



# Renewable Energy Alert

A publication of Nixon Peabody LLP

JUNE 8, 2009

## IRS guidance on claiming investment tax credits for wind, biomass, geothermal, and other PTC facilities

By *Forrest David Milder and Michael J. Goldman*

The 2009 Stimulus legislation (the American Recovery and Reinvestment Act of 2009 or ARRA) made two very significant changes to the tax treatment of renewable energy facilities:

- *Electing the ITC.* ARRA enables a broad range of production tax credit (PTC) facilities (e.g., wind, biomass, geothermal, landfill gas, trash, qualified hydropower, and marine and hydrokinetic facilities) for which a tax credit was (and continues to be) based on the production of electricity to, instead, elect an investment tax credit (ITC) based on the cost of the facility, as was already the case for solar and fuel cells.
- *Grants in lieu of ITCs.* ARRA provides a mechanism for both PTC and ITC facilities to claim a government grant (1603 Grant) in lieu of tax credits.

Now, in Notice 2009-52, issued on June 5, 2009, and to be formally published in Internal Revenue Bulletin 2009-25 on June 22, 2009, the IRS is providing guidance on the first of these two provisions, i.e., electing ITC treatment. The Notice does *not* address the 1603 Grant program, for which guidance is still thought to be about a month away.

Of course, the ITC operates *very differently* from the PTC. If the ITC is claimed, the entire 30-percent tax credit (10 percent for certain facilities) is claimed in the year the facility is placed in service, and there is no need to sell electricity in order to generate the credit. In comparison, the 2.1 cents per kwh (adjusted annually for inflation) PTC is claimed over a 10-year period, and it is based entirely on energy production, which must be sold to an unrelated person.

This *Alert* discusses the Notice and its rules. As discussed below, there are important starting and ending dates for claiming the energy credit, and detailed information that must accompany the election, so the guidance should be studied carefully to assure that a facility qualifies for and properly claims the desired credit.

*The new Code provision added by ARRA.* ARRA added Section 48(a)(5) to the Internal Revenue Code, which provides an irrevocable election to claim the 30-percent ITC in lieu of the 2.1 cents per kwh PTC. The election applies to the following renewable energy facilities:

- wind facilities placed in service in 2009 through 2012; and
- closed-loop biomass, open-loop biomass, geothermal, select solar that was not previously eligible for the ITC, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy facilities placed in service in 2009 through 2013.

The election does *not* apply to refined or Indian coal facilities. Note that geothermal is now eligible for both a 10-percent credit under existing ITC provisions and a 30-percent credit if it makes the election; presumably, a taxpayer will elect the higher 30-percent rate if the facility is placed in service during the eligible periods.

*Claiming the ITC.* Typically, a taxpayer claims the ITC by filing a completed Form 3468, "Investment Credit," with the taxpayer's return for the year the project is placed in service.

Notice 2009-52 provides that the election to claim the ITC on an otherwise-PTC facility is made with a timely filed return that includes a Form 3468 with the information described below. So, a taxpayer will have until the due date of its tax return (i.e., well after the facility has been placed in service) to choose the ITC rather than the PTC.

To elect ITC treatment, a statement with the following information must be attached to the filed Form 3468 for *each facility* for which the election is being made:

- Name, address, taxpayer identification number, and telephone number of the taxpayer;
- A detailed technical description of the facility, including generating capacity;
- A detailed technical description of the energy property placed in service during the taxable year as an integral part of the facility, including a statement that the property is an integral part of such facility;
- The date that the energy property was placed in service;
- An accounting of the taxpayer's basis in the energy property;
- A depreciation schedule reflecting the taxpayer's remaining basis in the energy property after the ITC is claimed;
- A statement that the taxpayer has not claimed and will not claim a 1603 Grant for property for which the taxpayer is claiming the ITC; and
- A declaration, under penalties of perjury, that the taxpayer is submitting, to the best of its knowledge and belief, true, correct, and complete information on the Form 3468 and the attached statement.

The Notice also requires that the taxpayer retain adequate books and records, which must include all of the above-required information relevant to the Form 3468 and all supporting documentation relevant to the election and the claiming of the ITC.

*Thoughts about the Notice.* As noted above, the election is made for "each facility"; the IRS has yet to provide a definition of a "facility." Indeed, the Notice refers to "energy property" that is "integral" to a "facility," and then requires technical descriptions with respect to both the facility and the integral energy property. So, it is possible that the IRS is treating (A) individual parts of a wind turbine (e.g., blades, gear box, generator) as "energy property" and a single turbine as a "facility," or (B) individual turbines as energy property, and a wind farm as a facility for which a single election is made. Until further clarification is issued, or we get better guidance from Treasury, it is prudent to prepare a separate election for each turbine/structure in a wind or other renewable energy "farm."

Similarly, the Notice does not provide a clarification of the term “detailed technical description,” or indicate whether the IRS will scrutinize this description to determine just what parts of a facility will qualify for the credit, or whether any of the “descriptions” or the “accounting” are best provided by an independent “expert,” rather than the taxpayer. It is hoped that technical descriptions can be prepared in a way that enables them to be re-used for identical, or nearly identical, facilities that comprise a single “farm.”

Two further observations: First, the Notice contemplates a taxpayer spending only about an hour to compile the required information, suggesting that “detailed” doesn’t mean “very detailed.” Second, the Notice anticipates that only 100 taxpayers will file the election, a relatively small number when compared to the thousands expected to seek 1603 Grants.

As noted above, the Internal Revenue Service and Treasury are expected to issue guidance regarding the 1603 Grant within the next month. We expect that the information required to claim the 1603 Grant will be quite similar to the list enumerated above. The person at the IRS responsible for the Notice is also working on the 1603 Grant procedures. Of course, a tax credit is claimed pursuant to a tax return and is potentially subject to audit. It is thought that the IRS does not have any interest in auditing grant recipients, so the 1603 Grant process is likely to contemplate some kind of greater diligence on behalf of recipients with respect to claiming the 1603 Grant and avoiding recapture.

For more information regarding the ITC, the PTC, 1603 Grants, or this *Alert*, please contact:

In Boston:

Forrest David Milder at 617-345-1055 or [fmilder@nixonpeabody.com](mailto:fmilder@nixonpeabody.com)  
James F. Duffy at 617-345-1129 or [jduffy@nixonpeabody.com](mailto:jduffy@nixonpeabody.com)

In Los Angeles:

Aleks Frimershtein at 213-629-6010 or [afrimershtein@nixonpeabody.com](mailto:afrimershtein@nixonpeabody.com)

In Washington, D.C.:

Michael J. Goldman at 202-585-8289 or [mjgoldman@nixonpeabody.com](mailto:mjgoldman@nixonpeabody.com)  
Herbert F. Stevens at 202-585-8811 or [hstevens@nixonpeabody.com](mailto:hstevens@nixonpeabody.com)