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New Legislation Extends Energy Tax Credits To Landfill Gas

On October 22, 2004, President Bush signed into law the American Jobs Creation Act of 2004. Contained within the bill's 663 pages are tax incentives to encourage the development of renewable energy sources.

Among the incentives is the extension of the alternate energy tax credit to electricity produced from landfill gas. This tax credit, found at Section 45 of the Internal Revenue Code, had previously granted a per-kilowatt tax credit only to energy produced from wind, poultry waste, and "closed-loop biomass" (organic plant material). In addition to landfill gas, the new legislation also covers geothermal energy, solar energy, and small irrigation power.

Landfill Gas Problems and Opportunities

When organic waste in landfills decomposes it generates a gas consisting of roughly equal parts methane and carbon dioxide. The gas builds up in the landfill and, if not controlled, eventually escapes through the landfill cover as a fugitive emission. Depending upon the size of the landfill, federal air pollution laws require the landfill owner to collect and control this gas. The air pollution laws, however, do not require the gas to be reused as an energy source, and the vast majority of landfill gas is simply burned in flares. Smaller landfills need not even capture the gas much less reuse it.

The uncontrolled emission of landfill gas has been recognized as an environmental and health hazard, and methane gas is gaining universal attention as a source of greenhouse gas emissions. Using landfill gas as an energy source thus not only helps reduce greenhouse gas emissions but serves as a rich source of energy.

Of the roughly 6,000 landfills in the United States only about 360 use landfill gas to produce energy. According to the Solid Waste Management Association of North America (SWANA), each ton of methane gas collected by a landfill gas-to-energy ("LFGTE") project offsets 21 tons of CO₂ emissions. In 2001, according to USEPA, all operating LFGTE projects reduced CO₂ emissions by 14.5 million metric tons, the equivalent of taking 11.7 million cars off the road for one year. Waste Management, Inc., the nation's largest waste disposal company and landfill-gas supplier, estimates that its 85 LFGTE projects provide enough energy to fuel 215,000 homes and replace 2 million barrels of oil per year.

But, according to SWANA, many LFGTE projects are simply not economically feasible without tax incentives. Prior to the recent legislation, the only federal tax incentive for LFGTE projects was the “non-conventional source fuel” production credit under Section 29 of the Internal Revenue Code. This tax credit, expressed on a per barrel-of-oil basis, last applied to projects placed into service by June 30, 1998, and expires December 31, 2007. 26 U.S.C.A. § 29(f). In 2003, USEPA estimated that the waste industry would install 600 more LFGTE projects if Congress passed another tax credit. Added to the existing 360 landfill gas projects, these projects would together account for 8-10 percent of the greenhouse gas reduction goal under the Kyoto Protocol, while providing enough energy to power 1 million homes.

The New Legislation

The new tax credit is a start, but opens only a narrow window for new LFGTE projects. The amount of the tax credit – 0.9 cent per kilowatt hour – is one-half of the credit for wind, solar, or geothermal energy. In addition, the tax credit for landfill gas expires five years after the project is placed in operation, as opposed to ten years for wind, solar, or geothermal sources. Last, those seeking to benefit from the new Section 45 tax credit must act quickly: it rewards only those who place a LFGTE project into service between October 22, 2004 (date of enactment) and January 1, 2006. (The January 1, 2006 deadline also applies to wind, solar, and trash-to-energy facilities).

The extent to which the new legislation will encourage new LFGTE projects is unclear. It is evident, however, that the legislation, though a step in the right direction, does not begin to tap the potential environmental and energy benefits now resting in the nation’s 6,000 landfills.

For further questions, please contact Phillip L. Comella or Eric E. Boyd of our Environmental Safety and Toxic Tort Practice Group.



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