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Environmental LAW

Renewable energy benefits from the 'fiscal cliff'

Discussions about energy in New York have remained intensely and divisively focused on the extraction of reserves of natural gas from the Marcellus shale. Even as the Department of Environmental Conservation's latest procedural deadline nears, polls show New Yorkers evenly divided and fervently committed to pro or con positions, apparently regardless of the outcome of DEC's assessment.

By RONALD G. HULL
Daily Record Columnist

The debate has overshadowed — actually obliterated — news concerning renewable, non-fossil fuel energy, including wind, solar, biomass, geothermal and cellulosic biofuels. These alternatives to coal, oil and natural gas faced a huge crisis of their own as 2012 drew to a close as tax credits intended to foster research and development and to encourage investment in renewable energy facilities expired.

As deadlines to take advantage of these incentives loomed, with no discernible action or discussion in Congress, investment in new renewable energy facilities declined precipitously. Bloomberg New Energy Finance calculates that clean energy investment dropped by 32 percent in 2012, due in large part to concerns about the expiration of the tax credits and other incentives.

When Congress acted after-the-fact to avert the "fiscal cliff," the American Taxpayer Relief Act of 2012 also extended, in modified form and with little public attention, many renewable energy tax credits and incentives through the end of 2013.

The modifications loosened some of the rules for eligibility, giving the short, one-year extension some added punch. Among the most significant provisions were extensions of the production tax credit and the investment tax credit for wind energy and other renewables.

The production tax credit has been around since 1992 and provides an income tax credit per kilowatt-hour of electricity generated from qualified sources, including wind, solar, geothermal and biomass. The credit is offered for 10 years and is available to facilities placed in service by Dec. 31, 2012. For 2012, the IRS calculated the credit at 2.2 cents per kilowatt-hour.

Since 2009, developers have had the option to claim a 30 percent investment tax credit in lieu of the production tax credit for wind and other renewable energy facilities. To qualify, wind projects had to be placed in service by Dec. 31, 2012.

Title IV of the American Taxpayer Relief Act extends the production and investment tax credits for one year through 2013, but also changes the rules by providing that the facilities remain eligible for the credits so long as construction begins before Jan. 1, 2014, which is significantly less rigorous than the requirement that the facility be placed in service by the deadline.

Of course, Congress did not define when construction will be deemed to have begun, which throws the question of eligibility into the lap of the IRS with very little guidance from Congress. In the past, the IRS has used a variety of metrics to determine when construction has begun for regulatory purposes. The most stringent require significant physical construction on the facility site, while under related programs the IRS has more leniently allowed an expenditure of more than 5 percent of the total cost to create a "safe harbor" for eligibility.

Congress also did not specify when construction must be completed and a facility actually placed in service. This leaves developers in need of yet more guidance from the IRS in planning projects in 2013. Delays in answering these questions may negate the utility of the extended tax credits. Wind energy projects in New York are invariably controversial, with environmental impact review under SEQRA that can easily take a year and much longer when litigation under CPLR Article 78 is factored in.

In addition to the production and investment credits, the American Taxpayer Relief Act extended a number of other energy-related provisions, some of which had already expired, including credits for energy efficient home improvements (which had expired in 2011 and was extended retroactively), credits for

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new plug-in electric vehicles (adding-in two- and three-wheeled vehicles), credits for cellulosic biofuels production, credits for biodiesel, credits for construction of new energy efficient homes and credits for energy efficient appliances.

Overall, the Act received round-the-clock media attention because of the drama of the "fiscal cliff" and the partisan showdown over income tax rates, but received no attention for the energy provisions which were included. In the near term, renewable energy producers toasted extensions for providing a measure of certainty to spur investment and production in 2013.

In the longer term, the wind and solar tax credits are widely regarded as unlikely to survive more than a few years because they are big line items and were only intended to make the industries competitive as they developed technology, infrastructure and cost efficiencies. The American Wind Energy Association proposes a phase out over a six-year period. Whether they will be truly cost competitive within that time may depend on the abundance of low cost natural gas, which brings us back to hydrofracking and the Marcellus shale.

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