



LOEB & LOEB adds Knowledge.

# Energy Law

# ALERT

APRIL 17, 2013

## IRS Releases Guidance on Beginning Construction for Production Tax Credit and Investment Tax Credit

A qualified facility is eligible to receive a renewable electricity production tax credit (PTC) or energy investment tax credit in lieu of the PTC if construction of the facility begins before January 1, 2014. Qualified facilities include wind facilities, closed-loop biomass facilities, open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, hydropower facilities, and marine and hydrokinetic facilities.

IRS Notice 2013-29 provides two methods for taxpayers to establish that construction of a qualified facility has begun, either by starting physical work of a significant nature or satisfying a safe harbor. The rules are substantially similar to the rules relating to when construction began under the expired cash grant provisions.

### Physical Work of a Significant Nature

Whether a taxpayer has begun construction of a facility before January 1, 2014, depends on the relevant facts and circumstances. The IRS will closely scrutinize a facility, and may determine that construction has not begun on a facility if the taxpayer does not maintain a continuous program of construction.

Work performed by the taxpayer and for the taxpayer by another person under a binding written contract that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in the taxpayer's trade or business (or for the taxpayer's production of income) is taken into account in determining whether construction has begun. On-site and off-site work may be taken into account in demonstrating that physical work of a significant nature has begun. Only physical work of a significant nature on tangible personal property and other tangible property used as an integral part of the activity performed by the facility is considered for purposes of determining whether a taxpayer has begun construction.

Preliminary activities and work to produce property that is in existing inventory or normally held in inventory by a vendor do not constitute physical work of a significant nature.

A continuous program of construction involves continuing physical work of a significant nature and will be determined by the relevant facts and circumstances. Certain disruptions in the taxpayer's construction of a facility that are beyond the taxpayer's control, however, are not taken into account.

### Safe Harbor

Construction of a facility will be considered as having begun before January 1, 2014, if a taxpayer pays or incurs 5 percent or more of the total cost of the facility before January 1, 2014, and, thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility (Safe Harbor).

All costs properly included in the depreciable basis of the facility are taken into account to determine whether the Safe Harbor has been satisfied. Costs incurred by the taxpayer include costs incurred by a third party under a binding written contract.

Whether a taxpayer makes continuous efforts to advance towards completion of the facility is determined by the relevant facts and circumstances, including, but not limited to, paying or incurring additional amounts included in the total cost of the facility, entering into binding written contracts for components or future work on construction of the facility, obtaining necessary permits, and performing physical work of a significant nature. Certain disruptions that are beyond the taxpayer's control are disregarded.

*This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.*

If the total cost of a facility exceeds the anticipated total cost so that the amount a taxpayer actually paid or incurred with respect to the facility before January 1, 2014, is less than 5 percent of the total cost of the facility at the time the facility is placed in service, the Safe Harbor may be lost or apply to only some individual facilities in a single project comprising multiple facilities.

If you have any questions, please contact [Alan J. Tarr](mailto:atarr@loeb.com) at [atarr@loeb.com](mailto:atarr@loeb.com) or 212.407.4900.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

*For more information about Loeb & Loeb's Energy Practice, please contact:*

ARTHUR W. ADELBERG	AADELBERG@LOEB.COM	202.618.5020
KENNETH A. ADLER	KADLER@LOEB.COM	212.407.4284
ROBERT S. BARRY, JR.	RBARRY@LOEB.COM	310.282.2258
NORWOOD P. BEVERIDGE, JR.	NBEVERIDGE@LOEB.COM	212.407.4970
GREGORY J. BLASI	GBLASI@LOEB.COM	212.407.4236
ALBERT M. COHEN	ACOHEN@LOEB.COM	310.282.2228
ANGELA M. SANTORO DOWD	ADOWD@LOEB.COM	212.407.4097
THEODORE F. DUVER	TDUVER@LOEB.COM	212.407.4158
CHELSEA A. GRAYSON	CGRAYSON@LOEB.COM	310.282.2188
FRANK LEE	FLEE@LOEB.COM	212.407.4825

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2013 Loeb & Loeb LLP. All rights reserved.

RICHARD M. LORENZO	RLORENZO@LOEB.COM	212.407.4288
ELIZABETH L. MAJERS	EMAJERS@LOEB.COM	312.464.3142
RONELLE C. PORTER	RPORTER@LOEB.COM	212.407.4110
STEVE A. SEMERDJIAN	SSEMERDJIAN@LOEB.COM	212.407.4218
WALTER STEIMEL, JR.	WSTEIMEL@LOEB.COM	202.618.5015
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
MEGAN A. STOMBOCK	MSTOMBOCK@LOEB.COM	212.407.4226
ALAN J. TARR	ATARR@LOEB.COM	212.407.4900
NICOLE A. TRAVERS	NTRAVERS@LOEB.COM	202.618.5030