

ALERT

October 6, 2008

www.daypitney.com**Energy Improvement and
Extension Act of 2008**

The Energy Improvement and Extension Act of 2008 (the "Energy Act"), which was signed by the President on Friday, October 3, 2008, extends the tax credits for renewable energy and adds categories of renewable energy that are eligible for tax credits. These provisions are contained in Division B of HR 1424, the same legislation that includes the Emergency Economic Stabilization Act of 2008 (Division A) and the Tax Extenders and Minimum Tax Relief Act of 2008 in Division C. [1]

For the full text of HR 1424, [click here](#).

This Alert does not address the provisions of the Emergency Economic Stabilization Act (to view our Emergency Economic Stabilization Act Alert, [click here](#)) and the Tax Extenders and Minimum Tax Relief Act of 2008. This Alert focuses solely on the provisions of Title I of the Energy Act addressing Energy Production Incentives.

Please contact any of the members of our Renewable Energy Practice Group for further information on the implications of the Energy Act.

**Highlights of Title I of the Energy Improvement and Extension Act of 2008 –
Energy– Production Incentives**

The section numbers in parentheses below refer to the Sections of the Energy Act, which begins on page 113 of HR 1424. [For convenience, the corresponding page number of HR 1424 appears in brackets.]

A. Existing Tax Credits Extended through the Act

- Subtitle A: Renewable Energy Incentives (Section 101-109)
 - Production tax credits for wind facilities and refined coal production facilities are extended by one year, until January 1, 2010. [115]
 - Production tax credits for closed-loop biomass facilities, open-loop biomass facilities, geothermal or solar energy facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities and qualified hydropower facilities are extended by two years, until January 1, 2011. [115-116]

[1] Division B was added to HR 1424 by the Senate, which had previously passed the extension of existing energy tax credits, on Wednesday, October 1, 2008, adding a new energy tax credit. HR 1424 as so amended was agreed to by the House of Representatives on Friday, October 3, 2008, and the same day the President signed HR 1424 into law. To view a copy of HR 1424, [click here](#).

For more information, please contact any of the individuals listed below:

Gregory J. Blasi^{NY, PA}
gblasi@daypitney.com
(212) 297 5806

Frank Lee^{NY}
flee@daypitney.com
(212) 297 5825

Richard M. Lorenzo^{NY}
rlorenzo@daypitney.com
(202) 218 3905
(212) 297 2480

Paul N. Belval^{CT, NY}
pnbelval@daypitney.com
(860) 275 0381

Sabino "Rod" Rodriguez^{CT, NY}
srodriguez@daypitney.com
(212) 297 2454

- The Energy Act also refines the credit for refined coal by (a) eliminating the requirement that be produced to have a market value increase of at least 50% as compared to the value of the feedstock coal, and (b) increasing the required nitrogen oxide emissions reduction from 20% to 40%, effective for property placed in service after December 31, 2008. [116]
 - Clarifying that the definition of a qualifying trash facility by stating that a facility need only use trash, and does not have to burn trash, in order to be a qualifying trash facility, effective upon enactment. [116-117]
 - Extending the credit for expanding open-loop and closed-loop biomass facilities that produce increased electricity as a result of the expansion, effective upon enactment. [117-118]
 - Modification of rules for adding hydropower capacity to an existing non-hydroelectric dam that does not change the water surface elevation, effective for property placed in service after December 31, 2008. [118-119]
- Investment tax credits for solar energy property are extended by eight years, until January 1, 2017. [123]
- Investment tax credits for fuel cell property and microturbine property are extended by eight years, until December 31, 2016. [123] The credit limitation for fuel cell property is increased from \$500 to \$1,500. [128]
- Provisions are made for the application of the credits for purposes of the alternative minimum tax. [123-124]
- Subtitle B: Carbon Mitigation and Coal Provisions (Section 111-117)
 - The investment tax credit amount for advanced coal project investment now includes 30% of the qualified investment for such taxable year in the case of qualifying advanced coal-based generation technologies. Aggregate credits for qualifying coal projects expanded from \$1.3 billion to \$2.55 billion. [154]
 - The requirement for becoming certified as a qualifying coal project has been modified to include a capture and sequestration requirement of at least 65%, (or 70% for reallocated credits) of such project's total carbon dioxide emissions. If a project fails to attain or maintain the separation and sequestration requirements, the benefits of any tax credit given to the project may be recaptured. [156-157]
 - The credit amount for coal gasification investment in a qualified gasification project is increased from 20% of the qualified investment for a taxable year to 30% of such an investment. Additionally, the maximum amount of credit is expanded \$250

[2] Beyond the scope of this Alert are the other provisions of the Energy Act, which include Title II dealing with Transportation And Domestic Fuel Security (Sections 201-211), Title III dealing with Energy Conservation And Efficiency (Sections 301-308) and Title IV dealing with Revenue Provisions (Sections 401-405), which provisions are also available at the link.

million (for a total maximum of \$600 million) for projects that separate and sequester at least 75% of such project's total carbon dioxide emissions. If a project is given credit based upon its ability to sequester carbon dioxide emissions, but fails to attain or maintain such requirements, the benefits of such tax credit may be recaptured. [159-160]

B. New Tax Credits Created by the Act

- Subtitle A: Renewable Energy Incentives
 - Marine and hydrokinetic renewable energy facilities are eligible to receive a new production tax credit. (Section 102) [120-122]
 - Marine and hydrokinetic renewable energy facilities are facilities deriving energy from waves, tides and currents in oceans, estuaries and tidal areas, free flowing water in rivers, lakes and streams, free flowing water in irrigation systems, canals, or other man-made channels, or from differentials in ocean temperatures. Such facilities do not include energy derived from dams or divisionary structures. [121]
 - To receive the new tax credit, the facility must have a nameplate capacity rating of at least 150 kilowatts and be placed in service on or after October 3, 2008 and before January 1, 2012. [122]
 - Combined heat and power system properties are eligible to receive a new investment tax credit. (Section 103) [124]
 - A “combined heat and power system property” means property comprising a system that uses the same energy source for simultaneous or sequential generation of electric power and/or mechanical shaft power in combination with the generation of steam or other thermal energy. [125]
 - To receive the new tax credit, the property must produce at least 20% of its total useful energy in the form of thermal energy, at least 20% of its total useful energy in the form of electrical or mechanical power, and exceed an energy efficiency percentage of 60%. The facility must also have a maximum capacity not exceeding 50 megawatts, or a mechanical energy capacity not exceeding 67,000 horsepower, or an equivalent combination of electrical and mechanical energy capacities. [126]
 - To receive the investment tax credit, the combined heat and power system must be placed in service before January 1, 2017. [125]
 - Qualified small wind energy properties are eligible to receive a new investment tax credit. (Section 104) [130-132]
 - A “qualified small wind energy property” means a property which uses a qualifying small wind turbine to generate electricity. A qualifying small wind turbine has a nameplate

capacity of not more than 100 kilowatts. [131-132]

- To receive the investment tax credit, the property must be placed in service prior to January 1, 2017. [131-132]
- Geothermal heat pump systems are eligible to receive a new investment tax credit. (Section 105) [132-133]
 - A “geothermal heat pump system” means those systems that use ground or ground water as a thermal energy source to heat a structure or that use a thermal energy sink to cool a structure. [132]
 - To receive the investment tax credit, the property must be placed in service prior to January 1, 2017. [132-133]
- The credit for residential energy efficient property is extended to December 31, 2016 and additional refinements have been made to the provisions applicable to particular types of energy property and to allowing the credit for purposes of the alternative minimum tax. (Section 106) [113-140]
- Subtitle B: Carbon Mitigation and Coal Provisions
 - The Act establishes a new credit for carbon dioxide sequestration, equal to \$20 per metric ton of qualified carbon dioxide which is captured and disposed of by the taxpayer, and \$10 per metric ton of qualified carbon dioxide which is captured and used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project. This credit only applies to carbon dioxide captured and disposed of in the United States or its possessions. This amount will be adjusted for inflation. [175-178]
 - “Qualified carbon dioxide” means carbon dioxide which would otherwise be released into the atmosphere, and is measured at the source of capture and verified at the point of disposal or injection. The term does not include carbon dioxide that is recaptured, recycled, and re-injected into an enhanced oil or natural gas recovery project. [175-176]
 - In order to obtain this credit, the taxpayer must own the facility used to capture the qualified carbon dioxide, and must capture not less than 5000,000 metric tons of carbon dioxide during the taxable year. [176]
 - The benefits of this credit may be recaptured with respect to qualified carbon dioxide which ceases to be captured, disposed of, or used as a tertiary injectant (as described in Section 193 of the Internal Revenue Code). [178]

In addition to the foregoing, the Title I Energy Act contains provisions addressing the following, which are beyond the scope of this Alert (but which provisions are available through the link to the Energy Act indicated above): [\[2\]](#)

- A credit for steel industry fuel. (Section 108)
- A special rule to implement FERC and State electric restructuring policy. (Section 109)

- A temporary increase in coal excise tax; funding of Black Lung Disability Trust Fund. (Sections 113-114)
- A tax credit for carbon dioxide sequestration (Section 115) and the treatment of certain income and gains relating to industrial source carbon dioxide treated as qualifying income for publicly traded partnerships. (Section 116)
- Authorization of a National Academy of Sciences study of tax provisions that have effects on carbon and other greenhouse gas emissions. (Section 117)

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