

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: **August 27, 2015**.....Agenda Item # **

Company: Comfrey Wind Energy, LLC

Docket No. IP6630/WS-07-318

In the Matter of Comfrey Wind, LLC's Site Permit for a 31.5 MW Large Wind Energy Conversion System in Brown and Cottonwood Counties

Issue(s): Should the Commission amend or revoke the LWECS Site Permit? Should the Commission take some other action?

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Background Documents

Commission – Order Amending Site Permit May 9, 2013
Comfrey Wind Energy – Letter: Notice of Forthcoming Request to Extend Deadlines for Commencing Construction of the 31.5 MW Comfrey Wind Project May 8, 2015
Comfrey Wind Energy – Other: Petition to Amend Permit June 2015 June 16, 2015
Comfrey Wind Energy – Letter: Attachment..... June 16, 2015
Comfrey Wind Energy – Letter: Keybank Letter of Support June 16, 2015
MN DNR – Letter June 26, 2015
DOC EERA – Comments on Petition to Amend or Revoke Site Permit..... July 6, 2015
Comfrey Wind Energy – Letter: Regarding Reply Comments..... July 13, 2015
Comfrey Wind Energy – Letter: Reply Comments July 14, 2015
Commission – Public Comment (*Confirmation None Received via SpeakUp*)..... July 22, 2015

The attached materials are work papers of the Commission staff. They are intended for use by the Minnesota Public Utilities Commission (Commission) and are based upon information already in the record unless noted otherwise.

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I. Statement of Issues

Should the Commission amend or revoke the Comfrey Wind LWECS Site Permit? Should the Commission take some other action?

II. Procedural History

On January 15, 2008, the Commission issued a Large Wind Energy Conversion (LWECS) site permit to Comfrey Wind Energy, LLC (Comfrey or Comfrey Wind) for a 31.5 megawatt (MW) wind farm in Brown and Cottonwood counties. The project is proposed to be located immediately to the west of the city of Comfrey.

The site permit required Comfrey Wind to either obtain a power purchase agreement (PPA) or other legally enforceable mechanism for selling the project's electricity within three years of the date the permit was issued or advise the Commission of the reason for failing to do so.¹ The site permit imposes the same requirement for beginning construction of the wind farm.

First Extension Granted by Commission

On January 14, 2011, Comfrey Wind filed a petition to amend the site permit to extend by two years the deadlines for obtaining a power purchase agreement and beginning construction. The company stated that delays in the power grid interconnection process had prevented it from executing a power purchase agreement or beginning construction.

On March 11, 2011, the Commission granted Comfrey's petition amending the permit to allow the company two more years to obtain a power purchase agreement and begin construction of the wind farm.

Second Extension Granted by Commission

On January 15, 2013, Comfrey filed a second petition for a two-year extension of the power purchase agreement and construction deadlines in its site permit. Comfrey stated that continuing, protracted interconnection delays and uncertainty over whether Congress would renew the production tax credit in 2013 had, until recently, made it impossible for the company to move forward with developing the wind farm.

On May 9, 2013, the Commission granted Comfrey's petition, amending the permit to allow the company two more years to obtain a power purchase agreement and begin construction of the wind farm. The Commission also significantly updated the permit terms and conditions to reflect more recently issued permits.

Third Extension Request

¹ In the late 2000's several site permits were granted allowing three years to commence construction and obtain a power purchase agreement. The error was corrected in subsequent permits to be consistent and allow two year terms. Comfrey Wind was one of the permits to be permitted an initial three year time period.

On June 16, 2015, Comfrey filed a third petition for a two-year extension of the power purchase agreement and construction deadlines in its site permit.

DOC Comments – Recommendation to Revoke Site Permit

On July 6, 2015, the Department of Commerce (DOC) filed comments which recommended that the Commission revoke the Comfrey Wind LWECS Site Permit as the Permittee had violated its permit terms by commencing construction without submitting the required compliance filings (outlined in more detail below).

The Department of Natural Resources (DNR) and Comfrey Wind filed additional comments, discussed further below.

III. Statute, Rules and Permit Conditions

Minn. Stat. §216F.03 Siting of LWECS

The legislature declares it to be the policy of the state to site LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources.

Minn. Stat. §216F.04 Site Permit.

d) The commission may place conditions in a permit and may deny, modify, suspend, or revoke a permit.

Minn. Rule 7854.1200 Delay in Construction.

If the permittee has not commenced construction of the project within two years after issuance of the site permit, the permittee must advise the commission of the reasons construction has not commenced. In such event, the commission may determine whether the permit should be revoked. No revocation of a permit for failure to commence construction may be undertaken except in accordance with part 7854.1300, subpart 4.

Minn. Rule 7854.1300 Site Permit Amendment or Revocation.

Subp. 2. Permit amendment. The commission may amend a site permit for an LWECS at any time if the commission has good cause to do so.

Subp. 3. Permit revocation. The commission may revoke a site permit for an LWECS at any time if the commission determines that any of the following has occurred:

- A. the applicant knowingly made a false statement in the application or in accompanying statements or studies required of the applicant, if a true statement would have warranted a change in the commission's findings;
- B. the applicant has failed to comply with a material condition or term of the permit;
- C. the permitted LWECS endangers human health or the environment and the danger cannot be resolved by modification of the permit or LWECS; or
- D. the permittee has violated other laws that reflect an inability of the permittee to comply with the permit.

Subp. 4. Procedure. The commission may initiate action to consider amendment or revocation of a site permit for an LWECS on its own initiative or upon the request of any person. No site permit may be amended or revoked without first providing notice and affording due process to the permit holder.

Permit Condition - 10.2 Power Purchase Agreement

In the event the Permittee does not have a power purchase agreement or some other enforceable mechanism for sale of the electricity to be generated by the Project at the time this permit is issued, the Permittee shall provide notice to the Commission when it obtains a commitment for purchase of the power. This permit does not authorize construction of the Project until the Permittee has obtained a power purchase agreement or some other enforceable mechanism for sale of the electricity to be generated by the Project. In the event the Permittee does not obtain a power purchase agreement or other enforceable mechanism for sale of electricity to be generated by the Project within two years of the issuance of the permit, the Permittee must advise the Commission of the reason of not having such commitment. In such event, the Commission may determine whether this permit should be amended or revoked. No amendment or revocation of this permit may be undertaken except in accordance with applicable statutes and rules, including Minn. Rule 7854.1300.

Permit Condition - 10.3 Failure to Commence Construction

If the Permittee has not completed the pre-construction surveys required under this permit and commenced construction of the Project within two years of the issuance of this permits, the Permittee must advise the Commission of the reason construction has not commenced. In such event, the Commission shall make a determination as to whether this permit should be amended or revoked. No revocation of this permit may be undertaken except in accordance with applicable statutes and rules, including Minn. Rule 7854.1300.

IV. Comfrey Petition

Comfrey stated in its petition for a site permit extension that during the last two years the project faced several problems including lack of financial investor (insufficient project capital) and additional uncertainty regarding the production tax credit (PTC) extension. Comfrey stated that the production tax credit uncertainty through 2014 made it difficult to secure investors and even though the PTC was extended, it was not sufficient time to obtain a power purchase agreement and commence construction.

Comfrey provided that it is in a much better position to continue with development activities at this time, as the project: 1) has raised additional funds from local investors, 2) has interest from banks in financing the project (see letter of support in relevant documents) if the project can secure a PPA, 3) is in talks with an off-taker, 4) has hired a consultant to assist in seeing the project to completion, and 5) has committed significant additional time and resources into further the project (as outlined in the petition).

V. Comments

The Department of Commerce Energy Environmental Review and Analysis (DOC EERA) staff provided a comprehensive overview of the project history and relevant statute and rules, not repeated here.

The Department focuses its analysis on whether to extend a permit on three areas:

- 1) Project changes that would substantially change the findings accompanying the Commission's original permit decision, and potentially change the Commission's determination that the project is compatible with the standards set out in Statute and Rule;
- 2) Compliance with existing site permit terms and conditions; and
- 3) Potential permit amendments not requested by the applicant, but consistent with more recently issued permits.

Staff provides a brief overview of the DOC EERA's analysis below but refers the Commissioners to the DOC EERA comments for the full analysis.

1) Project Changes Potentially Affecting the Commission's Findings

DOC EERA noted that while the Petition does not identify any changes to the project, the information in the record is largely based on the information submitted in the original application in 2007. The DOC EERA noted that:

- A. **Turbine Type:** No turbine modification request has been submitted by Comfrey (since the turbine selection has not been finalized), but one of the turbines noted in attachments to Comfrey's Petition were not in the size range authorized by the Commission and the original turbine anticipated for the project (Suzlon S88) was not listed in the attachment to the petition as a potential turbine type.
- B. **Project Detail:** The information in the record is scant compared to the level of detail now required of project applicants and as outlined in the DOC EERA's *Application Guidance* booklet.
- C. **Additional Record Information:** The information in the record has not been updated since March 2013, and at that time, the update was to file an updated Natural Heritage Inventory System (NHIS) search results.

2) Compliance with Existing Terms and Conditions

The DOC EERA reviewed the Petition and concluded that Comfrey was in violation of its permit in that it commenced construction and did not complete a required notification to landowners. This is outlined in more detail in the DOC EERA filing (at page 4-5) and not repeated here.

3) Consistency with Recently Issued Permits

The DOC EERA noted that the 2013 amendment largely updated the permit terms and conditions to the current standards, but noted some additional modifications the Commission may want to impose on Comfrey (EERA title modifications, provisions regarding site permit transfers (11.5), and additional avian and bat fatality monitoring).

DOC EERA Recommendation

The DOC EERA staff recommended that the Commission revoke Comfrey's site permit as Comfrey has violated at least two material conditions or terms of the permit. Additionally, EERA staff noted that the information available on the project is, in most cases, nearly eight years old and not consistent with the level and specificity of information expected of more recent applications for site permits.

Department of Natural Resources

The Department of Natural Resources (DNR) recommended that the Commission require one year of post-construction fatality monitoring and that the monitoring protocol should be developed in coordination with the DOC EERA and the DNR.

Comfrey Wind Reply Comments

A. Post-Construction Fatality Monitoring

Comfrey Wind filed reply comments which noted it was in agreement with the DNR recommendation regarding post-construction fatality monitoring.

B. Project Changes Potentially Affecting the Commission's Findings

Comfrey noted that it was evaluating different turbine types, and would continue to do so, as it is customary for developers to perform wind resource assessments on different turbine models before making a selection.

C. Alleged Violations

Commencement of Construction - Comfrey provided that it did commence construction at the end of 2014 in order to qualify for the PTC, however, Comfrey believes that the construction work completed was de minimis and just sufficient to meet the PTC requirements. Comfrey noted that it has not conducted any construction activities since that time and that it understands the importance of pre-construction meetings and intends to follow the correct protocol moving forward.

Notification to Landowners - Comfrey noted that landowner notification of the May 9, 2013 amended permit was completed by PUC staff (by way of use of the Project Contact List) when it served the Commission Order on the 2013 extension authorization.

D. Consistency with Recently Issued Permits

Comfrey does not object to the additional permit modification suggested by DOC EERA.

VI. Staff Discussion

Staff agrees with the DOC EERA recommendation that the Commission should not grant the Petition of Comfrey Wind and instead find that Comfrey has violated a material term of its permit in that Comfrey Wind commenced construction without the proper preconstruction filings and requirements, and it did not properly notify landowners.

By way of background, this is the first time the Commission has received a ‘third’ petition for a site permit extension. The Commission has another petition pending, by Flat Hill Windpark for a third extension. The Flat Hill Windpark matter is anticipated to be considered by the Commission at an agenda meeting in September.

Currently, Comfrey and Flat Hill Windpark are the only Commission permitted wind projects that have received a site permit extension from the Commission but have not yet commenced construction or become operational. As the DOC EERA noted, since the time of Comfrey’s 2007 application, 1,400 MW of wind has been permitted and come online in Minnesota. Staff believes it is reasonable for the Commission to revoke Comfrey’s site permit and deny the extension, as the project information is now out of date, and as the Commission noted in the Kenyon Wind site permit termination order:²

“The wind facility siting permits allow the Commission to set time limits in site permits because the public interest requires providing as much certainty and stability as possible for residents, landowners, and communities likely to be affected by potential wind developments. Such time limits promote the siting of LWECS in an orderly manner, consistent with environmental preservation, sustainable development, and the efficient use of resources...”

No other project has been afforded the time extensions provided to Comfrey Wind.

Additionally, staff believes that a material term of the site permit has been violated as the DOC EERA suggest. Staff has attached to this briefing paper the Internal Revenue Service (IRS) Notice 2013-29, *Beginning of Construction for Purposes of the Renewable Electricity Production Tax Credit and Energy Investment Tax Credit* which provides guidance on what would qualify as ‘construction’ for purposes of the PTC. The document provides:

SECTION 3. METHODS FOR ESTABLISHING BEGINNING OF CONSTRUCTION

This notice provides two methods that a taxpayer may use to establish that construction of a qualified facility has begun. A taxpayer may establish the beginning of construction by starting physical work of a significant nature as described in section 4. Alternatively, a taxpayer may establish the beginning of construction by meeting the safe harbor provided in section 5 (Safe Harbor). Although a taxpayer may satisfy both methods, a taxpayer need only satisfy one method to establish that construction of a facility has begun for the purpose of qualifying for the PTC or ITC.

SECTION 4. PHYSICAL WORK

² Commission *Order Denying Petition and Allowing Site Permit to Expire*, Docket WS-06-1445, Dated December 23, 2010, at page 4.

.01 In general. Construction of a qualified facility begins when physical work of a significant nature begins. ...

.02 Physical work of a significant nature. Both on-site and off-site work (performed either by the taxpayer or by another person under a binding written contract) 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. ...

Comfrey Wind alleges that the construction work completed was ‘*de minimis*’ however, pursuant to the IRS definition, construction would need to be of ‘significant nature’ to qualify for the PTC. Other projects have faced the same problem faced by Comfrey Wind, in that they needed to begin construction to qualify for the PTC – and all projects to date have submitted the required compliance filings in the manner required by their permit, proceeded with pre-construction meetings, and began construction. The Commission has not been faced with this type of permit violation before.

Regarding the landowner notification requirements – notification completed by Commission administrative staff of our May 2013 Commission order does not constitute notification by the applicant to project landowners. The Commission used the Project Contact List as a courtesy and did not use the landowner list. It is unclear whether the Project Contact List matches up with the landowner list and it should be noted that notification was not made by the permittee as required.

If the Commission decides to allow Comfrey Wind a permit extension, staff agrees with the additional requirements outlined by DOC EERA staff. Additionally, staff notes that the Commission does have the ability to fine a permittee it has been found in violation of a Commission Order under Minn. Stat. 216B.51-54.

Again, staff believes the Commission should revoke the Comfrey Wind site permit, as it was unable to secure a power purchase agreement in the time allotted, the project information is out of date, and Comfrey Wind has violated permit terms and conditions.

VII. COMMISSION DECISION ALTERNATIVES

1. Comfrey Wind Energy, LLC – LWECS Site Permit

- A. Revoke the Comfrey Wind Site Permit for a Large Wind Energy Conversion System in Brown and Cottonwood Counties for the reasons outlined above.
- B. Grant the permit amendments as requested by Comfrey Wind.
- C. Take some other action deemed appropriate.

Staff recommends A1.

Beginning of Construction for Purposes of the Renewable Electricity Production Tax Credit and Energy Investment Tax Credit

Notice 2013-29

SECTION 1. PURPOSE

Under the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (ATRA), a qualified facility (as described in section 45(d) of the Internal Revenue Code) will be eligible to receive the renewable electricity production tax credit (PTC) under section 45, or the energy investment tax credit (ITC) under section 48 in lieu of the PTC, if construction of such facility begins before January 1, 2014. This notice provides guidelines and a safe harbor to determine when construction has begun on such a facility.

SECTION 2. BACKGROUND

A taxpayer can claim a PTC with respect to electricity produced at a “qualified facility” within the meaning of section 45(d). If the taxpayer makes an election under section 48(a)(5), the taxpayer may instead claim an ITC with respect to that facility. Prior to ATRA, to be a qualified facility, a facility was required to be placed in service before January 1, 2014, except for qualified wind facilities, which had to be placed in service before January 1, 2013. Section 407 of ATRA modified section 45 by extending the PTC for wind facilities through 2013. ATRA also modified the definition of qualified facility by replacing the requirement to place a facility in service before January 1, 2014, with the requirement to begin construction of a facility before January 1, 2014. For

purposes of sections 45(d) and 48(a)(5), 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.

SECTION 3. METHODS FOR ESTABLISHING BEGINNING OF CONSTRUCTION

This notice provides two methods that a taxpayer may use to establish that construction of a qualified facility has begun. A taxpayer may establish the beginning of construction by starting physical work of a significant nature as described in section 4. Alternatively, a taxpayer may establish the beginning of construction by meeting the safe harbor provided in section 5 (Safe Harbor). Although a taxpayer may satisfy both methods, a taxpayer need only satisfy one method to establish that construction of a facility has begun for the purpose of qualifying for the PTC or ITC.

SECTION 4. PHYSICAL WORK

.01 In general. Construction of a qualified facility begins when physical work of a significant nature begins. Work performed by the taxpayer and work performed for the taxpayer by other persons 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. Whether a taxpayer has begun construction of a facility before January 1, 2014, will depend on the relevant facts and circumstances. The Internal Revenue Service will closely scrutinize a facility, and may determine that construction has not begun on a facility before January 1, 2014, if a taxpayer does not maintain a continuous program of construction as determined under

section 4.06.

.02 Physical work of a significant nature. Both on-site and off-site work (performed either by the taxpayer or by another person under a binding written contract) 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 by a person other than the taxpayer and delivered to the site, physical work of a significant nature begins when the manufacture of the components begins at the off-site location, but only if (i) the manufacturer's work is done pursuant to a binding written contract (as described in section 4.03(1)) and (ii) these components are not held in the manufacturer's inventory (as described in section 4.02(2)). If a manufacturer produces components for multiple facilities, a reasonable method must be used to associate individual components with particular facilities.

(1) Preliminary activities. Physical work of a significant nature does not include preliminary activities, even if the cost of those preliminary activities is properly included in the depreciable basis of the facility. Preliminary activities include planning or designing, securing financing, exploring, researching, obtaining permits, licensing, conducting surveys, environmental and engineering studies, 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). Removal of existing turbines and towers is preliminary work and, therefore, does not constitute physical work of a significant nature with respect to the facility.

(2) Inventory. Physical work of a significant nature does not include work (performed either by the taxpayer or by another person under a binding written contract) to produce property that is either in existing inventory or is normally held in inventory by a vendor.

.03 Construction by contract. For property that is manufactured, constructed, or produced for the taxpayer by another person under a binding written contract (as described in section 4.03(1)), the work performed under the contract is taken into account in determining when physical work of a significant nature begins, provided the contract is entered into prior to the work taking place.

(1) Binding written contract. A contract is binding only if it is enforceable under local law against the taxpayer 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 five percent of the total contract price will not be treated as limiting damages to a specified amount. For additional guidance regarding the definition of a binding contract, see § 1.168(k)-1(b)(4)(ii)(A)-(D).

(2) Master contract. If a taxpayer enters into a binding written contract for a specific number of components to be manufactured, constructed, or produced for the taxpayer by another person under a binding written contract (a “master contract”), and

then through a new binding written contract (a “project contract”) the taxpayer assigns its rights to certain components to an affiliated special purpose vehicle that will own the facility for which such property is to be used, work performed with respect to the master contract may be taken into account in determining when physical work of a significant nature begins with respect to the facility.

.04 Facility – (1) In general. A facility (within the meaning of section 45(d)) generally includes all components of property that are functionally interdependent. Components of property are functionally interdependent if the placing in service of each of the components is dependent upon the placing in service of each of the other components in order to generate electricity. For example, on a wind farm for the production of electricity from wind energy, an electricity-generating wind turbine, its tower, and its supporting pad comprise a single facility. Each such facility can be separately operated and metered and can begin producing electricity separately. See Rev. Rul. 94-31, 1994-1 C.B. 16.

(2) Single project. Solely for purposes of determining whether construction of a facility has begun for purposes of sections 45 and 48, multiple facilities that are operated as part of a single project (along with any property, such as a computer control system, that serves some or all such facilities) will be treated as a single facility. Whether multiple facilities are operated as part of a single project will depend on the relevant facts and circumstances. Factors indicating that multiple facilities are operated as part of a single project include, but are not limited to:

(a) The facilities are owned by a single legal entity;

- (b) The facilities are constructed on contiguous pieces of land;
- (c) The facilities are described in a common power purchase agreement or agreements;
- (d) The facilities have a common intertie;
- (e) The facilities share a common substation;
- (f) The facilities are described in one or more common environmental or other regulatory permits;
- (g) The facilities were constructed pursuant to a single master construction contract; and
- (h) The construction of the facilities was financed pursuant to the same loan agreement.

(3) Example. X is developing a wind farm that will consist of 50 turbines, their associated towers, their supporting pads, a computer system that monitors and controls the turbines, and associated power conditioning equipment. The entire wind farm will be connected to the power grid through a single intertie, and power generated by the wind farm will be sold to a local utility through a single power purchase agreement. In 2013, for 10 of the 50 turbines, X excavates the site for the foundations of the wind turbines and pours concrete for the supporting pads. Thereafter, X completes the construction of all 50 turbines and related facilities pursuant to a continuous program of construction (as determined under section 4.06). For purposes of sections 45 and 48, the entire wind farm is a single project that will be treated as a single facility, and X has performed physical work of a significant nature that constitutes the beginning of

construction of that facility in 2013.

.05 Property integral to the facility – (1) In general. 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 will be considered for purposes of determining whether a taxpayer has begun construction of a facility. This includes property integral to the production of electricity, but does not include property used for electrical transmission. Thus, physical work on a transmission tower located at the site is not physical work of a significant nature because the transmission is not an integral part of the activity performed by the facility. However, physical work on a custom-designed transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission is physical work of a significant nature with respect to the facility because power conditioning equipment is an integral part of the activity performed by the facility.

(2) Roads. Roads that are integral to the facility are integral to the activity performed by the facility; these include onsite roads that are used for moving materials to be processed (for example, biomass) and roads for equipment to operate and maintain the qualified facility. Starting construction on these roads constitutes physical work of a significant nature with respect to the facility. Roads primarily for access to the site, or roads used primarily for employee or visitor vehicles are not integral to the activity performed by the facility; physical work of a significant nature on these roads is not considered for purposes of determining whether a taxpayer has begun construction of a facility.

(3) Fencing. Generally, fencing is not an integral part of the facility because it is not integral to the activity performed by the facility.

(4) Buildings. Generally, buildings are not integral parts of the facility because they are not integral to the activity of the facility. However, the following structures are not treated as buildings for this purpose: (1) a structure that is essentially an item of machinery or equipment, or (2) a structure that houses property that is integral to the activity of the facility if the use of the structure is so closely related to the use of the housed property that the structure clearly can be expected to be replaced when the property it initially houses is replaced. See Treas. Regs. § 1.48-1(e)(1).

.06 Continuous construction – (1) In general. A continuous program of construction involves continuing physical work of a significant nature (as described in section 4.02). Whether a taxpayer maintains a continuous program of construction will be determined by the relevant facts and circumstances.

(2) Construction disruptions. Certain disruptions in the taxpayer's construction of a facility that are beyond the taxpayer's control will not be considered as indicating that a taxpayer has failed to maintain a continuous program of construction. Examples of such disruptions include, but are not limited to:

- (a) severe weather conditions;
- (b) natural disasters;
- (c) licensing and permitting delays;
- (d) delays at the written request of a state or federal agency regarding matters of safety, security, or similar concerns;

- (e) labor stoppages;
- (f) inability to obtain specialized equipment of limited availability;
- (g) the presence of endangered species;
- (h) financing delays of less than six months; and
- (i) supply shortages.

SECTION 5. SAFE HARBOR

.01 In general. Construction of a facility will be considered as having begun before January 1, 2014, if (1) a taxpayer pays or incurs (within the meaning of Treas. Reg. § 1.461-1(a)(1) and (2)) five percent or more of the total cost of the facility, except as provided in section 5.01(2), before January 1, 2014, and (2) thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility (as determined under section 5.02).

(1) Total cost of the facility. All costs properly included in the depreciable basis of the facility are taken into account to determine whether the Safe Harbor has been met. The total cost of the facility does not include the cost of land or any property not integral to the facility, as described in section 4.05(1).

(2) Look-through for economic performance. Solely for purposes of this notice, for property that is manufactured, constructed, or produced for the taxpayer by another person under a binding written contract with the taxpayer, costs incurred with respect to the property by the other person before the property is provided to the taxpayer are deemed incurred by the taxpayer when the costs are incurred by the other person under the principles of section 461.

(3) Example. In 2013, accrual-method taxpayer W enters into a binding written contract with A pursuant to which W will provide a wind turbine to A in June 2015. In 2013, W pays Y pursuant to a contract for Y to provide parts in May 2014 for use in the wind turbine. W's employees provide W with services necessary to design and plan for the production of the wind turbine in 2013 and with services to manufacture (assemble) the wind turbine in 2015. W incurs the cost to design and plan for the production of the turbine assembly in 2013, incurs the costs for the parts in May 2014 when Y delivers the parts to W (even though the parts were paid for in 2013), and incurs the costs for W's employees to manufacture the wind turbine in 2015. See § 1.461-4(d) and § 1.446-1(c)(1)(ii). The costs W incurred in 2013 for its employees' performance of turbine design and planning activities are costs deemed incurred by A before January 1, 2014, for purposes of the Safe Harbor. The other costs in this example were incurred by W in 2014 and 2015 and are costs that A includes in the total cost of the facility, but these other costs were not deemed incurred by A before January 1, 2014.

.02 Continuous efforts – (1) In general. Whether a taxpayer makes continuous efforts to advance towards completion of the facility will be determined by the relevant facts and circumstances. Facts and circumstances indicating continuous efforts to advance towards completion of the facility may include, but are not limited to:

- (a) paying or incurring additional amounts included in the total cost of the facility;
- (b) entering into binding written contracts for components or future work on construction of the facility;
- (c) obtaining necessary permits; and

(d) performing physical work of a significant nature (as described in section 4.02).

(2) Disruptions to continuous efforts. Certain disruptions in the taxpayer's continuous efforts to advance towards completion of the facility that are beyond the taxpayer's control will not be considered as indicating that a taxpayer has failed to make continuous efforts to advance towards completion of the facility. Examples of such disruptions include, but are not limited to:

(a) severe weather conditions;

(b) natural disasters;

(c) licensing and permitting delays;

(d) delays at the written request of a state or federal agency regarding matters of safety, security, or similar concerns;

(e) labor stoppages;

(f) inability to obtain specialized equipment of limited availability;

(g) the presence of endangered species;

(h) financing delays of less than six months; and

(i) supply shortages.

.03 Cost overruns – (1) Single project. If the total cost of a facility that is a single project comprised of multiple facilities (as described in section 4.04(2)) exceeds its 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 five percent of the total cost of the facility at the time the facility is placed in service, the Safe Harbor is not fully satisfied. However, the Safe Harbor will be satisfied and the PTC or ITC may be

claimed with respect to some, but not all, of the individual facilities (as described in section 4.04(1)) comprising the single project, as long as the total aggregate cost of those individual facilities is not more than twenty times greater than the amount the taxpayer paid or incurred before January 1, 2014 (see Example 1 in section 5.03(3)(a)).

(2) Single facility. If the total cost of a single facility that is not a single project comprised of multiple facilities (as described in section 4.04(2)), and cannot be separated into smaller facilities, exceeds its 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 five percent of the total cost of the facility at the time the facility is placed in service, then the taxpayer will not satisfy the Safe Harbor with respect to any portion of the facility.

(3) Examples – (a) Example 1. A taxpayer incurs \$25,000 in costs in 2013 constructing a five-turbine wind farm that will be operated as a single project (as described in section 4.04(2)), anticipating that each turbine (including its own tower and pad) will cost \$100,000 for a total cost for the facility of \$500,000. Thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility. At the time the taxpayer places the wind farm in service, the actual total cost of the facility amounts to \$600,000, with each turbine costing \$120,000. Although the taxpayer did not pay or incur five percent of the actual total cost of the facility before January 1, 2014, the taxpayer will be treated as satisfying the Safe Harbor with respect to four of the turbines, as their actual total cost of \$480,000 is not more than twenty times greater than the \$25,000 in costs incurred by the taxpayer in 2013. Thus, the taxpayer may

claim the PTC on electricity produced from four of the turbines, or the ITC based on \$480,000, the cost of four of the turbines. Alternatively, if construction of the facility began (within the meaning of section 4.01) before January 1, 2014, the taxpayer may be able to claim the PTC or the ITC with respect to the entire facility (all five turbines).

(b) Example 2. A taxpayer incurs \$25,000 in costs in 2013 in constructing an open-loop biomass facility, anticipating that the total cost of the facility, including one boiler and one turbine generator, will be \$500,000. The boiler and turbine generator are functionally interdependent. Thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility. At the time the taxpayer places the facility in service, its actual total cost amounts to \$600,000. Because the boiler and turbine generator are a single facility that is not a single project comprised of multiple facilities (as described in section 4.04(2)), the taxpayer will not satisfy the Safe Harbor. However, if construction of the facility began (within the meaning of section 4.01) before January 1, 2014, the taxpayer may be able to claim the PTC or the ITC with respect to the entire facility.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Brian J. Americus of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Brian J. Americus on (202) 622-3110 (not a toll-free call).