

IRS Extends Renewables Continuity Safe Harbor

Notice 2021-41 gives renewable energy developers more time to complete their projects and qualify for tax credits.

Key Points:

- Developers of PTC- and ITC-eligible renewables projects that began construction in 2016 through 2019 now have six years to finish construction under the Continuity Safe Harbor, and projects that began construction in 2020 now have five years.
- For projects that can't be completed within the safe harbor, developers can now meet the Continuity Requirement by satisfying either the Continuous Construction Test or the Continuous Efforts Test regardless of the method used to begin construction.

On June 29, 2021, the US Treasury Department and the Internal Revenue Service (IRS) issued Notice 2021-41 (the Notice), which extends an important safe harbor for taxpayers developing renewable energy projects. Developers of renewables projects now have six years to complete their projects and qualify for this safe harbor if construction on the project began in 2016 through 2019 and five years if construction began in 2020. The Notice also provides developers who are unable to meet this safe harbor with more flexibility to demonstrate that construction on their projects has been continuous.

Background

The amount of Production Tax Credit (PTC) or Investment Tax Credit (ITC) available for a project depends on the year that construction on the project begins. Under IRS guidance, a developer can establish the beginning of construction either by incurring 5% of the total eligible costs of the project (the Five Percent Test) prior to the applicable deadline, or by commencing physical construction of the project (the Physical Work Test) prior to the applicable deadline. Under prior law, once a developer has begun construction, the developer is required to make “continuous efforts” to complete the project (Continuous Efforts Test) in the case of projects relying on the Five Percent Test or maintain a “continuous program of construction” with respect to the project (Continuous Construction Test) in the case of projects relying on the Physical Work Test (the Continuity Requirement).

Developers previously would be deemed to satisfy the Continuity Requirement for projects placed in service within four calendar years after the year during which construction on the project began, or five calendar years if construction began during 2016 or 2017 (the Continuity Safe Harbor). Notice 2021-05, issued earlier this year, extended the Continuity Safe Harbor to 10 years for certain offshore and federal

land projects. (For more information, see Latham's *Client Alert* [IRS Gives Offshore Wind and Federal Land Projects More Time to Qualify for Tax Credits.](#))

For projects that do not satisfy the Continuity Safe Harbor, developers are required to show that they complied with the Continuous Efforts Test or the Continuous Construction Test based on the relevant facts and circumstances. However, the facts and circumstances test has been difficult to apply in practice, and these projects are left with an uncertain path to tax credit qualification and tax equity financing.

Extension of the Continuity Safe Harbor

The Notice recognizes that the COVID-19 pandemic has continued to cause delays in the development of PTC- and ITC-eligible projects. In response to these delays, the Notice extends the Continuity Safe Harbor period for projects on which construction began in 2016 through 2020.

Projects on which construction began in 2016 through 2019 can now qualify for the Continuity Safe Harbor if the project is placed in service by the end of the calendar year that is no more than six calendar years after the calendar year during which construction of the project began. Similarly, projects on which construction began in 2020 can now qualify for the Continuity Safe Harbor if the project is placed in service by the end of the calendar year that is no more than five calendar years after the calendar year during which construction of the project began.

The Notice does not change the deadline for solar projects to be completed by the end of 2025 in order to qualify for an ITC greater than 10%. Any change to the solar ITC deadline would have to come from Congress in the form of a change to the Internal Revenue Code.

Easing of the Continuity Requirement

The Notice provides that the Continuity Requirement may be satisfied for any project either through the Continuous Construction Test or the Continuous Efforts Test, regardless of whether the beginning of construction was originally established by the Physical Work Test or the Five Percent Test. This will allow developers who began physical construction on their project to demonstrate continuity through a greater array of methods, including incurring additional costs, entering contracts for work on the project either onsite or offsite, and obtaining project permits. Given the perceived difficulties in proving that a continuous program of construction has been maintained, the availability of these additional methods provides developers with more flexibility to demonstrate the continued development of their projects.

Key Takeaways

The COVID-19 pandemic has disrupted renewable energy developers' timelines and ability to meet the existing Continuity Safe Harbor, leaving them to rely on the facts and circumstances test to satisfy the Continuity Requirement. This has left developers in an uncertain position as financing parties have been cautious about investing in projects that cannot be completed within the Continuity Safe Harbor. The extension of the Continuity Safe Harbor, along with increased flexibility for projects that do not meet the extended deadlines, is welcome news for developers who need more time to complete their projects and qualify for tax credits.

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