

**Energy, Clean  
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## Energy Update

### **Cash Grants for Wind Power Development: Section 1603 Grants and Their Benefits for Wind Power Projects**

*by David R. Brown*

The American Recovery and Reinvestment Act (ARRA) was enacted in February to provide appropriations of over \$70 billion for renewable energy projects, through tax credits, cash grants, loan guarantees and other programs. The availability of these incentives for new and ongoing projects has been a primary concern of industry participants, especially as regulations and application procedures for some of the most important incentives have taken months to develop and implement. This Client Alert focuses on the so-called 1603 Grant, the recently enacted regulations, eligibility requirements and application procedures, and specifically its usefulness for the wind energy industry.

Wind energy projects have historically been highly dependent on the availability of the production tax credit (PTC), which provides a tax credit for the production of renewable energy. Many wind farm developers lack taxable income against which to apply the PTC for a number of years, necessitating the involvement of so-called "tax equity" investors who have taxable income from other activities against which the PTC may be applied from day one. Tax equity investors in turn generally require that wind energy projects be financed with a level of debt financing not always available in the current economic climate. In response, ARRA contains two alternatives to the PTC.

The first alternative, the investment tax credit (ITC), allows a developer to forego the PTC and instead receive a tax credit based upon the level of its investment in wind power property, effectively accelerating the availability of tax credits from the date upon which a wind farm begins commercial operations to the date upon which investment commences. Like the PTC, however, the ITC generally requires significant tax equity investor involvement.

The second alternative, and the subject of this Client Alert, is a refundable tax credit in the form of a grant from the Department of the Treasury in lieu of the ITC under ARRA Section 1603. The 1603 Grant is of special significance as it allows wind farm developers to monetize the value of the ITC and benefit from it from the early stages of a project.

#### **Overview of the 1603 Grant**

For wind energy projects, the 1603 Grant is equal to 30% of the cost basis of "qualified property" purchased in connection with a wind energy facility and "placed in service" or "constructed" in 2009 or 2010.

#### **Qualified Wind Energy Property**

Qualified property is tangible personal property or other property (not real estate) that is an "integral part" of a wind energy facility, as defined in the new Treasury regulations. Property is considered "integral" if it (1) is used "directly in" the wind energy facility, (2) is "essential to the completeness" of wind energy production, and (3) is "located at" the

wind energy facility. Some property clearly will qualify as “integral,” such as turbines, towers, and related equipment. Storage, power conditioning, transfer equipment and roads for turbine maintenance also qualify, whereas transmission lines, downstream equipment and the like will not.

#### **Property Placed in Service or Constructed in 2009 or 2010**

The 1603 Grant applies to property (1) placed in service in 2009 or 2010, or (2) placed in service after 2010 but no later than January 1, 2013 if construction (“physical work of a significant nature”) begins in 2009 or 2010. A safe harbor provides that construction may be deemed to have begun when the applicant incurs or pays more than 5% of the cost of the property. Individual units of functionally interdependent qualified property, e.g., an individual turbine, together with its tower and foundation pad, may be treated as a separate unit of property, as may larger portions of a wind farm development. This will allow developers to tailor the scope of their application to obtain the optimal 1603 Grant.

It should be noted here that the 1603 Grant is clearly available not only for a new project, but also for an expansion of a wind energy facility that was placed in service before 2009, so long as the addition satisfies the foregoing placed-in-service requirements.

#### **Disqualified Persons and Other Limitations**

The recent Treasury guidance is helpful in its clarification concerning the availability of the 1603 Grant for projects involving foreign, public-sector and non-profit participants, as to which there had been some questions as to availability. The guidance indicates that the 1603 Grant will be available in connection with a wind power project involving such participants, so long as they participate (e.g., in the limited liability company that is the owner of the project) through “blocker” C-corporations subject to U.S. taxation.

As noted above, the 1603 Grant is offered in lieu of the PTC and ITC, so the applicant may not have elected to receive either of these incentives in connection with the project for which it wishes to obtain a Section 1603 Grant.

#### **Leases**

The 1603 Grant is available for use in connection with lease and sale/leaseback structures as well as purchases, subject to minimal conditions that should encourage the continued use of these transaction structures.

#### **Recapture**

Some or all of the 1603 Grant is subject to recapture if the property no longer constitutes qualified property under Section 1603, or if the property is transferred to a disqualified person, within five years after the grant is received. The amount subject to recapture declines on a straight-line basis over this period.

#### **How to Apply**

Applications for the 1603 Grant may be submitted online at <http://www.treasury.gov/recovery.1603.shtml>. For property placed in service in 2009 or 2010, applications are

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WASHINGTON, D.C.  
1500 K Street, NW  
Suite 250  
Washington, DC 20005  
202.639.7500  
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due after the property is placed in service, but before October 1, 2011. For property not placed in service in 2009 or 2010 (but with construction beginning in 2009), applications must be submitted after construction commences, but before October 1, 2011.

Treasury will make payments to qualified applicants within 60 days after a complete application is submitted, with respect to property placed in service at the time of submission. For property not yet placed in service, Treasury will notify the applicant if all eligibility requirements are met. Within 90 days after such property is placed in service, the applicant must submit supplemental information sufficient for Treasury to make a final determination as to eligibility. If the requirements are met, payment will be made within 60 days after the supplement information is submitted.

Applicants for the 1603 Grant must:

- Obtain a Data Universal Numbering System (DUNS) from Dun & Bradstreet;
- Register with the Central Contractor Registration (CCR).

Applicants should be prepared to submit copies of the following documentation:

- Designs plans for qualified property, including final engineering design documents stamped by a licensed professional engineer;
- Commissioning report by the project engineer, equipment vendor, or independent third party certifying that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose;
- For property already placed in service, if interconnected with a local utility, an interconnection agreement establishing the terms and conditions under which the utility agrees to interconnect with the applicant's system, as well as documentation showing that the interconnection agreement has been placed in effect;
- For property under construction but not yet placed in service, documentation showing that "physical work of a significant nature" has begun on the property, including invoices or other financial documents; and a binding contract for the construction or development of the qualifying property;
- If the applicant is a lessee, the lease agreement.

### Conclusion

As outlined above, the 1603 Grant should prove helpful to many wind power developers in the current economic environment. In addition to those conditions outlined above, however, other requirements apply. Accordingly, developers interested in obtaining a 1603 Grant should consult with counsel before submitting an application.

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