

## Wind Projects May Get Jump Start From Updated Tax Credit

By **Natalie Rodriguez**

*Law360, New York (April 16, 2013, 7:32 PM ET)* -- The Internal Revenue Service on Monday clarified when it will consider a renewable energy project to have started and thus be eligible for certain tax credits that can span a decade, offering wind power developers a significant helping hand along with incentives to start construction now, experts say.

Per the new guidance, certain renewable energy projects will be eligible in 2014 for the production tax credit — or, in the alternative, the energy investment tax credit — if developers make significant physical construction work this year or spend more than 5 percent of the project's total cost in 2013.

The rules apply to myriad renewable energy projects, including geothermal, biomass and hydropower facilities, though solar power is notably absent from the list. But several points in the new guidance, including being able to consider a project as a whole to meet that 5 percent benchmark — rather than, say, having to consider each turbine individually as historically required under tax rules — is particularly helpful for wind power developers, experts say.

It's significant that the IRS will consider a project in its entirety because developers tend to work on a string of turbines before moving on to the next area, according to experts.

"One of the important takeaways [from the new guidance] is that it largely follows the cash grant program, including with respect to the ability to treat multiple facilities as a single facility. I think that is huge," Jeffrey G. Davis, a tax partner at Mayer Brown LLP, told Law360.

It's also a relief for developers that the IRS followed the U.S. Treasury's standard of a 5 percent safe harbor to count as a construction start, rather than requiring 10 percent or more, according to Anne S. Levin-Nussbaum, a senior attorney at Akin Gump Strauss Hauer & Feld LLP, told Law360.

The IRS did, however, cap eligibility for the tax credits with a requirement that developers show continuous efforts toward construction work after this year to stay eligible for the credits.

"This is not a blank check. ... The developer can't get a lot of money, buy a lot of parts and store them in a warehouse," Akin Gump tax partner David K. Burton told Law360. The rules also require that work and equipment stored must be done on the specific property for the project.

Burton added that the continuous construction provision — which also allows for certain exemptions such as if the project is hit by a natural disaster, labor stoppages or permitting delays — adds a layer of complexity and subjectivity to the interpretation of the rules.

"This is not a mathematical equation," he said.

There are also still some unanswered questions left about the credits despite the in-depth guidance, experts say. For example, it is still unclear what it means for developers that start a project this year but transfer it to another developer later on, according to Burton and Levin-Nussbaum.

The new guidance, which spans several pages, had been requested by industry players and several senators earlier this year after Congress tweaked eligibility requirements for the PTC and ITC when the credits were renewed with the American Taxpayer Relief Act of 2012.

Earlier this month, the IRS upped the PTC, which was first introduced in 1992, to 2.3 cents per kilowatt-hour generated for a wind farm's first decade in service. Last year, that credit was at 2.2 cents.

The ITC, a PTC alternative first mandated in 2009, provides an incentive equivalent to 30 percent of the initial cost of wind, solar and fuel cell systems, or 10 percent of the cost of geothermal, microturbine and so-called combined heat and power systems.

Such credits could be a big boost for any proposed renewable energy project, and will likely spur developers who are in the design and permitting phases of a project to push forward to start construction this year, experts say.

"Certainly if a developer was thinking about doing a project in 2014 or later, the changes to the statute provide a strong incentive to start construction in 2013 so the project can qualify for the credit," Davis said.

--Additional reporting by Keith Goldberg and Daniel Wilson. Editing by Elizabeth Bowen and Katherine Rautenberg.