

From: Allen, Meredith  
Sent: 8/12/2010 9:41:53 PM  
To: 'as2@cpuc.ca.gov' (as2@cpuc.ca.gov)  
Cc:  
Bcc:  
Subject: FW: Definition of "Begin Construction" for ARRA Tax Grant

Andy,

In response to your question on the qualification for the cash grant, a project needs to "(i) begin 'physical work of a significant nature' in 2009 or 2010, or (ii) pay or incur at least 5% of the total cost of the specified energy property before the end of 2010." Below is more information on qualifying under these categories.

On the BSE generation project permitting, the CEC issued the Presiding Members Proposed Decision on August 6 and the BLM Final Environmental Impact Statement was issued on August 7th. They should have the final permits this fall from both agencies.

Please let me know if you need more information.

Thanks,  
Meredith

**From:** Stoel Rives LLP [mailto:stoel\_rives@stoel.com]  
**Sent:** Friday, June 25, 2010 2:26 PM  
**Subject:** Energy Tax Law Alert: Treasury Department Issues Guidance Regarding Cash Grant Begin Construction Requirement

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**Energy Tax Alert**

**Treasury Department Issues Guidance Regarding Cash Grant "Begin Construction" Requirement**

**June 25, 2010**

The U.S. Treasury Department today released on its website [additional guidance](#) regarding the "begin construction" requirement for qualifying for the 30% ARRA cash grant. To qualify for the

grant, a project either must be placed in service in 2009 or 2010 or, if construction begins on or before December 31, 2010, must be placed in service by a specified credit termination date (December 31, 2012 for large wind projects; December 31, 2013 for biomass, certain geothermal and other projects; and December 31, 2016 for solar and other projects).

There has been a great deal of confusion and discussion regarding what it means to "begin construction." These issues have become increasingly important as developers and investors work toward financing projects that will not be placed in service by the end of 2010.

In July 2009 the Treasury Department issued guidance providing that the requirement could be satisfied either by (i) beginning "physical work of a significant nature" in 2009 or 2010, or (ii) paying or incurring at least 5% of the total cost of the specified energy property before the end of 2010 (the "5% safe harbor"). In March 2010 the Treasury Department revised its published guidance to clarify a number of issues regarding the begin construction requirement. Today's guidance, which was issued in the form of a list of questions and answers, is intended to provide further clarification regarding a number of issues that have been raised.

Some of the more interesting issues regarding "physical work of a significant nature" that are addressed in the guidance are:

- Any physical work on specified energy property will be treated as beginning construction, even if the work relates to only a small part of the facility.
- The Treasury Department will closely scrutinize long delays in construction activity that may indicate the lack of a continuous program of construction or contractual obligations to complete work within a reasonable time (other than delays beyond the control of the developer, such as weather).
- Starting construction of roads that are integral to the qualified facility may constitute physical work of a significant nature.
- Work performed under a contract does not include work to produce components or parts that are in existing inventory or are normally held in inventory by a manufacturer.
- Physical work of a significant nature can be considered to have begun even if a specific site for a project has not been identified at the time of the initial application.

Some of the issues regarding the 5% safe harbor that are addressed in the guidance include:

- A cost will not be considered "incurred" by an accrual-method taxpayer until "economic performance" has occurred. This generally requires that the property be provided to the applicant. Thus, amounts paid as prepayments or deposits by an accrual-method applicant generally will not count toward the 5% threshold.
- Property is considered "provided" to an applicant either when title passes to the applicant or when it is delivered to or accepted by the applicant. In addition, property that the applicant reasonably expects to be provided within 3 1/2 months of the end of 2010 will be considered incurred within 2010.
- The guidance clarifies a number of issues relating to how costs paid by a manufacturer on an applicant's behalf pursuant to a binding written contract can be counted toward the 5% threshold.
- An applicant must pay or incur 5% of the total project costs to qualify for the safe harbor. If actual costs exceed estimates, the applicant will not qualify unless it has paid or incurred 5% of the actual costs. An applicant may, however, apply for the grant based on fewer than all

of the units of a multi-unit facility if doing so causes the applicant to meet the 5% threshold.

The guidance also addresses procedural issues regarding the "begin construction" requirement:

- If a project is placed in service before October 1, 2011, only one application should be filed, demonstrating both that construction began in 2009 or 2010 and that the project has been placed in service.
- If a project is placed in service after October 1, 2011, the applicant must submit a preliminary application by October 1, 2011 showing that construction began in 2009 or 2010. The preliminary application must then be supplemented at the time the project is placed in service. The Treasury Department will confirm in writing that physical work of a significant nature has occurred or that qualifying costs have been incurred toward the 5% safe harbor, but will not confirm that other requirements have been met.
- The guidance explains what documents must be provided to establish either that physical work of a significant nature began in 2009 or 2010 or that the 5% safe harbor was satisfied.

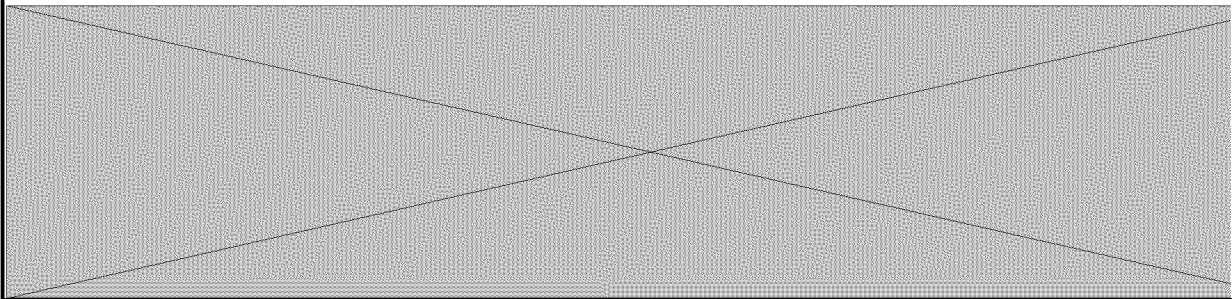
Much of the guidance confirmed what practitioners, developers and investors have understood to be the rules since the original guidance was issued. Some of the clarification is quite helpful, however, and will provide additional comfort to developers and investors alike. If you have questions regarding the guidance or the grant program in general, please contact one of the following attorneys.

Please contact one of the attorneys listed below if you have questions about the "beginning of construction" requirement or any other aspect of the Treasury Grant, or if you have questions relating to renewable project finance or related tax issues.

Carl Lewis at (206) 386-7688 or [cslewis@stoel.com](mailto:cslewis@stoel.com)  
Greg Jenner at (612) 373-8857 or [gjenner@stoel.com](mailto:gjenner@stoel.com)  
Kevin Pearson at (503) 294-9622 or [ktpearson@stoel.com](mailto:ktpearson@stoel.com)  
Adam Kobos at (503) 294-9246 or [ackobos@stoel.com](mailto:ackobos@stoel.com)

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