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Powerful Forces at Work in Renewable Energy

By Michael J. Novogradac, CPA

A great deal of attention has been focused recently on renewable energy as several lawmakers introduce legislation intended to encourage new and expanded energy projects; however, challenges are mounting as owners and developers struggle to meet the deadlines and requirements of legislation already passed. Let me start this month's column with a rundown of some of the proposed legislation.

The Encouragement

On April 26, bipartisan legislation was introduced in the House that will encourage development of the next generation of biofuels. The bill, Grow Renewable Energy Economy Now, Jumpstart Other Biofuels Act (GREEN JOB Act), would expand the types of property eligible for the 30 percent renewable energy investment tax credit to include property used to produce fuel from algae and plant mass. This change would give the biofuel industry treatment under the tax code equal to that for other renewable energy sectors. The bill would also extend for four years, from December 31, 2012 to December 31, 2016, the expiration date of the production tax credit for biofuels.

That proposed legislation was followed on May 6 with the introduction of the Security in Energy and Manufacturing (SEAM) Act. S. 3324 is a companion bill to H.R. 5041, which was introduced in the House on April 15.

The SEAM Act would expand and improve the Advanced Energy Manufacturing Tax Credit program (Section 48C program) that was authorized by the American Recovery

and Reinvestment Act of 2009 (Recovery Act). The Section 48C program provides domestic companies with a 30 percent credit for investments in new, expanded or reequipped clean energy manufacturing projects. The SEAM Act would provide an additional \$5 billion and allow for grants in lieu of tax credits. The allowance of grants in exchange for tax credits would enable the program to reach companies that do not have federal income tax liabilities and cannot find tax credit investors. Both the tax credit and grant would remain at 30 percent of the cost of the project but the SEAM Act would adjust the selection criteria to give higher priority to facilities that manufacture — rather than assemble — goods and components in the United States. Copies of these bills can be downloaded from www.energytaxcredits.com.

In a third bit of recent good news, the Coalition for Green Capital (CGC) recommended a set of tax provisions to accelerate and expand the deployment of clean efficient energy. The group's recommendations include proposals to extend expiring tax provisions as well as enhance and implement technical fixes to current tax provisions.

CGC, a consortium of leaders in energy development enterprises, advocates for tax and finance policies that support investment in energy efficiency and clean energy at the national, state and international level.



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The group recommends that the Internal Revenue Code (IRC) be changed to allow master limited partnership structures to be used for renewable power generation. CGC says that amending IRC section 7704(d) to expand the definition of qualifying income to include revenues arising from the generation and sale of electricity produced from renewable resources would permit more favorable capital structures to be employed, thereby allowing such projects to obtain more and cheaper equity financing. CGC says that this amendment helps level the playing field between renewable energy and fossil fuels.

The CGC also recommends extending the grant in lieu of tax credit program that was created by the Recovery Act. It says that extending the grant through the end of 2012 would enable developers to obtain the capital needed to build renewable energy projects that otherwise may not be built because they would not be ready to begin construction by the end of 2010.

Keith Martin, a partner in Chadbourne & Parke's Washington, D.C. office, said the odds are better than 50-50 that the cash grant program will be extended; however the House is expected to turn the cash grants into tax refunds. Sen. Charles Schumer's, D-N.Y., complaint about grants paid on projects that use foreign equipment remains a potential complication.

Other CGC proposals include three technical fixes to current tax provisions, including amending IRC section 50 to state that recapture occurs only if during the recapture period the investment credit property or an interest in it is sold to a person that would be ineligible to receive an ITC, or the property ceases to be specified energy property. The group also proposes amending section 1603(g) of the Recovery Act to clarify that tax-exempt organizations subject to the unrelated business income tax are not prohibited from receiving grants, and amending section 1603(g) to provide for a proportionate disallowance of grant payments due to ineligible ownership.

The CGC also backs expanding the Section 48C program, revising the investment tax credit treatment for offshore wind facilities, providing tax benefits for community based solar projects, creating an ITC for energy storage, as well as others that can be viewed at www.coalitionforgreencapital.com.

The Challenges

Speaking to participants at Novogradac & Company's Financing Renewable Energy conference in late April, Martin addressed the difficulties that those who had been allocated Section 48C tax credits face when building factories that make products for the clean economy.

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Martin also focused on the strategies being employed to start construction of renewable energy projects. Of particular challenge to developers is a lack of clarity surrounding the requirement that all projects must be under construction by the end of this year to qualify for the Section 1603 30 percent Treasury cash grant. The tests for meeting this requirement can be met in one of two ways: by starting physical work of a significant nature or incurring more than 5 percent of the total project cost, but questions remain about what constitutes "under construction."

Martin said that the outcome of an April 6 meeting between the wind industry and senior Treasury staff on these two tests quashed the belief of many who had assumed the easiest and cleanest way to meet the requirement would be to incur 5 percent of the total cost of the project. "Treasury has made clear you can't just pay the costs and count them, you can only count payment if you expect delivery of the goods or services within three and a half months of the payment," he said. To illustrate, he said that a payment made on December 31, 2010 counts in 2010 only so long as the equipment is reasonably expected to be delivered by April 15, 2011. Otherwise, the payment is treated as spending in 2011 after delivery in 2011.

Treasury staff also said if there is a "binding" contract with a supplier or manufacturer, the developer can look through any binding contracts with equipment suppliers or other contractors that are signed before manufacture of the equipment or other work starts and count spending by the contractor; however, the supplier or manufacturer also must expect delivery of the components or services within three and a half months. "That was [a] disappointment," Martin said, noting that Vestas and GE, two large turbine manufacturers, told Treasury there was no way for them to trace spending to specific turbine orders. Manufacturers, he said, don't allocate components to any particular turbine until a week before it starts manufacturing the turbine.

After that meeting, Martin said, the wind industry concluded it would be hard to meet the 5 percent test and refocused on the requirement of starting physical work of a significant nature. "Treasury has said it's enough to start work on the roads on the site so now almost everybody is looking at getting roads under way. They've also said it's enough to pour concrete pads for three turbines for a wind farm of 65 turbines," Martin said.

Important issues remain, however. Among them are what to do about turbine frame agreements; whether contracts between affiliates can be "binding;" what happens if the developer starts work in 2010 but doesn't resume until mid-2011; whether spending by contractors on off-the-shelf solar modules counts toward the 5 percent test; how to calculate cash grant basis in transactions that are sale-leasebacks for tax purposes but not for grant purposes;

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and section 59(e) elections in geothermal projects.

Martin said the wind, solar, geothermal and biomass industries are all collecting questions and proposed answers and Treasury hopes to have answers by late June. He added, however, that it's more likely to be July. His practical advice for those who feel July is not soon enough: Sign "binding" contracts this year to build the project or order equipment; have the contractor or vendor pay more than 5 percent of the cost or, better yet, start physical assembly; have it certify that its spending was on components or services that will be received within

three and a half months; start construction of roads or foundations and keep working at the site, even if at a slow pace; use care in amending contracts later; and ask Treasury to confirm construction started.

These and other efforts to clarify and expand tax credits for the manufacturing and production of clean energy can help to support economic growth, create jobs and reduce greenhouse gas emissions. Please join with me in urging lawmakers to continue forging and sponsoring pathways to a cleaner energy future. ❖

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