drive an electric generator; (4) biomass energy systems, which generate electricity using heat derived from combustion of plant matter, or from combustion of gases or liquids derived from plant matter, animal waste, or sewage, or from combustion of gases derived from landfills, or which derive hydrogen from these same sources to generate electricity using fuel cells; and (5) geothermal systems, which generate electricity using naturally-occurring underground heat.

Several editorial changes have been made to § 451.2. First, the illustrative list of renewable energy facilities has been deleted to avoid confusion. Second, the list of excluded renewable energy sources has been incorporated in the definition of ''renewable energy source.''

Section 451.4 What is a Qualified Renewable Energy Facility

DOE proposed, consistent with the provisions in section 1212, a list characterizing the attributes of a qualified renewable energy facility, and sought in proposed paragraph (b) to clarify a potential ambiguity with regard to what constitutes ownership. Recognizing that State laws vary in assignment of ownership of financed capital facilities, DOE proposed wording the ownership requirements to cover situations in which a State, political subdivision, or a cooperative has all rights to the beneficial use of the qualified renewable energy facility, but legal title under State law is held by a source that provided secured financing for the benefit of the State, political subdivision, or cooperative.

A number of comments were received on ownership issues. Some of the commenters wanted the Department to extend the ownership criteria to include joint action agencies. Joint action agencies are State-sanctioned organizations of public power electric utilities established to achieve economies of scale in equipment and power purchases or to jointly provide other utility services. These agencies are normally owned by their member utilities, but commenters have indicated that in some cases actual legal ownership of the joint agency may be unclear under State law. Accordingly, any joint action agency is considered to qualify under the ownership requirement if each member meets the classification requirement as an entity designated under the § 451.4(a) provision.

One commenter also requested that DOE clarify whether public school districts are deemed political subdivisions of a State. DOE recognizes the broad umbrella of the term ''political subdivision of a State.'' Generally, public school districts fall within the § 451.4(a) classification.

DOE proposed paragraph (c) regarding sale of electricity to track the language of section 1212. In the preamble of the proposed rule, DOE discussed its interpretation of the word ''sale'' as used in the phrase ''for sale in, or affecting, interstate commerce.'' Sale was interpreted to mean a transaction between two entities, who may be related, involving the sale of electric energy at fair market value. Based on this interpretation, electricity generated for use within the renewable energy facility would not constitute a sale. Twelve commenters requested further clarification of the requirement for such sale ''in or affecting interstate commerce.'' Specifically, they asked DOE to elaborate on the meaning of ''interstate commerce.'' Recognizing that activities within a State can affect interstate commerce, DOE has concluded that the statutory requirement concerning effect on interstate commerce is satisfied when electricity is sold to another party for consideration and has revised § 451.4(c) accordingly. DOE has also incorporated the use of the new term ''net electric energy generated,'' discussed under § 451.2 of this section of the preamble, to clarify that parasitic energy is not eligible for incentive payments.

Proposed paragraph (e) listed excluded renewable energy sources. In the case of excluded geothermal energy, certain characteristics of the reservoir were specified that included the phrase ''steam quality of 95 percent water or higher.'' Even though the Department did not receive any comments on this provision, clarifying language has been added in the final rule interpreting the meaning of this specification. The Department has interpreted the phrase ''a stream quality of 95 percent water or higher'' to mean a fluid composed of at least 95 percent water vapor. These exclusions have been moved to the definition of ''renewable energy source'' in section 451.2, of this final rule.

Proposed paragraph (f) tracked the language of section 1212 which requires that qualifying renewable energy facilities must first be used during the period beginning October 1, 1993, and ending on September 30, 2003. Several commenters requested that the Department clarify the term ''first used'' for facilities that have been converted to renewable energy. In response to these comments, the Department has inserted the term ''newly constructed'' in paragraph (e) to distinguish between facilities which are newly constructed and those existing facilities which are converted. A new paragraph (f) has been added that elaborates on the criteria that conversions of existing facilities must meet to quality for incentive payments. There are two possibilities for conversion. The first is based on converting an existing renewable energy facility. In consideration of the comments to address the eligibility of converting existing renewable energy facilities, DOE reviewed an IRS revenue ruling that specifies the qualifications of an eligible facility that contains some used property. The IRS ruled that such a facility would qualify for tax credit provided the fair market value of the used property is not more than 20 percent of the eligible facility's total value (i.e., the cost of the new property plus the value of the used property). Rev. Rul. 94–31, I.R. B. 1994–21,4. By revising proposed paragraph (f) (renumbered in this final rule as paragraph (e)), and adding paragraph (f), DOE has adopted this criterion in the final rule. Accordingly, a renewable energy facility that is refurbished such that the fair market value of any used property does not exceed 20% of the facility's total value and meets the other criteria specified in this part would be eligible for an incentive payment. Paragraph (f)(2) specifies eligibility when converting an existing non-renewable facility. The facility must be converted in part or in whole to a renewable facility and placed in use within the specified time period.

Section 451.5 Where and When to Apply

DOE proposed in paragraph (a) that owners or operators of qualified renewable energy facilities file applications only in response to an annual notice in the Federal Register. There was little comment on this proposal, but the tenor of other comments favored simplification of the application process. Consequently, DOE is eliminating the annual Federal Register notice and establishing a standard application period. In the final rule, DOE is requiring that owners or operators of qualified renewable energy facilities apply during the period beginning October 1 and ending December 31 of each year (except for fiscal year 1994) for an incentive payment for electricity generated and sold in the preceding fiscal year. Under paragraph (b)(2), applications for energy generated in fiscal year 1994 shall be due 45 days after the date of this rule. The extension of the application period for FY 1994 incentive payments was provided because the standard application period passed prior to the