

NOW +

NEXT

ENERGY LAW ALERT | NIXON PEABODY LLP

SEPTEMBER 18, 2018



Time may be running out to recover Section 1603 grant money

By Ellen S. Friedman, John C. Hayes Jr. and Brian P. Donnelly

Section 1603 of the American Recovery and Reinvestment Tax Act of 2009—which Congress passed to spur investment in renewable energy amidst the 2008 financial crisis—directed the U.S. Treasury to provide an immediate cash grant to any applicant who placed a qualified renewable energy property into service between 2009 and 2011 (or after 2011 if construction began during that time period). Section 1603 grants soon became a popular source of financing among energy developers, with nearly 110,000 grants awarded over the life of the program.

Since 2011, however, dozens of Section 1603 applicants have filed lawsuits against Treasury in the U.S. Court of Federal Claims, claiming Treasury improperly reduced their grant awards well below entitled amounts, sometimes by tens and even hundreds of millions of dollars. Other applicants have taken a wait-and-see approach, choosing to sit on potential claims while the body of law surrounding Section 1603 actions continues to develop. Those in the latter group should be mindful that the six-year limitation period for Section 1603 claims which may be rapidly approaching for grants awarded toward the end of the program's lifespan.

The Court of Federal Claims has exclusive jurisdiction over most Section 1603 claims. See *ARRA Energy Co. I, et al. v. United States*, 97 Fed. Cl. 12 (2011); *Desert Sunlight 250, LLC, et al. v. Lew*, 169 F. Supp. 3d 91 (2016). Any claim in that court must be filed within six years “after such claim first accrues.” 28 U.S.C. § 2501. Though the question of when a Section 1603 claim “accrues” has not been litigated, there is consensus among practitioners that the six-year limitation period begins to run on the date of Treasury's award letter in response to a Section 1603 application. Claims brought more than six years after that date are likely to be strictly barred. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (limitations period is not subject to waiver or equitable tolling).

That means applicants who received reduced grant awards in late 2012 and early 2013 must move quickly to preserve their claims. While the body of law in this area continues to develop, applicants risk leaving grant money on the table if they do not remain mindful of approaching deadlines.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- Ellen S. Friedman at efriedman@nixonpeabody.com or (212) 940-3053
 - John C. Hayes Jr. at jhayes@nixonpeabody.com or (202) 585-8345
 - Brian P. Donnelly at bdonnelly@nixonpeabody.com or (202) 585-8191
-