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Counsellors at Law

Sustainable Developments

CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT PRACTICE GROUP

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About the Climate Change and Sustainable Development Group

Committed to meeting client needs as they are affected by a rapidly changing environment, Wiggin and Dana's Climate Change and Sustainable Development Practice Group advises clients reacting to new mandates for change. In particular, the Practice Group advises with regard to the adoption of environmentally-desirable business practices, emerging business opportunities, and litigation associated with climate change and a sustainable development.

As a firm, Wiggin and Dana is committed to reducing the environmental impact of its offices. Wiggin and Dana's Green Team is implementing a plan to achieve the firm's goal of creating an environmentally sustainable workplace.

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Obama's Proposed Climate Change Initiative Stands to Benefit from Tax Credits Extended in Wall Street Bailout

President-elect Barack Obama has recently articulated an aggressive strategy for promoting energy efficiency and addressing climate change. Significant goals of this strategy include the reduction of climate-altering carbon dioxide emissions by 80% by 2050 and investing $150 billion in new energy-saving technologies over the next ten years.[1] This hard-hitting proposal received a boost from Congress and the current administration when President George W. Bush signed into law the Energy Improvement and Extension Act of 2008 on October 3, 2008. Better known as the $700 billion stimulus package for Wall Street, this legislation extended consumer tax credits for energy-efficiency home and building improvements, creating approximately $17 billion in clean energy tax incentives. At its core, this Act aims to mitigate carbon footprints and energy consumption across the United States by stimulating "green" investment at a time when the United States' economy needs it most. The numerous tax credits created and extended under the Energy Improvement and Extension Act of 2008, combined with existing federal energy programs and state climate change mandates, are bound to stimulate investment in large renewable energy projects and new jobs. The Energy Improvement Act, therefore, may act as a springboard for the incoming Obama Administration's expected overhaul of U.S. climate change policy and for its announced large-scale public works program that includes a "green" technology component.

Key Elements of the Energy Improvement and Extension Act of 2008

The Energy Improvement and Extension Act of 2008 broadens federal energy tax incentives, as described below, for investments in (1) renewable energy; (2) carbon mitigation and coal projects; and (3) conservation and energy efficiency measures.[2]

<u>Renewable Energy</u>

- Extends the "Production Tax Credit" (PTC) under Section 45 of the Tax Code through January 1, 2010 for facilities that produce electricity from wind and refined coal, and extends this credit through January 1, 2011 for other energy sources such as open and closed-loop biomass, geothermal, hydropower, landfill gas, trash combustion facilities, and small irrigation. Facilities that produce electricity from these sources may claim an income tax credit of 2.1 cents/kilowatt-hour. The Energy Improvement Act does not place a ceiling on the available tax credits claimed.
- Extends the PTC to investment in energy derived from waves, tides, free flowing water in rivers, lakes, streams and man-made systems and differentials in ocean temperature by expanding the definition of "qualified energy resources" for purposes of Section 45 of the Tax Code to include "marine and hydrokinetic renewable energy."
- Extends through 2016 a 30% tax credit under Section 48 of the Tax Code for investment in solar energy and qualified fuel cell properties, as well as a 10% tax credit under

the same provision for investment in "energy property." The Energy Improvement Act broadens the definition of "energy property" to include combined heat and power sources, small wind energy property, and geothermal equipment that uses "ground or ground water" as an energy source for heating and cooling.

- Authorizes $800 million in "new clean renewable energy bonds" to finance facilities that generate electricity from alternative sources such as wind, trash combustion, and biomass.
- Extends to independent transmission companies approved by the Federal Energy Regulatory Commission the deferral of gains from the sale of electric transmission property. In addition, the Energy Improvement Act extends the period in which a seller obtains these gains from the year of the sale to eight years following the sale.

<u>Carbon Mitigation and Coal</u>

- Increases the aggregate tax credit for projects that utilize carbon-capture technology (so-called "coal projects") from $1.3 billion to $2.55 billion and broadens the scope of qualifying "advanced coal projects" to include equipment which separates and sequesters at least 65% of a project's carbon dioxide ("CO2") emissions. This change effectively results in a $10 tax credit for each metric ton of qualified CO2 used as a tertiary injectant in a qualified enhanced oil or natural gas carbon sequestration recovery project and a $20 tax credit for each metric ton of qualified CO2 disposed of in secure geological storage (including deep saline formations and coal that cannot be mined). These credits appear in the new Section 45Q to the Tax Code.
- Provides $1.5 billion in new tax credits targeting coal and carbon sequestration, allocating $1.25 billion for advanced coal electricity projects and $25 million for coal gasification projects.
- Provides $1.1 billion in new tax credits for facilities that capture and dispose of CO2 in secure geological storage. Qualifying facilities must capture a minimum of 500,000 metric tons of CO2 each year.

<u>Energy Conservation and Efficiency</u>

- Extends, through the end of 2013, a deduction for energy-efficient property in commercial buildings under Section 179D of the Tax Code, as well as a credit for energy-efficient improvements to existing homes under Section 451 of the Tax Code. Specifically, this tax deduction applies to building expenditures that reduce the total annual energy used in the operation of the building, including (1) interior lighting systems, (2) heating, cooling, ventilation, hot water systems, and (3) building envelope systems.
- Creates two new categories of tax credit bonds -- "Qualified Energy Conservation Bonds" and "Clean Renewable Energy Bonds" -- to finance state and local government initiatives aimed at reducing greenhouse emissions. These bonds appear in Sections 54D and 54C of the Tax Code.

- Extends issuing authority for qualified green building and sustainable design project bonds through the end of 2012 under Section 142 of the Tax Code.
- Extends increased tax credits through 2010 to manufacturers of energy-efficient dishwashers, washing machines, and refrigerators under Section 45M of the Tax Code. The amounts of these credits vary according to the attainment of specified numeric energy and water factors or other production standards.

Conclusion

Additional changes for energy tax credits may be on the horizon. Solar and wind energy advocacy groups are lobbying Congress to make refundable the tax credits that the Energy Improvement Act renewed. These groups have proposed using a forthcoming economic stimulus package as a vehicle for this change. Beyond this potential development, the first steps that President-elect Obama takes upon his inauguration on January 20, 2009 remain to be seen but all indications point toward climate change as a "front-burner" issue.

1. John M. Broder, "Obama Affirms Climate Change Goals," *The New York Times* (Nov. 18, 2008).

2. For further reference, the Internet provides an abundance of information that both describes and analyzes the Energy Improvement and Extension Act of 2008. See, e.g., **U.S. Senate Finance Committee, The Energy Improvement and Extension Act of 2008** (Sept. 17, 2008); **EPA, Energy Improvement and Extension Act of 2008: Key Energy Tax Credit Provisions Affecting Combined Heat and Power**, (Nov. 2008).