

A Renewable Energy Law Update

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IRS Announces Qualifying Advanced Energy Project Tax Credit Program

Preliminary applications due September 16, 2009

The Internal Revenue Service yesterday issued Notice 2009-72 (the “Program Guidance”) establishing a program implementing the Qualifying Advanced Energy Project Credit (“QAEP Credit”) under Section 48C of the Internal Revenue Code (the “Code”). The Program Guidance may be found on the IRS website: <http://www.irs.gov/pub/irs-drop/n-09-72.pdf>.

The QAEP Credit was enacted as part of the American Recovery and Reinvestment Act of 2009 (“ARRA”). It is intended to encourage the development of a domestic manufacturing base to support the U.S. renewable energy industry by providing a tax credit equal to 30 percent of the “qualified investment” in a “qualifying advanced energy project.” The QAEP Credit is subject to a nationwide limitation of \$2.3 billion, which must be allocated among eligible projects. ARRA required the Treasury Department to establish by August 17, 2009, a program to consider and award certifications for the QAEP Credit. The program announced yesterday fulfills that mandate and sets a short timeline for credit allocation applications.

➤ QAEP Credit Basics

- A “qualifying advanced energy project” is a project that re-equips, expands, or establishes a manufacturing facility for the production of specified advanced energy property.
- “Advanced energy property” is (i) equipment used to produce energy from renewable resources, (ii) fuel cells, microturbines, or energy storage systems for use with electric or hybrid-electric motor vehicles, (iii) electric grids to support storage and transmission of energy from intermittent sources of renewable energy, (iv) property designed to capture and sequester carbon dioxide, (v) property designed to refine or blend renewable fuels or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies), (vi) plug-in electric motor vehicles or their components, and (vii) other property designed to reduce greenhouse gas emissions as may be determined by the IRS.
- “Qualified investment” is the basis of depreciable tangible personal property that is a necessary part of a “qualifying advanced energy project” and is placed in service by the taxpayer during the taxable year.

- The amount of QAEP Credit that may be allocated to any one project is limited to the amount certified by the IRS as eligible. Thus, in order to claim the QAEP Credit, a taxpayer must apply for certification under the advanced energy project program.

➤ **Application Procedure Under the Program Guidance**

- The first step in applying for a QAEP Credit is to submit an application to the Department of Energy (“DOE”) for a recommendation and ranking of the project. The DOE will provide a recommendation and ranking only if it determines that the project has a reasonable expectation of commercial viability and merits a recommendation based on the criteria in Code Section 48C(d)(3)(B), as discussed below. The application to the DOE requires both a preliminary application and a final application.
- The second step is to apply to the IRS for certification of the project for a tax credit allocation. The IRS will consider an application for certification only if the DOE has provided the recommendation and ranking.
- The project receiving the highest DOE ranking will receive the full amount of the QAEP Credits requested before any allocation is made to the second-ranking project. The second-ranking project will then receive the full amount requested before any credit is allocated to the third-ranking project, and so on until the entire \$2.3 billion designated for the program by Congress has been allocated. If the entire \$2.3 billion is not allocated to applicants in the initial round, a second allocation round will be held in 2010-2011.

➤ **Application Deadlines**

- Preliminary applications for DOE recommendation and ranking must be submitted to the DOE by September 16, 2009. (A preliminary application contains summary information about the project.)
- Final applications for DOE recommendation must be submitted by October 16, 2009.
- Applications for certification by the IRS must be submitted by December 16, 2009. (This is the same date by which the DOE is required to complete its recommendations and rankings. Thus, it appears that an applicant must complete its IRS application before it knows whether its project will be recommended to the IRS by the DOE or what ranking the DOE has assigned to the project.)
- A completed application submitted to the IRS at any time before December 17, 2009, will be deemed submitted on December 16, 2009. Thus, there is no advantage to early submission of applications to the IRS, as long as the deadlines to apply for DOE recommendation and ranking are met.
- The IRS will accept or reject each application for certification by January 15, 2010. If the application is accepted, the acceptance letter will state the amount of the credit

allocated to the project.

➤ **Selection Criteria**

- The Code establishes the following selection criteria: (i) expectation of commercial viability, (ii) job creation during the period prior to February 17, 2013, (iii) impact on reducing air pollutants or emissions of greenhouse gases, (iv) potential for technological innovation and commercial deployment, and (v) relatively short period to completion. These evaluation criteria are also provided in Exhibit B to the Program Guidance.
- In addition to these evaluation criteria, the Program Guidance lists the following “program policy factors”: (i) Geographic Diversity, (ii) Technology Diversity, (iii) Project Size Diversity, and (iv) Regional Economic Development. The Program Guidance does not specify how those factors will be taken into account.

➤ **Allocation Agreement**

- If a QAEP Credit is allocated to an applicant, the applicant must enter into an agreement with the IRS in a specified form. The agreement will apply only to the taxpayer that signs the agreement. Any successor in interest must execute a new agreement with the IRS. Failure to do so will result in forfeiture or recapture of any credits allocated to the project.

➤ **Other Important Dates and Deadlines**

- A successful applicant will have one year from the date of the acceptance letter to obtain all permits necessary to commence construction and to satisfy other requirements for certification.
- An applicant receiving certification from the IRS will have three years from receipt of certification to place the project in service. A project is “placed in service” when the property is “placed in a condition or state of readiness and availability for a specifically assigned function.” If this deadline is not met, the credit will be forfeited.

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