

Client Alert

August 2014

Update on Section 1603 Litigation in US Court of Federal Claims

In 2011, the US Court of Federal Claims held that it had jurisdiction to hear claims relating to Treasury's denial or reduction of grants applied for under the Department of Treasury's Section 1603 program.¹ See *ARRA Energy Company I et al. v. United States*, No. 10-84C (Jan. 18, 2011). During the course of the Section 1603 program, and more so in recent years, applicants under the Section 1603 program have had their requested grant payments substantially reduced and, in some cases, completely disallowed. Treasury does not provide any formal administrative appeal process. Consequently, the Court of Federal Claims' holding provided a forum to appeal unfavorable grant determinations by Treasury.

Under Section 1603, as amended, energy facilities qualify for grant payments provided they were placed in service in 2009–2011 or construction on such facilities began in those years (and they are placed in service within certain timeframes post-2011). Begun-construction applications had to be filed no later than September 30, 2012. Up to that cut-off point, Treasury had received a total of over 210,000 applications. As of May 13, 2014, Treasury had funded 96,675 projects and awarded \$21.6 billion in grants. An estimated \$12 billion in additional awards are in the pipeline. Most of the Section 1603 applications are for solar (mostly, residential solar) and most of the dollars awarded were for the larger wind facilities.

There is no clear indication of the number of applications that have been disallowed/reduced or the actual dollars involved for disallowed/reduced applications. However, more so in recent years, it is our experience that most of the applications have experienced some reduction. In many cases, the reductions have been substantial. All told, the total dollar amount of the disallowances and reductions is perhaps in the billions.

The reductions fall into two general categories. One, Treasury has challenged the reported cost basis of many solar and wind facilities on the basis that the cost basis does not correspond to so-called "open market expectations." In the norm, those transactions involve sale-leaseback transactions, pass-through lease transactions or transactions that include related-party or affiliated costs. The crux of these cases is whether there are "peculiar circumstances" negating the use of the purchase price as the cost basis because it is not on a truly arms-length basis. In other cases, the issue is focused on valuation and potentially shifting cost basis between qualifying tangible costs and nonqualifying intangible costs. At one point, Treasury established "benchmark" pricing for solar facilities but then doubled down with lower and undisclosed internal benchmarks.

Two, Treasury has challenged the qualification of certain equipment or costs. With respect to equipment, Treasury has concluded that the equipment either is not an integral part of the qualified facility or otherwise is not included within the definition of the qualified facility. Property in this category includes equipment and property added in order to satisfy federal, state or local permitting requirements. With respect to costs, Treasury has challenged costs relating to removal of existing property and site preparation, among other things. One of the more disputatious items is whether any portion of the costs

¹ American Recovery and Reinvestment Tax Act of 2009, P.L. 111-5, §1603, 123 Stat. 115, 364 (Feb. 17, 2009).

is attributable to a separate intangible asset, which is raised by Treasury as a means to shift cost basis away from qualified tangible assets.

At this point, we have identified approximately 20 cases that have been filed in the Court of Federal Claims under the Section 1603 program. Some of those cases are related or have been consolidated. Most of the cases fall into the first category above — i.e., they involve cost basis and valuation issues. With the exception of one or two outliers, the other cases fall into the second category above — i.e., they involve qualification or cost issues.

At this point, only one case has gone to trial (*RP1 Fuel Cell, LLC*) and another case is pending with cross-motions for summary judgment having been filed (*W.E. Partners II, LLC*). The other cases are on a slower track. A number of those cases were idled by initial motions to dismiss and other procedural issues resulting from the manner in which the complaints were filed. Some of the cases are on a slow discovery track.

To date, the Court of Federal Claims has published four opinions — all of which relate to procedural matters. The first opinion was the jurisdictional holding in *ARRA Energy*. The next two opinions (*Clean Fuel, LLC*, and *LCM Energy Solutions*) related to entitlement to consequential damages. The last and more recent opinion (*Alta Wind*) related to the government's request for full discovery prior to the court's disposition of the plaintiffs' motion for summary judgment (see client alert in the chart below). Judgment has not been reached in any Section 1603 case. The initial substantive opinions from the Court of Federal Claims likely will establish some guideposts for the subsequent cases.

A chart describing the Section 1603 cases that have been filed in the Court of Federal Claims, the type of energy resource or facility, and the current status of each of those cases is provided on the next page. Links to relevant filings and alerts for each of the cases are also provided.

The tax controversy team at Hunton & Williams LLP consists of a cross-practice group with significant experience in energy tax credits and Section 1603 Treasury grants, tax controversy and litigation. Hunton & Williams LLP is well positioned to assist Treasury grant applicants resolve disputes with Treasury. Please contact us if you require assistance with Treasury's denial or reduction of Section 1603 grant amounts.

Contacts

Timothy L. Jacobs
tjacobs@hunton.com

David S. Lowman, Jr.
dlowman@hunton.com

Laura Ellen Jones
ljones@hunton.com

Hilary B. Lefko
hlefk@hunton.com

US Court of Federal Claims: Section 1603 Litigation

<u>Case Name</u>	<u>Resource/ Property Type</u>	<u>Date Complaint Filed & Links</u>	<u>Current Status</u>	<u>Notes & Links to Opinions/ Key Filings</u>
<i>ARRA Energy Co., I et al.</i>	Solar	02-12-2010	Dismissed	Opinion re jurisdiction. H&W Client Alert.
<i>Clean Fuel, LLC</i>	Open-loop biomass	02-03-2012	Suspended re criminal case	Biodiesel qualification & used parts. Opinion re consequential damages.
<i>LCM Energy Solutions</i>	Solar	05-18-2012	Discovery	Cost basis and valuation issues. Counterclaim for false claims, etc. Opinion re consequential damages.
<i>Nevada Controls, LLC</i>	Various	12-07-2012 Amended 08-12-2013	Dismissed	Failure to file applications.
<i>W.E. Partners II, LLC</i>	Open-loop biomass	01-22-2013	Cross-Motions for Summary Judgment	Steam cogeneration qualification. W.E. Partners' MSJ. Govt's MSJ.
<i>Sequoia Pacific Solar I, LLC</i>	Solar	02-22-2013 Amended 11-01-2013	Discovery	Cost basis and valuation issues.
<i>Alta Wind I Owner-Lessor C, et al.</i>	Wind	06-14-2013 (seven additional complaints filed)	Discovery. MSJ pending	Cost basis and valuation issues. Opinion re MSJ and Discovery. H&W Law360 Article.
<i>Blue Heron Properties, LLC</i>	Solar	07-24-2013	Discovery	Cost basis and valuation issues. Treasury "benchmarks" for solar.
<i>RP1 Fuel Cell LLC, et al.</i>	Fuel cell/ Trash facility	08-06-2013	Trial 07-14-2014. Briefs submitted	Wastewater sludge/digester gas. Gas conditioning qualification.
<i>Windpower Partners 1993, LLC; Vasco Winds, LLC</i>	Wind	09-18-2013 09-18-2013	Discovery	Cost basis and valuation issues. Consolidated cases.
<i>California Ridge Wind Energy LLC</i>	Wind	03-28-2014	Preliminary	Cost basis and valuation issues. Related-party cost issues.
<i>Bishop Hill Energy LLC</i>	Wind	03-28-2014	Preliminary	Cost basis and valuation issues. Related-party cost issues.
<i>Fire Island Wind, LLC</i>	Wind	05-12-2014	Preliminary	Qualification of costs related to navigational aid facility per FAA.