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Budget Bill Contains Energy Tax Credit Boon

By **Keith Goldberg**

Law360 (February 9, 2018, 7:56 PM EST) -- Energy tax credit extenders included in the two-year budget deal signed by President Donald Trump on Friday provide potential boosts for renewable energy development and potential lifelines for nuclear and carbon capture and storage projects.

Here's a recap of what's in the deal and why this may be the last governmental action on energy tax issues for a while.

Orphaned Renewable Tax Credits Find a Home

For so-called orphaned renewable tax credits that weren't included in the previous renewal of the production tax credit benefiting large-scale wind projects and investment tax credit benefiting large-scale solar projects in 2015, the budget bill ends a long period in exile, as well as uncertainty for project developers.

The orphaned credits were included in sprawling tax overhaul legislation last year, but ultimately left out of the version signed into law. But now, projects including fuel cells, combined heat and power and small-scale wind will regain their ITC eligibility and be subject to a phaseout schedule similar to that of solar projects.

“This is the end of a two-year saga,” said Liam Donovan, a lobbyist and principal with Bracewell LLP's policy resolution group. “It gets those [orphaned credits] off the table as extenders going forward and it's a model of how to wind these credits down.”

Mayer Brown LLP tax partner David Burton, who leads the firm's New York renewable energy group, said the extension could be huge for companies like United Wind, which develop small-scale wind projects and lease them to individual users, similar to what SolarCity Corp. does with rooftop solar panel systems.

“With the reinstatement of their tax credit for small wind, they may be able to offer more attractive terms to customers and raise tax equity,” Burton said.

But for biogas, biomass, geothermal and other orphaned renewable projects that relied on the PTC, the extension in the budget bill will only cover projects that began construction before the end of 2017. That means for most developers, the extension is a case of “too little, too late” unless they were gutsy enough to start a project last year in anticipation of a retroactive extension, according to Burton.

“It's a big win for them, and they're uniquely positioned at the moment,” Burton said. “If you're cautious and waited, you're out of luck.”

Nuclear and Carbon Capture Gets Additional Life

The nuclear industry scored a win both for its present and future with the budget bill's lifting of a 2021 in-service deadline for nuclear projects in order to be eligible for a production tax credit.

Removing the time limit for the credit, which covers up to 6 gigawatts of nuclear power, could prove vital for the troubled Vogtle project in South Carolina, the only large-scale nuclear project remaining in the U.S. But with the Vogtle project only expected to generate roughly 2 gigawatts, that leaves plenty of room for developers of next-generation nuclear projects to cash in, according to Jeremy Harrell, the managing director for policy at the ClearPath Foundation, a conservative advocacy group for clean energy policies.

“Four gigawatts of advanced nuclear is a lot,” Harrell said. “It's a real game-changer for a lot of advanced nuclear development, especially first-of-its-kind projects. This is going to drive investment into small modular reactors and other advanced reactors, and help those first reactors that will inevitably be more expensive.”

The budget bill also boosted the value of tax credits for carbon capture and sequestration, or CCS, technologies. Previously, the credits only made economic sense for enhanced oil recovery from drilling operations, but Harrell says that will change as the credits grow from $20 per metric ton of carbon geologically stored to $50 per metric ton and from $10 per metric ton of carbon used for enhanced oil recovery to $20 per metric ton.

“That's going to end up providing a revenue stream for a wider range of CCS technologies entering the market,” Harrell said.

The budget bill also slashes the amount of carbon emissions that facilities have to capture in order to claim the credit from 500,000 metric tons per year to 100,000 metric tons per year, which Harrell said will encourage industrial facilities and other smaller emitters to invest in CCS technologies.

One factor working in favor of pumped-up CCS credits making it into the final budget bill was their bipartisan support, from coal country Republicans to Democratic climate change hawks.

“Any time you can get Sheldon Whitehouse [D-R.I.] and Shelley Moore Capito [R-W.Va.] on the same page, it's an interesting mix,” Donovan said.

Energy Tax Policy Sent to Back Seat

Experts say the fate of the orphaned renewable tax credits was the biggest legislative fruit left hanging in the wake of last year's tax overhaul. Now that the issue has been sewn up in the budget bill, don't expect Congress to take any further action on energy tax issues for the foreseeable future, especially with midterm elections on the horizon.

“In terms of Congress, this is it,” Burton said. “I cannot see this Congress and this president wanting to do anything else for renewables, until the midterm elections play out.”

On the administrative side of the ledger, one major energy tax issue that is still out there is guidance from the Internal Revenue Service on what constitutes the start of construction in order for a project to qualify for the full ITC.

Burton said solar developers are now only operating under the assumption that they can claim the full value of the ITC as long as their project is complete before the credit's phaseout begins in 2020. He said developers will want to know if the IRS will adopt similar eligibility guidance for the ITC as it did for the PTC, which requires starting physical work of a significant nature or spending at least 5 percent of the project's total cost.

“Can they spend 5 percent on a residential project in 2019, put those panels into a warehouse, do nothing and put them on a house in Nevada in 2022, and still claim the full 30 percent credit based on their start-of-construction date?” Burton said.

New ITC guidance is included on an updated priority guidance plan put out on Wednesday by the U.S. Department of Treasury that outlines projects it hopes to complete by June 30, 2018. But leading that priority guidance plan is Treasury's implementation of the tax overhaul bill, which has Donovan wondering if ITC guidance will get pushed aside for the time being.

“My hunch is that it will be behind more immediate and urgent priorities,” Donovan said.

--Editing by Pamela Wilkinson and Aaron Pelc.
