JULY-AUGUST 2023
VOL. 23-7

PRATT'S

ENERGY LAW REPORT

LexisNexis

Pratt's Energy Law Report

VOLUME 23 **NUMBER 7** **July-August 2023**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Jessica Carnevale, Esq. at .... (212) 229-4942
Email: .... jessica.carnevale@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . (518) 487-3385
Fax Number . . . . (800) 828-8341
Customer Service Website . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2023–Pub.1898)

Editor-in-Chief, Editor & Board of Editors

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Inflation Reduction Act Offers a Variety of Energy-Related Tax Incentives

*By Marcy Hart, Holly R. Camisa, Maria Z. Cortes and Olufunke Leroy**

In this article, the authors discuss a variety of energy-related tax incentives and credits available under the Inflation Reduction Act of 2022.

The Internal Revenue Service (IRS) is currently in the process of implementing the Inflation Reduction Act of 2022 (IRA), which addresses energy, tax and health policy. According to the U.S. Environmental Protection Agency (EPA), "The Inflation Reduction Act of 2022 is the most significant climate legislation in U.S. history." The IRA offers, among other incentives, tax credits to an array of organizations (e.g., businesses, nonprofits, educational institutions, and state, local and tribal governments). The IRA even allows certain nonprofits to transfer their tax incentive to contractors.

IRA tax credits are applied to reduce the costs of renewable energy. Taking advantage of such tax credits can help to significantly reduce greenhouse gas (GHG) emissions and accelerate the transition to clean energy. The IRA emphasizes providing cleaner air to disadvantaged populations; for example, it is projected to help prevent 3,900 premature deaths and reduce the number of asthma attacks in American by 100,000 each year by 2030. It is also expected to protect nearly 2 million acres of national forests.

Additionally, the average family is expected to save an average of $500 annually on energy costs, with ample opportunities to save more (such as through clean energy and electric vehicle (EV) tax credits, which will save more than $1,000 each year).

The Energy-Efficient Commercial Buildings Tax Deduction[1] offers significant opportunities to the real estate community to transition to clean energy and thus, ultimately, reduce energy costs. This tax incentive is available to the commercial, construction, state government and federal government sectors. Eligible technologies include equipment insulation, water heaters, lighting, lighting controls/sensors, chillers, furnaces, boilers, heat pumps, air conditioners, caulking/weather-stripping, duct/air sealing, building insulation, windows, siding, roofs, comprehensive measures/whole building and tankless water heaters. The amount of this tax deduction, which is adjusted annually for

---

* The authors, attorneys with Holland & Knight LLP, may be contacted at Marcy.Hart@hklaw.com, Holly.Camisa@hklaw.com, Maria.Cortes@hklaw.com and Olufunke.Leroy@hklaw.com, respectively.

[1] https://programs.dsireusa.org/system/program/detail/1271/energy-efficient-commercial-buildings-tax-deduction.

inflation, is currently $0.30 - $1.80 per square foot, depending on the technology and amount of energy reduction.

The Renewable Electricity Production Tax Credit (PTC),[2] discussed in more detail below, is a corporate credit tax available to the commercial and industrial sectors. Eligible technologies include geothermal electric, solar thermal electric, solar photovoltaics (PV), wind, biomass, hydroelectric, municipal solid waste, landfill gas, tidal, wave, ocean thermal and offshore wind. Unused credits may be carried forward for up to 20 years after their year of generation or carried back one year by filing an amended tax return.

The U.S. Department of Energy's (DOE) Loan Guarantee Program[3] is available to the commercial, industrial, local government, nonprofit, school, state government, agricultural and institutional sectors. Eligible technologies include geothermal electric, solar thermal electric, solar thermal process heat, solar PV, wind, biomass, hydroelectric, fuel cells using non-renewable fuels, landfill gas, tidal, wave, ocean thermal, daylighting and fuel cells using renewable fuels. The loan must be fully repaid over a period not to exceed the lesser of 30 years or 90 percent of the projected useful life of the physical asset being financed.

BUSINESS ENERGY INVESTMENT TAX CREDIT

Among the other IRA tax credits available under the IRA is the Business Energy Investment Tax Credit (ITC).[4] The ITC is a corporate tax credit available to the commercial, industrial, investor-owned utility, cooperative utilities and agricultural sectors. The eligible technologies include solar water heat, solar space heat, geothermal electric, solar thermal electric, solar thermal process heat, solar PV, wind, geothermal heat pumps, municipal solid waste, combined heat and power, fuel cells using non-renewable fuels, tidal, geothermal direct use, fuel cells using renewable fuels, microturbines, offshore wind biogas, microgrid controllers, interconnection property and lithium-ion. Multiple bonus credits are available.

Eligible taxpayers may transfer all or a portion of their eligible tax credits to an unrelated taxpayer. Only one such transfer is permitted and must be reported to the IRS.

---

[2] https://programs.dsireusa.org/system/program/detail/734/renewable-electricity-production-tax-credit-ptc.

[3] https://programs.dsireusa.org/system/program/detail/3071/u-s-department-of-energy-loan-guarantee-program.

[4] https://programs.dsireusa.org/system/program/detail/658/business-energy-investment-tax-credit-itc.

Base Credits

The base credit amount is between 6 percent and 30 percent, depending on the status of the project and certain labor factors.

Projects under 1 megawatt (MW) that began construction after 2021 and begin construction before 2025 are eligible to receive the full tax credit of 30 percent.

Projects that commence construction on or after January 1, 2025, are eligible to receive a tax credit under the new Clean Electricity Investment Tax Credit (described below).

Projects of more than 1 MW that begin construction on or after January 29, 2023, and no later than January 1, 2025, will receive a base tax credit of 6 percent. Such projects, however, can qualify for the full 30 percent tax credit by ensuring that all laborers and mechanics involved in the construction of the project or the maintenance of the project for five years after project's completion are paid wages at rates not less than prevailing wages. A percentage of total labor hours must also be performed by qualified apprentices. That percentage increases over time to a maximum requirement of 15 percent from 2024 or after.

Projects that commence construction on or after January 1, 2025, can receive a tax credit under the new Clean Electricity Investment Tax Credit, which is functionally similar to the ITC, but it is not technology-specific, applying instead to all generation facilities and energy storage systems that have an anticipated greenhouse gas (GHG) emissions rate of zero. The credit amount will begin the same as under the IRA but will be phased out as the U.S. meets GHG emission reduction targets.

Bonus Credits

To be eligible for the Domestic Content Bonus, 100 percent of the steel or iron used for the project facility must be produced in the United States, and 40 percent of the manufactured products that are components of the facility must be produced in the United States. The Domestic Content Bonus increases the tax credit by 10 percent for projects under 1 MW and projects greater than 1 MW that meet the above described labor requirements. The Domestic Content Bonus increases the tax credit by 2 percent for larger products that do not meet the labor requirements.

To receive the Energy Community Bonus, a facility must be located in one of the following:

- A brownfield site;
- A metropolitan or non-metropolitan statistical area that either:

  - o Has (or, at any time during the period beginning after December 31, 2009, had) 0.17 percent or greater direct employment, or 25 percent or greater local tax revenues related to the extraction, processing, transport or storage of coal, oil or natural gas
  - o Has an unemployment rate above the national average for the previous year; or
- A census tract or a census tract that is adjoining a census tract in which a coal mine has closed after 1999 or a coal-fired electric generating unit was retired after 2009.

The Energy Community Bonus increases the tax credit by 10 percent for projects under 1 MW and projects larger than 1 MW that meet the labor requirements specified above. The Energy Community Bonus increases the tax credit by 2 percent for larger projects that do not meet the labor requirements.

Solar and wind facilities of less than 5 MW may be eligible for low-income bonuses. A project built in a low-income community (as defined by the New Markets Tax Credit) or on tribal land may be eligible for a 10 percent tax credit increase, and a project associated with a low-income residential building project or a low-income economic benefit project may be eligible a 20 percent tax credit increase.

RENEWABLE ELECTRICITY PRODUCTION TAX CREDIT

The PTC was added on April 4, 2023. According to the U.S. Environmental Protection Agency (EPA):

> The PTC provides a corporate tax credit of up to 1.3 cents/kWh for electricity generated from landfill gas (LFG), open-loop biomass, municipal solid waste resources, and small irrigation power facilities, or up to 2.6 cents/kWh for electricity generated from wind, closed-loop biomass and geothermal resources. The credit is good for 10 years after the equipment is placed in service.

For systems that exceed 1 megawatt (MW) in size, the tax credit starts at 0.5 cents/kilowatt hour (kWh), although projects may qualify for the full credit by satisfying the labor-related qualifications. Projects of any size are eligible for two bonus credits. The first such credit may be obtained in connection with the use of domestic steel/iron materials. The second bonus credit is based on a project's location within an "energy community" – a brownfield site, defined by the EPA as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contamination," or an area with a high unemployment rate and an economy that has historically depended on coal, oil or natural gas extraction.

Projects less than 1 MW in size are eligible if construction began or begins after December 31, 2021, and before January 1, 2025. Projects 1 MW or larger are eligible if construction began or begins on or after January 30, 2023, and no later than January 1, 2025. According to the IRS, a project is "under construction" when "physical work of a significant nature has begun," or a minimum of 5 percent of the project's total cost has already been incurred.

To apply for the PTC, use Form 8835. Form 8835, instructions and additional information are available on the IRS website.[5]

[5] https://www.irs.gov/forms-pubs/about-form-8835.