR). To register, go to [www.ccr.gov/startregistration.aspx](http://www.ccr.gov/startregistration.aspx). The registration must be completed before a payment can be made.

When Treasury determines that an application is approved, it will send a notice to the applicant. The notice informs the applicant that the payment will be made and incorporates the information contained in the applicant's completed application form and the Terms and Conditions. Treasury makes payment to the applicant no later than five days from the date of the notice. Payment will be made by Electronic Funds Transfer based upon the banking information in the CCR.

In cases where an applicant has not submitted sufficient information upon which a determination can be based, the applicant will be so notified and given 21 days from the date of the notice to submit additional information. If additional information is not received within the 21 day period, the application will be denied.

When Treasury determines that the application does not qualify for payment, the applicant will be so notified. Such notification will include the reasons for the determination and will be considered the final agency action on the application.

### **III. Applicant Eligibility**

Certain persons are not eligible to receive Section 1603 payments. These include:

- any Federal, state or local government, including any political subdivision, agency or instrumentality thereof
- any organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC
- any entity referred to in paragraph (4) of section 54(j) of the IRC or
- any partnership or other pass-thru entity, any direct or indirect partner (or other holder of an equity or profits interest) of which is an organization or entity described above unless this person only owns an indirect interest in the applicant through a taxable C corporation.

As long as each direct and indirect partner in the partnership or shareholder or similar interest holder in any other pass-thru entity is eligible to receive Section 1603 payments, the partnership or pass-thru entity is eligible to receive Section 1603 payments. Having as a direct or indirect partner, shareholder, or similar interest holder a taxable C corporation any of whose shareholders are not eligible to receive Section 1603 payments does not affect the eligibility of the partnership or pass-thru entity. Neither a Real Estate Investment Trust, nor a cooperative organization described in section 1381(a) of the IRC is a pass-thru entity for this purpose.

For an applicant to be eligible to receive a Section 1603 payment it must be the owner or lessee of the property and must have originally placed the property in service. Lessees are eligible to

apply for Section 1603 payments only if the conditions described in Section VI of this Guidance are met.

A foreign person or entity may be eligible for a Section 1603 payment if the person or entity qualifies for the exception in section 168(h)(2)(B) of the IRC.

Applicant eligibility will be determined as of the time the application is received.

#### **IV. Property and Payment Eligibility**

##### **A. Placed in Service**

Qualified property must be originally placed in service between January 1, 2009, and December 31, 2011, (regardless of when construction begins) or placed in service after 2011 and before the credit termination date (see below) if construction of the property begins between January 1, 2009, and December 31, 2011. Qualified property includes expansions of an existing property that is qualified property under section 45 or 48 of the IRC.

Placed in service means that the property is ready and available for its specific use.

##### **B. Credit Termination Date and Applicable Payment Percentage**

The following chart lists the Credit Termination Date and the applicable percentage of eligible cost basis used in computing the payment for each specified energy property.

<b>Specified Energy Property</b>	<b>Credit Termination Date</b>	<b>Applicable Percentage of Eligible Cost Basis</b>
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 sec. 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 sec. 48	Jan 1, 2017	10% *
Fuel Cells	Jan 1, 2017	30% **
Microturbines	Jan 1, 2017	10% ***
Combined Heat & Power	Jan 1, 2017	10%
Small Wind	Jan 1, 2017	30%
Geothermal Heat Pumps	Jan 1, 2017	10%

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

\*\* 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.

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

### C. Beginning of Construction

Construction begins when physical work of a significant nature begins. Work performed by the applicant and by other persons under a written binding contract is taken into account in determining whether construction has begun. An applicant may elect the safe harbor described below to determine when construction begins.

**Physical work of a significant nature.** Both on-site and off-site work may be taken into account for purposes of demonstrating that physical work of a significant nature has begun. For example, in the case of a facility for the production of electricity from a wind turbine, on-site physical work of a significant nature begins with the beginning of the excavation for the foundation, the setting of anchor bolts into the ground, or the pouring of the concrete pads of the foundation. If the facility's wind turbines and tower units are to be assembled on site from components manufactured off site and delivered to the site, physical work of a significant nature begins when the manufacture of the components begins at the off-site location. If a manufacturer produces components for multiple facilities, reasonable methods must be used to associate individual components with particular facilities. Physical work of a significant nature does not include preliminary activities such as planning or designing, securing financing, exploring, researching, clearing a site, test drilling of a geothermal deposit, test drilling to determine soil condition, or excavation to change the contour of the land (as distinguished from excavation for footings and foundations).

**Self construction.** If an applicant manufactures, constructs, or produces property for use by the applicant in the applicant's trade or business (or for the applicant's production of income), the work performed by the applicant is taken into account in determining when physical work of a significant nature begins.

**Construction by contract.** For property that is manufactured, constructed, or produced for the applicant by another person under a written binding contract (as described below) that is entered into prior to the manufacture, construction, or production of the property for use by the applicant in the applicant's trade or business (or for the applicant's production of income) the work performed under the contract is taken into account in determining when physical work of a significant nature begins. A contract is binding only if it is enforceable under State law against the applicant or a predecessor, and does not limit damages to a specified amount (for example, by use of a liquidated damages provision). For this purpose, a contractual provision that limits damages to an amount equal to at least 5 percent of the total contract price will not be treated as limiting damages to a specified amount. If a contract provides for a full refund of the purchase price in lieu of any damages allowable by law in the event of breach or cancellation, the contract is not considered binding. A contract is binding even if the contract is subject to a condition, as long as the condition is not within the control of either party or a predecessor. A contract will continue to be binding if the parties make insubstantial changes in its terms and conditions or any term is yet to be determined by a standard beyond the control of either party. For example, minor modifications to the design specifications of property to be produced under a contract,

such as a cold weather package for wind turbines, do not affect the binding nature of the contract. A contract that imposes significant obligations on the applicant or a predecessor will be treated as binding notwithstanding the fact that certain terms remain to be negotiated by the parties to the contract. An option to either acquire or sell property is not a binding contract. A binding contract does not include a supply, or similar, agreement if the amount and design specifications of the property to be purchased have not been specified.

**Safe Harbor.** 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 treat physical work of a significant nature as not having begun until more than 5 percent of the total cost of the property has been paid or incurred. In the case of property constructed by the applicant, costs of the property are treated as paid or incurred when paid or incurred by the applicant. In the case of property manufactured, constructed, or produced for the applicant by another person under a binding written contract that is entered into prior to the manufacture, construction, or production of the property (i) the cost of the property under the contract is treated as paid or incurred when the property is provided to the applicant, and (ii) for periods before the property is provided to the applicant, costs paid or incurred with respect to the property by such other person are treated as costs of the property that are paid or incurred when paid or incurred by such other person. If the property includes both self-constructed components and components constructed under a contract, the costs relating to the self-constructed components and the costs relating to the components constructed under a contract are combined in determining if the 5 percent of total costs has been exceeded. All costs included in the eligible basis (as described in section V) of the specified energy property and only such costs are taken into account in determining if 5 percent of total costs has been exceeded. If the applicant is a lessee of property for which the lessor has elected to pass-through the credit to the lessee, this safe harbor must be met by the lessor (unless the applicant sold and leased back the property). An applicant may elect to use this safe harbor by stating in section 2F of the application that the applicant is electing this safe harbor and describing the costs that satisfy the requirements for this election. See also section 6B of the application regarding supporting documentation.

**Reliance on prior guidance.** An applicant may determine when construction begins under the program guidance in effect before March 15, 2010. This guidance can be found at [\[link\]](#).

#### D. Units of Property

For purposes of determining the beginning of construction of property or the date property is placed in service, all the components of a larger property are a single unit of property if the components are functionally interdependent. Components of property that are produced by, or for, the applicant are functionally interdependent if the placing in service of one component is dependent on the placing in service of the other component. For example, on a wind farm for the production of electricity from wind energy, the electricity generating wind turbine, its tower, and its supporting pad are the single unit of property. Each wind turbine on the wind farm can be separately operated and metered and can begin producing electricity individually. A control system on a wind farm that optimizes the operation of the farm is a unit of property that is separate from the wind turbines.

The owner of multiple units of property that are located at the same site and that will be operated as a larger unit may elect to treat the units (and any property, such as a computer control system, that serves some or all such units) as a single unit of property for purposes of determining the beginning of construction and the date the property is placed in service. In such a case, the entire cost of such larger unit of property is taken into account in applying the safe harbor. The owner may not include within this larger unit any property that was placed in service before January 1, 2009. For example, the owner of a wind farm may treat as a single unit a wind farm that will consist of fifty turbines, their associated towers, their supporting pads, a computer system that monitors and controls the turbines, and associated power condition equipment. In cases where the applicant treats multiple units of property as a single unit, failure to complete the entire planned unit will not preclude receipt of a Section 1603 payment. For example, in the example noted above if only 40 of the planned 50 turbines were placed in service by the credit termination date, an otherwise eligible applicant would be eligible for a payment based on the 40 turbines placed in service.

#### E. Specified Energy Property Installed on Other Property

Only the portion of a facility that is described in section 48 of the IRC is taken into account in computing the Section 1603 payment. For example, in the case of a building with solar property on its roof, only the cost of the solar property (including the cost of mounting the solar property on the roof) qualifies for a Section 1603 payment; the cost of the building does not qualify. In the case of a truck on which solar energy property is mounted, the cost of the solar energy property and the cost of mounting the property may be eligible for a Section 1603 payment. However, the truck on which the property is mounted is not specified energy property. Likewise, in the case of a forklift powered by a fuel cell power plant, the fuel cell power plant may be eligible for a Section 1603 payment. However, the forklift in which it is used is not specified energy property.

#### F. Location of Property

Property which is used predominantly outside the United States does not qualify for a payment under section 1603. The determination of whether property is used predominantly outside the United States is made by comparing the period of time during which the property is physically located outside the United States with the period of time during which the property is physically located within the United States in a given year. If the property is located outside the United States during more than 50% of the year, such property is considered to be used predominantly outside the United States during that year. This limitation does not apply to property described in section 168(g)(4) of the IRC.

#### G. Original Use

The original use of the property must begin with the applicant. If the cost of the used parts contained within a facility is not more than 20 percent of the total cost of the facility (whether acquired or self-constructed), an applicant will not fail to be considered the original user of property because the facility contains used parts.

If new property is originally placed in service by a person and is sold to an applicant and leased back to the person by the applicant within three months after the date the property was originally placed in service by the person, unless the lessor and lessee elect otherwise, the applicant-lessor

is considered the original user of the property and the property is considered to be placed in service not earlier than when it is used under the lease back.

#### H. Required Documentation

Applicants must submit supporting documentation demonstrating that the property is eligible property and that it has been placed in service, and if placed in service after December 31, 2011, that construction began in 2009, 2010, or 2011 (See section V below for documentation required to support costs). The following documents are required as indicated below:

**Eligible Property** – the following documentation must be provided, as applicable, to demonstrate that the property is eligible (for further details on property eligibility, see sections 45 or 48 of the IRC):

Design plans (required of all applicants). Final engineering design documents, stamped by a licensed professional engineer.

Documentation demonstrating that the property is designed to have a nameplate capacity that meets required minimums or maximums (see Section 4A of the Application for properties with minimum or maximum nameplate capacity requirements) : [open-loop biomass facility (livestock waste nutrients), marine and hydrokinetic renewable energy facility, fuel cell property, microturbine property, combined heat and power system property, and small wind energy property only]. This documentation can be included within the required design plans or commissioning report, or with the original equipment manufacturer (OEM)/equipment vendor specification sheets.

Documentation demonstrating that the property is designed to meet the electricity-only generation efficiency requirements described in Section 4A of the Application (fuel cell property and microturbine property only). The system efficiency is typically calculated as a ratio of the electrical energy output from the device to the amount of fuel consumed to produce the electricity divided by the lower heating value (LHV) of the fuel (if alternating current, be sure to include conversion losses). OEM/equipment vendor specification sheets that specify the above values can be used as supporting documentation for nameplate capacity and system efficiency. This documentation can also be included within the required design plans or commissioning report, as long as it specifies the above values.

For combined heat and power system property only, documentation demonstrating that the system is designed to meet the requirements described in Section 4A of the Application. See IRC section 48( c )(3)( C ) for calculation of the system energy efficiency percentage. This documentation can be included within the required design plans or commissioning report, or with OEM/equipment vendor specification sheets.

For a closed-loop biomass facility modified to use closed-loop biomass to co-fire with coal, other biomass, or both, documentation demonstrating approval under the Biomass Power for Rural Development Program or documentation demonstrating that the facility is part of a pilot project of the Commodity Credit Corporation.

FERC certification (applicable to incremental hydropower production projects only). Certification provided by the Federal Energy Regulatory Commission that certifies the baseline and incremental increase in energy production for incremental hydropower production.

FERC license (applicable to hydropower facility installed on a qualifying nonhydroelectric dam only)

**Placed in Service** - the following documentation must be provided, as applicable, to demonstrate that the property is placed in service:

Commissioning report (required for all properties placed in service). A report provided by the project engineer, or the equipment vendor, or an independent third party that certifies that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose.

Interconnection agreement (required only for properties placed in service that are interconnected with a utility). A formal document between the applicant and the local utility that establishes the terms and conditions under which the utility agrees to interconnect with the applicant's system. Applicants must also submit any subsequent documentation to demonstrate that the interconnection agreement has been placed in effect.

**Under Construction but not yet Placed in Service** - the following documentation must be provided, as applicable, to demonstrate that construction has begun on the property: Paid invoices and/or other financial documents demonstrating that physical work of a significant nature has begun on the property as described in Section IV.C. If beginning of construction is based on the safe harbor, these documents must demonstrate that more than 5 percent of the total cost of the property (excluding the cost of any land and preliminary activities such as planning, designing, securing financing, exploring, or researching) has been incurred or paid by the applicant.

Binding contract (required for property not yet placed in service that is being manufactured, constructed or produced for the applicant by another person). The binding contract for the manufacture, construction or production of the property as described in section IV.C above.

**Leased Property** - the following documentation must be provided where the applicant is the lessee of the property to demonstrate that the lessor and lessee have entered into the agreement required by section VI of this guidance.

The written agreement with the lessor described in Section VI of this Guidance.

## I. Types of Property

Property eligible to receive Section 1603 payments is "specified energy property." Specified energy property includes only tangible property (not including a building) that is an integral part of the facility. The tangible property is tangible personal property and other tangible property as defined in sections 1.48-1(c) and (d) of the Income Tax Regulations. Specified energy property is property for which depreciation (or amortization in lieu of depreciation) is allowable.

Qualified property must be placed in service in 2009, 2010, or 2011, or, in the case of property placed in service after 2011 for which construction begins in 2009, 2010, or 2011, before the credit termination date. Property that satisfies this placed-in-service requirement may be qualified property even if it is an addition to or expansion of a qualified facility placed in service before 2009.

Qualified property includes only tangible property that is both used as an integral part of the activity performed by qualified facility and located at the site of the qualified facility. Qualified property does not include a building but may include structural components of a building. Property is an integral part of a qualified facility if the property is used directly in the qualified facility, is essential to the completeness of the activity performed in that facility, and is located at the site of the qualified facility. Roadways and paved parking areas located at the qualified facility and used for transport of material to be processed at the facility or equipment to be used in maintaining and operating the facility are integral to the activity performed there, but roadways or paved parking lots that provide solely for employee and visitor vehicle traffic are not an integral part a qualified facility. Property is considered used as an integral part of a qualified facility if so used either by the owner of the property or by the lessee of the property.

In the case of an open-loop biomass, closed-loop biomass, or municipal solid waste facility, an integral part of the qualified facility includes property used at the plant site for unloading, transfer, storage, reclaiming from storage, or preparation (shredding, chopping, pulverizing, or screening) of the material to be processed at the plant. However, similar equipment located away from the plant site is not an integral part of the qualified facility. Similarly, slurry pipelines, trucks, railroad cars, and barges that transport to the qualified facility open-loop biomass, closed-loop biomass, or municipal solid waste are not an integral part of a qualified facility. Property that is integral to a geothermal facility includes equipment that transports geothermal steam or hot water from a geothermal deposit to the site of ultimate use. This includes components of a heating system, such as pipes and ductwork that distribute within a building the energy derived from the geothermal deposit and, if geothermal energy is used to generate electricity, includes equipment that transports hot water from the geothermal deposit to a power plant.

For qualified property that generates electricity, qualified property includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items but does not include any electrical transmission equipment, such as transmission lines and towers, or any equipment beyond the electrical transmission stage, such as transformers and distribution lines.

Specified energy property, within the meaning of Section 1603, consists of two broad categories of property - certain property described in IRC section 45 and certain property described in IRC section 48. The following types of property are specified energy property within the meaning of Section 1603<sup>1</sup>:

---

<sup>1</sup> The property descriptions included in this Guidance are intended to assist applicants in determining if a property qualifies for funding. They are not intended to change the meaning of the terms as they are used in sections 45 or 48 of the IRC.

Generally, a qualified facility must be capable of operating as an independent unit even though the property is installed at the site of an existing facility. Certain modifications to property installed on an existing facility qualify as specified energy property even if the facility was placed in service before 2009.

*Qualified Facilities described under IRC section 45:*

A qualified facility is a facility as described in IRC section 45(d)(1), (2), (3), (4), (6), (7), (9), or (11), but only if no credit has been allowed under section 45 for the facility. This guidance does not address the placed-in-service requirements of IRC section 45.

*Wind facility:* A wind facility is a facility using wind to produce electricity (wind turbines 100kW or less may also qualify as qualified small wind energy property, but only one payment is allowed with respect to the property).

*Closed-loop biomass facility:* A closed-loop biomass facility uses closed-loop biomass to produce electricity. Closed-loop biomass is any organic material from a plant that is planted exclusively for purposes of being used at a qualified facility to produce electricity. A closed loop biomass facility includes the modifications to a facility that was originally placed in service and modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation as described in 65 Fed. Reg. 63052.

*Open-loop biomass facilities:* An open-loop biomass facility uses open-loop biomass to produce electricity. Open-loop biomass is any agriculture livestock waste nutrients or any solid, nonhazardous, cellulosic waste material or any lignin material that is derived from qualified sources.

- Agricultural livestock waste nutrients are agricultural livestock manure and litter, including wood shavings, straw, rice hulls, and other bedding material for the disposition of manure. Agricultural livestock includes bovine, swine, poultry, and sheep.
- The qualified sources from which solid, nonhazardous, cellulosic waste material or any lignin material must be derived are:
  1. Any of the following forest-related resources: mill and harvesting residues, precommercial thinnings, slash, and brush;
  2. Solid wood waste materials, including waste pallets, crates, dunnage, manufacturing and construction wood wastes (other than pressure-treated, chemically-treated, or painted wood wastes), landscape or right-of-way tree trimmings, but not including municipal solid waste, gas derived from the biodegradation of solid waste, or paper that is commonly recycled; and
  3. Agriculture sources, including orchard tree crops, vineyard, grain, legumes, sugar, and other crop by-products or residues.

An open-loop biomass facility does not include:

- A facility that burns fossil fuel (co-firing) beyond such fossil fuel required for startup and flame stabilization; or

- A facility using agricultural livestock waste nutrients that has a nameplate capacity rating of less than 150 kilowatts.

*Geothermal facility:* A geothermal facility uses geothermal energy to produce electricity. Geothermal energy is energy derived from a geothermal deposit. A geothermal deposit is a geothermal reservoir consisting of natural heat that is stored in rocks or in an aqueous liquid or vapor (whether or not under pressure).

*Landfill gas facilities:* A landfill gas facility is a facility producing electricity from gas derived from the biodegradation of municipal solid waste.

*Trash facilities:* A trash facility is a facility, other than a landfill gas facility, that uses municipal solid waste to produce electricity. In the case of a new unit placed in service in connection with a trash facility placed in service before October 23, 2004, only property related to the new unit can qualify as specified energy property that is eligible for a Section 1603 payment.

*Qualified hydropower facility:*

*Incremental hydropower:* A facility that produces incremental hydropower production described in IRC section 45(c)(8)(B). The percentage of incremental hydropower and baseline must be certified by the Federal Energy Regulatory Commission. The determination of incremental hydropower production shall not be based on any operational changes at such facility not directly associated with the efficiency improvements or additions of capacity. Only property related to the efficiency improvements and additions to capacity to which the incremental hydropower production is attributable can qualify as specified energy property that is eligible for a Section 1603 payment.

*Nonhydroelectric dam:* Qualified hydropower facilities also include any hydropower producing facility described in IRC section 45(c)(8)(C) (relating to hydroelectric projects installed on a nonhydroelectric dams that were placed in service before August 8, 2004, and did not produce hydroelectric power on August 8, 2004). The hydroelectric project must be licensed by the Federal Energy Regulatory Commission and must meet all other applicable environmental, licensing, and regulatory requirements. The hydroelectric project must be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway. The Secretary of the Treasury, in consultation with the Federal Energy Regulatory Commission, shall certify that the hydroelectric project licensed at a nonhydroelectric dam meets these criteria. Only property related to the turbines or other generating devices added to the facility to produce hydroelectric power can qualify as specified energy property that is eligible for a Section 1603 payment.

*Marine and hydrokinetic renewable energy facilities:* A marine or hydrokinetic renewable energy facility is a facility that produces electricity from marine and

hydrokinetic renewable energy and has a nameplate capacity rating of at least 150 kilowatts. Marine and hydrokinetic renewable energy is energy derived from:

- Waves, tides, and currents in oceans, estuaries, and tidal areas, free flowing water in rivers, lakes, and streams;
- Free flowing water in an irrigation system, canal, or other man-made channel, including projects that utilize nonmechanical structures to accelerate the flow of water for electric power production purposes; or
- Differentials in ocean temperature (ocean thermal energy conversion).

Marine and hydrokinetic renewable energy does not include any energy that is derived from any source that utilizes a dam, diversionary structure (except as provided above for man-made projects), or impoundment for electric power production purposes.

*Energy property described under IRC section 48:*

Specified energy property for purposes of Section 1603 includes, in addition to qualified property that is part of a qualified facility, any other energy property described under IRC section 48. Such energy property must meet performance and quality standards that are prescribed either in IRC section 48 or in associated Treasury Regulations and that are in effect at the time of the acquisition of the property.

*Solar property:* Equipment that uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool; equipment that uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight.

*Geothermal property:* Equipment used to produce, distribute, or use energy derived from a geothermal deposit, but only, in the case of electricity generated by geothermal power, up to (but not including) the electrical transmission stage. A geothermal deposit is a geothermal reservoir consisting of natural heat that is stored in rocks or in an aqueous liquid or vapor (whether or not under pressure).

*Qualified fuel cell property:* Qualified fuel cell property is a fuel cell power plant that has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process and has an electricity-only generation efficiency greater than 30%. A fuel cell power plant is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components that converts a fuel into electricity using electrochemical means. Payments for qualified fuel cell property cannot exceed an amount equal to \$1,500 for each 0.5 kilowatt of capacity of such property.

*Qualified microturbine property:* Qualified microturbine property is a stationary microturbine power plant that has a nameplate capacity of less than 2,000 kilowatts and has an electricity-only generation efficiency of not less than 26% at International Standard Organization conditions. A stationary microturbine power plant is an integrated system comprised of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and associated balance of plant components which converts a fuel into electricity and thermal energy. The microturbine power plant also includes all

secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, including equipment and controls for meeting relevant power standards, such as voltage, frequency, and power factors. Payments for qualified microturbine property cannot exceed an amount equal to \$200 for each kilowatt of capacity of such property.

*Combined heat and power (CHP) system property:* Combined heat and power system property is property comprising a system that meets the following requirements:

- The system uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications).
- The system--
  - Produces at least 20% of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power (or combination thereof); and
  - Produces at least 20% of its total useful energy in the form of electrical or mechanical power (or combination thereof); and
  - Has a system energy efficiency percentage in excess of 60%. This requirement does not apply to a facility designed to use biomass [within the meaning of IRC section 45(c)(2) and (3) without regard to the last sentence of paragraph (3)(A)] for at least 90% of the energy source. (See IRC section 48(c)(3)(C) for calculation of the system energy efficiency percentage and IRC section 48(c)(3)(D) for the reduction in payment for biomass systems with an energy efficiency of less than 60%.)
  - Does not have a capacity in excess of 50 megawatts or a mechanical energy capacity in excess of 67,000 horsepower or an equivalent combination of electrical and mechanical energy capacities.

CHP system property does not include property used to transport the energy source to the facility or to distribute energy produced by the facility.

*Qualified small wind energy property:* Qualified small wind energy property is property that uses a qualifying small wind turbine to generate electricity. A qualifying small wind turbine is a wind turbine that has a nameplate capacity of not more than 100 kilowatts.

*Geothermal Heat Pump Property:* Equipment that uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure.

## **V. Eligible Basis**

The basis of property is determined in accordance with the general rules for determining the basis of property for federal income tax purposes. Thus, the basis of property generally is its cost (IRC section 1012), unreduced by any other adjustment to basis, such as that for depreciation, and includes all items properly included by the taxpayer in the depreciable basis of the property, such as installation costs and the cost for freight incurred in construction of the specified energy property. If property is acquired in exchange for cash and other property in a

transaction described in IRC section 1031, in which no gain or loss is recognized, the basis of the newly acquired property is equal to the adjusted basis of the other property plus the cash paid.

Costs that will be deducted for federal income tax purposes in the year in which they are paid or incurred are not includible in the basis on which the payment is determined. For example, if the applicant will take the IRC section 179 deduction for all or part of the cost of the property, then no payment is allowed for the portion of the cost of the property for which the IRC section 179 deduction will be taken. For geothermal property, if intangible drilling and development expenses will be deducted by the applicant, no payment will be allowed on the costs that will be deducted as intangible drilling and development expenses. If the applicant will capitalize intangible drilling and development expenses, only those costs that may be recovered through depreciation are includible in the basis on which the payment is allowed. However, if the applicant will elect under IRC § 59(e) to deduct intangible drilling and development costs over 60 months, the payment is based on the amount for which the election under § 59(e) applies because the effect of § 59(e) is to treat these costs as amortizable.

Only the cost basis of property placed in service after 2008 is eligible for a Section 1603 payment. Thus, if property is placed in service in 2009 at a qualified facility that was placed in service in an earlier year, only the basis of the property placed in service in 2009 is eligible for a Section 1603 payment.

**Limitation on eligible basis.** The eligible basis of a qualified facility does not include the portion of the cost of the facility that is attributable to a non qualifying activity. For example, for a biomass facility that burns fuel other than open-loop biomass or closed-loop biomass, the eligible cost basis is the percentage of total eligible costs that is equal to the percentage of the electricity produced at the facility that is attributable to the open-loop biomass and closed-loop biomass. This limitation does not reduce the eligible basis of a facility that qualifies as a modification of an existing facility. For example, eligible basis includes the entire cost of modifying an existing facility to use closed-loop biomass to co-fire with coal, with other biomass, or with both, if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation as described in 65 Fed. Reg. 63052. Similarly, the eligible basis of a qualified hydropower facility producing incremental hydropower includes the entire costs of the modification even though only a portion of the power produced from the modification is attributable to the modification.

Applicants must submit with their application for a Section 1603 payment documentation to support the cost basis claimed for the property. Supporting documentation includes a detailed breakdown of all costs included in the basis. Other supporting documentation, such as contracts, copies of invoices, and proof of payment must be retained by the applicant and made available to Treasury upon request. For properties that have a cost basis in excess of \$500,000 applicants must submit an independent accountant's certification attesting to the accuracy of all costs claimed as part of the basis of the property.

## **VI. Leased Property**

A lessor who is eligible to receive a Section 1603 payment with respect to a property may elect to pass-through the Section 1603 payment to a lessee. The election may only be made with

respect to property that would be eligible for the Section 1603 payment if owned by the lessee. Such an election will treat the lessee as having acquired the property for an amount equal to the independently assessed fair market value of the property on the date the property is transferred to the lessee and will generally follow the rules in the IRC and Treasury regulations governing elections to allow lessees to receive energy tax credits.

The lessor and lessee must agree that the lessor waives all right to a Section 1603 payment or a production or investment tax credit with respect to the eligible property, before the lessee may apply for a Section 1603 payment with respect to such property. The lessee must agree to include ratably in gross income over the five year recapture period an amount equal to 50 % of the amount of the Section 1603 payment.

In order to make this election, both the lessor and the lessee must be persons eligible to receive a payment under Section 1603. Additionally, this election may not be made by a lessor that is a mutual savings bank or similar financial organization, a regulated investment company or a real estate investment trust.

The election of a lessor to allow the lessee to receive a Section 1603 payment may be made with respect to each property leased by the lessor to the lessee. The lessee's written consent is required. The lessor's election is made by a written agreement with the lessee that contains the following information:

- A waiver of the lessor's right to receive any payment under Section 1603 with respect to the property, as well as a waiver of the lessor's right to claim a production or investment tax credit under sections 45 and 48 of the IRC with respect to the same property for the taxable year of the payment or subsequent years;
- All information necessary to determine the amount of lessee's Section 1603 payment;
- The name, address, and employer identification number of the lessor and the lessee;
- A description of each property with respect to which the election is being made;
- The date on which possession of the property is transferred to the lessee; and
- The lessee's consent to the election.

A copy of this agreement must be included in the lessee's application for the Section 1603 payment. This election is irrevocable.

#### Special Rule for Sale-leaseback Transaction

In a sale-leaseback transaction, the lessee, who is not the owner of the property, may claim the Section 1603 payment, if three conditions are satisfied:

- First, the lessee must be the person who originally placed the property in service.
- Second, the property must be sold and leased back by the lessee, or must be leased to the lessee, within three months after the date the property was originally placed in service.
- Third, the lessee and lessor must not make an election to preclude application of the sale-leaseback rules.

#### **VII. Recapture**

If the applicant disposes of the property to a disqualified person or the property ceases to qualify as a specified energy property within five years from the date the property is placed in service (hereinafter "disqualifying event"), the Section 1603 payment must be repaid to the Treasury as

follows: 100% of the payment must be repaid if the disqualifying event takes place within one year from the date placed in service; 80% of the payment must be repaid if the disqualifying event takes place after one year but before two years from the date placed in service; 60% of the payment must be repaid if the disqualifying event takes place after two years but before three years from the date placed in service; 40% of the payment must be repaid if the disqualifying event takes place after three years but before four years from the date placed in service; and 20% of the payment must be repaid if the disqualifying event takes place after four years but before five years from the date placed in service.

Property is considered to have been disposed of to a disqualified person if any interest in the property or in the applicant or in any partnership or pass-thru entity that is a direct or indirect owner of an interest in the applicant is sold to: any Federal, state or local government, including any political subdivision, agency or instrumentality thereof; any organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC; any entity referred to in paragraph (4) of section 54(j) of the IRC; or any partnership or other pass-thru entity any partner (or other holder of an equity or profits interest) of which is a Federal, state or local government, including any political subdivision, agency or instrumentality thereof; an organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC; or an entity referred to in paragraph (4) of section 54(j) of the IRC. A taxable corporation some or all of whose shareholders are disqualified persons is not a disqualified person and such a corporation's ownership of an interest in a partnership or other pass-thru entity will not cause the partnership or other entity to be treated as a disqualified person.

Property ceases to qualify as a specified energy property if the use of the property changes so that it no longer qualifies as specified energy property. For example, use of property predominantly outside the United States in a year will result in recapture. Temporary cessation of energy production will not result in recapture provided the owner of the property intends to resume production at the time production ceases. Permanent cessation of production will result in recapture. Permanent cessation of production due to natural disaster will not result in recapture unless the property is replaced with property for which a Section 1603 payment is allowed. Replacement would be treated as occurring if the applicant uses IRC section 1033 to avoid gain recognition.

For a hydropower property where incremental hydropower production has been licensed by FERC, recapture will not take place if actual incremental increases in energy production do not occur that year due to environmental and/or regulatory factors. Recapture for a hydropower facility installed on a nonhydroelectric dam will occur if the Federal Energy Regulatory Commission license is surrendered or repealed based on significant changes in water surface elevation caused by operation of the facility.

If the amount of the Section 1603 payment depends on the percentage of electricity produced from biomass (in the case of closed-loop and open-loop biomass facilities) or the energy efficiency percentage (in the case of combined heat and power system property using biomass) and the percentage is reduced, a proportionate percentage of the property ceases to qualify as specified energy property. The applicable percentages will be determined on an annual basis for the year beginning on the date the property is placed in service and for each succeeding year

within the recapture period. No additional grant will be allowed in a subsequent year in which the percentage increases.

Selling or otherwise disposing of the property to an entity other than a disqualified person does not result in recapture provided the property continues to qualify as a specified energy property and provided the purchaser of the property agrees to be jointly liable with the applicant for any recapture. Recapture would occur in the event the property is resold to a disqualified person or ceases to qualify as a specified energy property. The applicant remains jointly liable to the Treasury for the recapture amount even if the applicant no longer has control over the property.

Where a lessor elects to pass through the Section 1603 payment to a lessee, if the lessor sells the property to a disqualified person, the lessee is liable to the Treasury for the recapture amount even if the lessee maintains control over the property. If the lease is terminated and possession of the property is transferred by the lessee to the lessor or any other person, the lessee is liable to the Treasury for the recapture amount if the use of the property changes during the recapture period so that it no longer qualifies as specified energy property.

Applicants are not required to post a bond as a condition of receiving payment under the section 1603 program and receipt of payment does not create a lien on the property in favor of the United States. However, funds that must be repaid to the Treasury under these rules are considered debts owed to the United States and if not paid when due, will be collected by all available means against any assets of the applicant, including enforcement by the United States Department of Justice. Debts arising under these rules are not considered tax liabilities.

## **VIII. Miscellaneous Provisions**

### **A. Assignment of Payment**

Applicants may submit, along with their request for payment, a Notice of Assignment, assigning the payment to a third party provided the requirements of the Federal Assignment of Claims Act (31 U.S.C. 3727) are met. The Notice of Assignment will include the DUNS number for the third party. The third party will be required to register in CCR.

### **B. National Environmental Protection Act (NEPA)**

A Section 1603 payment with respect to specified energy property does not make the property subject to the requirements of NEPA and similar laws.

### **C. Davis- Bacon**

A 1603 payment with respect to specified energy property does not make the property subject to the requirements of the Davis-Bacon Act.

### **D. Treatment of Payments as Taxable Income**

Except as described in Section IV of this Guidance with respect to leased property, a Section 1603 payment with respect to specified energy property is not includible in the gross income of the applicant. The basis of the property is reduced by an amount equal to 50% of the payment.

### **E. Real Estate Investment Trusts**

A Real Estate Investment Trust (REIT) will be eligible to receive Section 1603 payments only to the extent allowed by section 50 of the IRC. IRC section 50(d)(1) specifies that rules similar to the rules of former IRC section 46(e) will apply. IRC section 46(e)(1)(B) provides that, in general, in the case of a REIT, qualified investment is limited to the REIT's ratable share of such qualified investment. The ratable share is a ratio, the numerator of which is its taxable income and the denominator of which is its taxable income computed without regard to the deduction for dividends paid (provided by IRC section 857(b)(2)(B)). For this purpose, the REIT's taxable income is determined without regard to any deduction for capital gains dividends and by excluding any net capital gain.

F. Applicability of Normalization Rules

Payments received under the Section 1603 program must be normalized. See former IRC Section 46(f).

G. Reporting

Applicants will be required to provide reports, as required by Treasury, including an annual performance report as set forth in the Terms and Conditions.