

# Project Finance and Clean Power Notes



February 2015

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## PTC Extended Through December 2014

*David Lowman and Hilary Lefko*

On December 19, 2014, President Obama signed into law the Tax Increase Prevention Act of 2014 ([Pub. L. No. 113-295, H.R. 5771](#)). This legislation, which was passed by a large majority in the House and the Senate, retroactively extends through 2014, more than 50 tax provisions that were set to expire in 2013, including the production tax credit (PTC) for facilities that produce electricity from wind, biomass, geothermal energy, landfill gas, municipal solid waste, hydropower, and marine and hydrokinetic energy.

Section 155 of H.R. 5771 amends Section 45(d) of the Internal Revenue Code to extend retroactively the date that wind and other facilities must “begin construction” in order to qualify for the PTC. Under the prior law, facilities were required to begin construction prior to January 1, 2014. Under the new law, facilities that began construction before January 1,

2015, will be eligible to claim the PTC. Additionally, Section 155 retroactively extends the election to claim the investment tax credit (ITC) in lieu of the PTC for projects that began construction prior to January 1, 2015.

The Internal Revenue Service has not issued new guidance to address the extension of the beginning-of-construction requirement. Additional guidance is not expected until later this year. The IRS’s previous interpretations of the beginning-of-construction requirements discussed in prior client alerts<sup>1</sup> are expected to apply to the extended date.

The Tax Increase Prevention Act of 2014, by virtue of its last-minute enactment, did little to incentivize new project development before the end of 2014. Many in the wind industry have been critical of Congress’ failure to deliver a multiyear extension. The industry is anticipated to press the new Republican-controlled Congress to introduce tax extender legislation

<sup>1</sup> See client alerts [here](#), [here](#), and [here](#).

at an earlier stage — allowing a significant amount of additional projects to begin construction before the PTC expires.

## Opportunities in Solar

*Eric Pogue, Jo Anne Sirgado, Laura Jones and Mike Fitzpatrick*

In 2014 and continuing into 2015, we have continued to see an increase in opportunities available in the solar space — across a spectrum of project types and transaction structures.

**Tax Equity Transactions** — A combination of new entrants (including those forming or looking to form YieldCo-type structures) and a number of more seasoned developers continuing to grow their portfolios, kept the demand high for tax equity investments in 2014. So far in 2015 we are seeing the trend continue, with a number of residential and distributed generation transactions in the market. Although deals continue to get done through a variety of structures, the “partnership-flip” model prevailed among the traditional, financial institution investors.

**Aggregation and Back-leverage** – Particularly in the residential solar markets, developers are looking to monetize the “cash equity” side of the portfolios that are subject to tax equity transactions. We have seen an increasing number of these types of transactions occurring both at the sponsor level (i.e., traditional “back-leverage” of the developer’s interest in a tax equity partnership) and at the corporate level (i.e., aggregation facilities in which several portfolios or funds are used as collateral for purposes of a sponsor’s monetizing its interest in a number of residential solar funds).

**Securitization** – Although there have been only a few announced deals in this space, the market buzz around this structure continues with respect to residential solar projects. For example, the Solar Access to Public Capital working group was very active in 2014 and securitization received a lot of attention at industry-wide meetings. While structuring these transactions around the standard features of tax equity investments (as well as market concerns related to features of the solar market, such as net-metering) will continue to be a challenge, we anticipate an increasing number of transactions in this space going forward.

**Take-Out Deals** – We have started to see, particularly with respect to wind transactions, some activity with respect to take-out transactions for earlier tax equity deals. As time goes on, based on a number of factors (including the prevalence of YieldCos) we anticipate that this trend will grow. Opportunities are expected to include traditional energy M&A as well as re-financing opportunities under a number of structures.

**Utility Entrants** – For a number of reasons — including increasing RPS standards and the tension between traditional utilities and residential solar developers (for example in Arizona) — more utilities appear to be entering the solar space. We are seeing more transactions in this segment of the market (such as utilities developing their own solar programs) and would anticipate this trend to continue.

Hunton & Williams LLP’s lawyers have substantial experience in the solar transaction space and are actively working on transactions that touch on many above-noted structures.

## DOE Announces a New Nuclear Loan Guarantee Program

*John Tormey*

On December 10, 2014, the Department of Energy released a loan guarantee solicitation ([the Solicitation](#)) for advanced nuclear energy projects. The Solicitation describes a new loan guarantee program (the Program) authorized under Section 1703 of the Energy Policy Act of 2005. Under the Program, the Department of Energy would provide up to \$12.5 billion in loan guarantee authority for facilities that employ “innovative advanced nuclear energy technologies.” Of that amount, \$2.0 billion is available exclusively for advanced nuclear facilities for the “front-end” of the nuclear fuel cycle (i.e., uranium conversion, uranium enrichment and fuel fabrication projects) and the remaining \$10.5 billion is available for nuclear power facilities (including new reactors projects with certain technologies, small modular reactors and certain upgrades and uprates).

Hunton & Williams’ client alert on the Solicitation is available [here](#). As noted in our client alert, Hunton & Williams lawyers have extensive experience representing nuclear companies through the DOE loan guarantee process, having represented both a new nuclear project developer and a front-end nuclear technology company with respect to the DOE’s 2008 loan guarantee nuclear solicitations.

## USFWS Brings Second MBTA Criminal Enforcement Action Against A Wind Energy Facility Operator

*Eric Murdock*

The U.S. Fish and Wildlife Service (USFWS) made big news at the end of 2013 when it announced the first-ever enforcement action under the Migratory Bird Treaty Act (MBTA) against the operator of a wind energy facility. In that first enforcement action, the owner agreed to plead guilty to two criminal misdemeanor violations of the MBTA for the take of protected birds, including 14 Golden Eagles, at two wind projects in Wyoming. A year later, in December 2014, the USFWS concluded a second MBTA enforcement action for take of protected birds caused by the operation of wind energy facilities. In this most recent action, PacifiCorp Energy agreed to plead guilty to two criminal misdemeanor violations of the MBTA for the take of 336 protected birds, including at least 38 Golden Eagles, at two wind facilities also located in Wyoming, dating back to 2009. In bringing these charges, the USFWS alleged that preconstruction studies conducted by the developer showed that protected bird species were present in the project area, some of which were likely to be killed by collision with the wind turbines. The USFWS also noted that it was not given the opportunity to review the studies before the projects commenced operation, and the agency alleged that the projects were constructed contrary to relevant agency guidance for avoiding and minimizing take of protected birds. As part of the plea agreement, PacifiCorp Energy agreed to pay fines, restitution and contributions to conservation programs of \$2.5 million, and agreed to undertake mitigation measures at the facilities that will result in additional costs of several million dollars. Among the mitigation measures required is “informed curtailment” — which involves the use of biological professionals stationed at the site to monitor eagle activity, who are authorized to call for curtailment of one or more turbines if necessary to avoid impacts to eagles.

There are several key points to note from these first two MBTA enforcement actions targeting wind energy facilities. First, it is likely that wind energy facilities will continue to be targeted for enforcement by the USFWS. Second, the risk of enforcement appears to be greatest where the take involves a species of particular conservation concern, such as eagles or any species listed as threatened or endangered under the Endangered Species Act. Third, a project

operator’s decisions about where to site the project and what kind of avoidance and mitigation measures to implement will be subject to second-guessing by the USFWS in the context of an enforcement action, particularly if the developer has failed to heed warnings or recommendations from the agency about potential impacts to protected species, or failed to consult with the agency about the results of its wildlife impact studies or its plans for avoiding or mitigating impacts to protected bird species. Finally, the financial consequences of an enforcement are likely to be substantial, including millions of dollars in fines and other cash payments and additional operating costs for enhanced wildlife protection and mitigation.

## New Tax Credit Endorsement (Title Insurance)

*Dan Campbell and Allyson Moore*

New tax credit endorsements (ALTA 40-06 and 40.1-06) were approved by the ALTA board in April 2014. Endorsements along these lines have been negotiated and issued by title companies in the past in jurisdictions that allow CLTA form endorsements. These tax credit endorsement forms were developed by the ALTA forms committee to provide for a more uniform approach.

These forms were crafted to provide tax credit investors with the ability to be compensated for loss or damage sustained by a reduction in tax credits that is caused solely by a defect, lien, encumbrance or other matter insured against under the title policy. Now that the endorsement has been developed and a uniform approach undertaken by the ALTA board, the reduction of tax credits could be considered a consequential loss that may not be covered under the title policy, so these endorsements demand attention by tax equity investors. The amount of insurance established under the title policy sets the maximum liability of the title company to the insured, so tax credit investors should confirm that there is sufficient title insurance afforded under the title policy to cover the aggregate value of both the insured estate and the tax credits. The tax credit endorsements do not ensure the eligibility of the tax credit investor or the insured estate to receive tax credits; they only allow for damages associated with the tax credit losses to be specifically considered as an element of a loss under the title policy. As currently proposed, the title company has no liability to the tax credit investor under the tax credit endorsements until the tax credit investor establishes the reduction in the amount of tax credits caused by the insured title defect.

The ALTA 40-06 includes the value of the loss of the tax credits in the amount of insurance stated in the title policy. Under the endorsement, the insured project company under the title policy assigns the right to receive any payment or portion of a payment for losses otherwise payable to the insured to the tax credit investor, to the extent of the reduction of the amount of the tax credits.

The ALTA 40.1-06 establishes an “Additional Amount of Insurance,” which is supplemental to the amount of insurance stated in the title policy, and is applicable to a claim only for loss or damage payable to the tax credit investor under the endorsement. The benefit of this endorsement is that the tax credit investor has direct access to file a claim under the title policy resulting from the reduction in a tax credit caused by an insured title defect up to the amount of the Additional Amount of Insurance. Not surprisingly, this separate and additional insurance does result in additional premium beyond the fixed endorsement fee. These new endorsements do not need to be filed as a regulatory matter except in states where forms of endorsements must be filed with and approved by the applicable state insurance commission before they may be issued. Tax credit investors should note that not all filed endorsement jurisdictions have approved these endorsements, so they are not available in all 50 states just yet.

We expect the new tax credit endorsements (ALTA 40-06 and 40.1-06) to be utilized more and more, and with the certainty of coverage for tax credit losses, these are endorsements that should be included on the tax investors’ title requirements as a matter of course.

*If you have questions related to any of the articles in this issue, please contact any of above-listed contributors or any of the following members of the Renewable Energy and Clean Power practices and Energy and Infrastructure team at Hunton & Williams LLP:*

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