



Summary of Energy Provisions in the American Recovery and Reinvestment Act of 2009

By V&E lawyers Stephen Angle, John S. Decker, Debra J. Duncan, L. Price Manford, and Christine L. Vaughn

February 17, 2009

Appropriations and Energy Policy Provisions

The American Recovery and Reinvestment Act of 2009 (the “ARRA”), signed into law by the President on February 17, 2009, provides substantial new appropriations for existing programs administered by the Department of Energy (“DOE”), makes certain changes in the eligibility criteria for existing programs, and establishes other new programs. The appropriations for existing programs will enable DOE to commit the appropriated monies without having to promulgate new rulemaking. The new programs may require DOE to promulgate rulemaking.

- *Energy Efficiency and Renewable Energy.* The ARRA appropriates \$16.8 billion in new funds for energy efficiency and renewable energy programs.
 - \$3.2 billion is provided for energy efficiency and conservation block grants to states and local governments for broadly defined programs to promote more efficient energy use. This program was originally authorized by provisions of the Energy Independence and Security Act (“EISA”).
 - \$5.0 billion is provided for weatherization for dwellings owned or occupied by low income persons. This program was originally authorized by provisions of the Energy Conservation and Production Act.
 - \$3.1 billion is provided for State Energy Programs to develop and implement state energy conservation programs. This program was originally authorized under the Energy Policy and Conservation Act.
 - \$2 billion is provided for grants for the manufacture of advanced batteries and components.
- *Electricity Delivery and Energy Reliability.* The ARRA appropriations include \$4.5 billion for grants under provisions of EISA for up to 50 percent of the cost of qualified smart grid demonstration projects. Qualified projects are those that support delivery and reliability measures and serve to modernize the electric grid, including



demand responsive equipment. DOE will accept applications related to improving the security and rehabilitation of energy infrastructure and for energy storage research, development, and deployment. DOE is to use \$80 million of the monies, in consultation with FERC, to analyze future electricity demand and related transmission requirements.

- Smart grid projects (including both transmission and advanced metering) are to be promoted in urban, suburban, and rural areas, with the policy applicable to both tax-exempt funded and investor-owned entities.
- *Fossil Energy Research and Development.* The ARRA appropriates \$3.4 billion for this new program.
- *Science.* The ARRA appropriates \$1.6 billion for grants under a new program. There is no directive in the legislation on the use of the funds.
- *Innovative Technology Loan Guarantee Program.* The ARRA appropriates \$6 billion for innovative technology loan guarantees under a new §1705 of the Energy Policy Act of 2005.
- The ARRA increases from 20 percent to 50 percent the maximum level of funding support to qualifying advanced electric grid technology. This increase includes certain conditions.
 - DOE must, within 60 days of enactment, through a notice of intent and subsequent solicitation, take action to implement new rules. This specific time limit is likely included due to the lengthy delay in DOE's award of funds authorized under previous legislation.
 - DOE must establish specific procedures by which applicants can obtain grants.
 - The new rules must require that funded demonstration projects utilize open protocols and standards (including Internet-based protocols and standards) if available and appropriate.
- Loan guarantees to promote rapid deployment of renewable energy and electric transmission will be provided only to projects that commence construction no later than September 9, 2011. The funds will be available to three types of projects.
 - Sponsors may seek guarantees for projects for renewable energy systems that generate electricity or thermal energy, including incremental hydroelectric projects, and facilities that manufacture related components.



- Guarantees are also authorized for electric power transmission systems, including upgrading and projects to install new conductors on existing lines.
- Sponsors may seek guarantees for “leading edge” bio-fuel projects performing at pilot or demonstration stage that are likely to become commercial technologies and will produce transportation fuels that substantially reduce life cycle greenhouse gas emissions as compared to alternative transportation fuels.
- DOE must condition the grant of loan guarantees for electric transmission on an evaluation of the viability of the project without guarantees, the availability of other federal/state incentives, the importance of the project in meeting reliability requirements, and the effect on state/regional environmental (including climate change) and energy goals.
- *Borrowing Authority for Federal Power Marketing Agencies.* The ARRA authorizes both the Bonneville Power Administration (“BPA”) and the Western Area Power Administration (“WAPA”) to increase their borrowing by a total of \$6.5 billion.
 - BPA may use its \$3.25 billion in additional borrowing authority for construction, acquisition, and replacement of transmission plants, and to implement other authority granted to BPA under its authorizing statute. The general authority language was added in conference and provides the Administrator of BPA the discretion to use the additional borrowing authority for non-transmission purposes.
 - WAPA receives \$3.25 billion in additional borrowing authority to construct transmission to deliver renewable energy. The transmission must include one interconnection to areas currently served by WAPA, which is authorized to operate in 15 western U.S. states. WAPA may use the funds to pay for its share of projects jointly developed with other entities. WAPA has previously entered into joint development projects with investor-owned entities.
- The ARRA also directs certain modifications to the 2009 National Electric Transmission Study, which is the biennial study of electric grid congestion provided for under the Energy Policy Act of 2005. This biennial study is the foundation for the Secretary of Energy to designate additional National Interest Electric Transmission Corridors (“NIETC”). The designation of NIETC is the predicate for FERC backstop siting jurisdiction. The ARRA directs an expanded scope for the 2009 study.
 - DOE must analyze the potential sources of renewable energy that are constrained in accessing appropriate markets by lack of adequate transmission.
 - DOE must make findings of the reasons for failure to develop adequate transmission capacity.



- DOE must make recommendations to achieve adequate transmission capacity.
- DOE must analyze the extent that legal challenges at state and federal level have delayed construction of transmission needed to access renewable energy.
- The study must detail the assumptions and projections made, including those related to energy efficiency improvements in each load center, the location and type of new generation capacity, and the deployment of distributed generation.

Note – The availability of this study could provide the factual basis for future preemptive federal legislation to regulate siting of transmission.

- Grants to states will be predicated on the confirmation by the governor that the state’s utility commission will endeavor to adopt energy efficiency investment policies that will insure that utilities will not incur loss of revenue as a consequence of implementing energy efficiency measures. The corresponding provision in H.R. 1, the original bill passed by U.S. House of Representatives, had originally required the adoption of such policies and had been heavily criticized by industrial user groups and the National Association of Regulatory Utility Commissioners.

Energy Tax Incentives

The ARRA provides significant new tax incentives related to the development and deployment of renewable energy and clean energy.

Tax Provisions for Renewable Energy

For renewable energy projects, including wind projects currently eligible for production tax credits (“PTCs”) under Section 45 of the Internal Revenue Code of 1986, as amended (the “Code”) and solar projects eligible for investment tax credits (“ITCs”) under Section 48 of the Code, the ARRA modifies a number of existing tax incentives and establishes a program to make optional grants available in lieu of tax credits for certain projects.

- *Extension of Placed-in-Service Deadlines.* The ARRA extends the placed-in-service deadlines for claiming PTCs for three years. The new deadline is December 31, 2012, for wind facilities, and December 31, 2013, for biomass (closed-loop and open-loop), geothermal, landfill gas, waste-to-energy, certain hydropower, and marine and hydrokinetic facilities (collectively, “renewable energy facilities”).
- *Optional Investment Credit for Certain Facilities.* A taxpayer may make an irrevocable election to claim a 30 percent ITC instead of PTCs with respect to qualified property that is part of a renewable energy facility otherwise eligible for PTCs. Under limited circumstances, ITCs may be available for certain progress expenditures for property with a long construction period.



- Property eligible for the ITC must be tangible property, not including buildings or structural components, with respect to which depreciation is allowable; the property must be used as an integral part of the qualified facility. For example, for wind facilities the ITC will be available for property eligible for five-year MACRS depreciation.
- The limitations on carrybacks and carryforwards have not changed; unused credits may be carried back one year and forward 20 years.
- *ITC for Energy Property.* The ARRA repeals prior-law limitations that reduce the amount of allowable ITCs for energy property to the extent that the property was financed with subsidized energy financing or private activity bonds. In addition, the existing ITC credit cap of \$4,000 per year for qualified small wind energy property is eliminated.
- *Optional Grants for Certain Facilities.* The ARRA makes grants available in lieu of PTCs or ITCs to any person that places certain property in service during 2009 or 2010 in the United States. Grants also will be available for property placed in service after 2010 and before the applicable PTC or ITC placed-in-service deadlines (December 31, 2012, for wind, December 31, 2013, for other Section 45 property and December 31, 2016, for solar property) if construction of the property begins during 2009 or 2010.
 - The available grant equals 30 percent of the property's basis for all eligible property except for qualified microturbines, combined heat and power systems, and geothermal heat pump property, for which the grant amount equals 10 percent of basis. For these purposes the property's basis for calculating the amount of the grant will be determined using general tax principles.
 - Property eligible for the grants must be tangible property, not including buildings or structural components, with respect to which depreciation is allowable; the property must be used as an integral part of the qualified facility.
 - Tax-exempt persons, including government-owned utilities and cooperatives, will be ineligible for the grants. Partnerships are also ineligible for grants if any of the partners is a tax-exempt person.
 - Grants are excludible from gross income, but the basis of the property for depreciation purposes (MACRS) will be reduced by half of the amount of the grant.
 - Property that receives a grant will be ineligible for PTCs or ITCs.



- If grant property is disposed of, or otherwise ceases to qualify, some or all of the grant may be recaptured unless the property is held by the owner for at least five years. In certain circumstances, the lessor in a sale-leaseback transaction may be eligible for the grant.
- The grant program will be administered by the Treasury Department (and not by the Department of Energy). Treasury will be required to extend a grant within 60 days of the later of the date the taxpayer applies for the grant or the date the property is placed in service, provided that the taxpayer must apply for the grant before October 1, 2011.
- *CREBs Bonds*. The ARRA authorizes the issuance of an additional \$1.6 billion of new, clean renewable energy bonds to finance renewable energy facilities owned by public power providers, governmental bodies, and cooperative electric companies.

Clean Energy Tax Provisions

- *Qualified Energy Conservation Bonds*. The ARRA authorizes an additional \$2.4 billion of qualified energy conservation bonds. The provision clarifies that capital expenditures to implement green community programs include grants, loans and other repayment mechanisms, so that these bonds can be issued to finance retrofits of existing private buildings through loans and/or grants to individual homeowners or businesses, or through repayment mechanisms such as periodic fees on utility bills that approximate the energy savings. Bonds used for such purposes will not be treated as private activity bonds for purposes of the requirement that 70 percent of allocations within a state or local government not be used for private activity bonds.
- *Credit for Investment in Advanced Energy Property*. The ARRA provides a new 30 percent credit for investments in certain depreciable property that is used in a qualified advanced energy manufacturing project. Credits will be available only for projects certified by the Treasury Department (in consultation with the Secretary of Energy) using specified selection criteria. Applications for certification must be submitted within a two-year period beginning on the date the Treasury establishes the program. Treasury may allocate a total of \$2.3 billion in credits. After certification, a taxpayer has five years to place the project in service. The Treasury Department may reallocate unused credits.

A qualified advanced energy manufacturing project is a project that re-equips, expands, or establishes a manufacturing facility for the production of:

- Property designed to be used to produce energy from the sun, wind, or geothermal deposits, or other renewable resources



- Fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles
 - Electric grids to support transmission of intermittent resources of renewable energy, including storage
 - Property designed to capture and sequester carbon dioxide
 - Property designed to refine or blend renewable fuels (but not fossil fuels) or to produce energy conservation technologies (including energy lighting or smart grid technologies)
 - Property designed to manufacture certain vehicles, including new qualified plug-in electric drive motor vehicles, and components designed especially for use with such vehicles.
- *Modification of Carbon Capture Credit.* The credit provision adopted in 2008 that provides a credit of \$10 per metric ton of carbon dioxide captured and used as a tertiary injectant in an enhanced oil or gas recovery project has been amended to require that the carbon dioxide be sequestered in permanent geologic storage in order to qualify for the credit. Under the provision, secure geological storage includes storage in oil and gas reservoirs.
 - *Alternative Fuel Refueling Property.* The ARRA increases the credit for alternative fuel refueling property placed in service in 2009 or 2010 to \$200,000 for qualified hydrogen refueling property and \$50,000 for other refueling property. For nonbusiness property, the maximum credit is increased to \$2,000. The credit rate for nonhydrogen refueling property is increased temporarily to 50 percent.
 - *Nonbusiness Energy Property.* The ARRA increases the credit for the purchase of qualified energy efficiency improvements to existing homes to 30 percent for property placed in service through December 31, 2010, and replaces the \$500 lifetime cap with an aggregate cap of \$1,500 for property placed in service during 2009 or 2010. The provision also modifies the efficiency standards for qualifying property.
 - *Residential Energy Efficient Property.* The existing credit caps for the personal credit for the purchase of certain residential solar electric and solar water heating property, geothermal heat pump property, small wind energy property, and fuel cell power plants have been eliminated.

Credit for Plug-In Vehicles. The ARRA limits the maximum plug-in electric drive vehicle credit to \$7,500, and eliminates the credit for vehicles weighing 14,000 pounds or more. The 250,000 total plug-in vehicle limitation has been replaced with a 200,000 plug-in vehicle



per manufacturer limitation. The ARRA also creates new 10 percent credits for (i) low-speed vehicles, motorcycles and three-wheeled vehicles that would otherwise be qualified plug-in electric drive motor vehicles, up to a maximum credit of \$2,500, and (ii) a new 10 percent credit (up to \$4,000) for the cost of converting any motor vehicle to a qualified plug-in electric drive motor vehicle, provided the minimum capacity of the battery module is at least four kilowatt-hours, effective for conversions before January 1, 2012. The alternative motor vehicle credit is treated as a personal credit allowable against the alternative minimum tax.

For further information on this topic, please contact V&E lawyers [Stephen Angle](#), [John S. Decker](#), [Debra J. Duncan](#), [L. Price Manford](#), and [Christine L. Vaughn](#). Visit our website at www.velaw.com to learn more about Vinson & Elkins' Energy practice.

This paper is intended for educational and informational purposes only and does not constitute legal advice or services. If legal advice is required, the services of a competent professional should be sought. These materials represent the views of and summaries of the authors, and do not necessarily reflect the opinions or views of Vinson & Elkins LLP or of any of its other attorneys or clients. It is not guaranteed to be correct, complete, or current, and it is not intended to imply or establish standards of care applicable to any attorney in any particular circumstance. Prior results do not guarantee a similar outcome.

Circular 230 Disclosure To the extent this communication contains any statement regarding federal taxes, that statement was not written or intended to be used, and it cannot be used, by any person (i) as a basis for avoiding federal tax penalties that may be imposed on that person, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

© 2009 VINSON & ELKINS LLP. ALL RIGHTS RESERVED.