

Client Alert

November 2015

Recent Developments in Section 1603 Grant Litigation

We note the following recent developments in the Section 1603 grant litigation:

Filed/Decided Cases. About 25 cases have been filed in the U.S. Court of Federal Claims challenging Section 1603 grant denials or reductions. At this time, only one case has gone to trial (*RP1 Fuel Cell*) and only two cases (*RP1 Fuel Cell* and *W.E. Partners*) have been decided on the merits—*RP1 Fuel Cell* was decided for the applicant and *W.E. Partners* was decided for the Government on summary judgment. The *RP1 Fuel Cell* case involves the question of whether gas conditioning equipment for anaerobic digester gas is a qualified part of a fuel cell power plant or, alternatively, a trash facility. The *W.E. Partners* case involves the question of whether two additional steam boilers are an integral part of a biomass facility and whether the cost basis of the facility must be reduced due to the cogeneration of steam for thermal energy. The *RP1 Fuel Cell* and *W.E. Partners* cases are now on appeal in the U.S. Court of Appeals for the Federal Circuit awaiting argument and decision. Only a handful of cases have been filed in 2015. A chart briefly describing the cases that have been filed and their current status may be found at the end of this alert.

Treasury Review Irrelevant? In the *W.E. Partners* case, the Court of Federal Claims held that Section 1603 cases are reviewed *de novo* similar to tax refund cases. Based on this holding, the government has adopted the view in recent cases arguing that Treasury's administrative decision and review process is irrelevant. There are two immediate impacts of this development. One, the government will resist discovery of Treasury's and NREL's decision-making process and will not rely on and will resist testimony from Treasury or NREL personnel at trial or in depositions. This issue is playing itself out in a number of cases. Two, the court would not review Section 1603 cases on the basis of any administrative record and would not accord administrative deference to Treasury's determination. That point favors applicants.

Is Settlement Possible? Unlike IRS disputes, the Section 1603 program provides no mechanism for independent administrative review or appeal of grant decisions. In addition, Treasury has refused to compromise, mediate, or settle cases. As a consequence, the only avenue for relief is to file a claim in the Court of Federal Claims. Until recently, the government has resisted any meaningful settlement discussions. That situation appears to be changing. The government recently settled the *Windpower Partners* and *Vasco Winds* cases, which involved assertions that the purchase price of energy equipment was not arm's length. The details of that settlement have not been made public.

SolarCity Valuation Case. The SolarCity (*Sequoia*) residential solar litigation has been ongoing since early 2013. This litigation involves the proper valuation of SolarCity's residential solar systems and the role of Treasury's "benchmark" values for solar systems. Fact discovery in the case concluded last month and expert discovery is scheduled to conclude in February 2016. Trial will be held sometime after March 2016, likely in the summer, assuming no further delays or discovery disputes.

Alta Wind Case. In July 2014, the Court of Federal Claims determined that the government was entitled to full discovery in a case involving the sale-leaseback of wind facilities. See our prior alert at [link](#). At the heart of the case is Treasury's determination (similar to numerous cases) that the cost of acquiring the wind facilities did not reflect an arm's-length price and/or that some portion of the price is allocable to an intangible asset (e.g., power purchase agreement, goodwill, going concern value, etc.) not eligible for the

grant. Fact discovery in the case concluded in October and expert reports have been exchanged. Expert discovery is scheduled to close in January with trial anticipated sometime in late spring or summer 2016.

Time to File Suit? In a [prior alert](#), we advised that applicants have six years to file suit in the Court of Federal Claims. The six-year period begins when the claim “accrues.” Applicants who received a reduced or disallowed award in the 2009-2010 timeframe should consider filing their claims in short order so as to avoid any statute of limitations problems.

The tax controversy team at Hunton & Williams LLP consists of a cross-practice group with significant experience in energy tax credits and Section 1603 Treasury Grants, tax controversy and litigation. Hunton & Williams LLP is well positioned to assist Treasury Grant applicants resolve disputes with Treasury and to litigate claims in the Court of Federal Claims. Please contact us if you require assistance with Treasury’s denial or reduction of Section 1603 grant amounts.

Contacts

Timothy L. Jacobs
tjacobs@hunton.com

Hilary B. Lefko
hlefkoh@hunton.com

David S. Lowman, Jr.
dlowman@hunton.com

Matthew S. Paolillo
mpaolillo@hunton.com

Laura E. Jones
ljones@hunton.com

US Court of Federal Claims: Section 1603 Litigation

<u>Case Name</u>	<u>Resource/ Property Type</u>	<u>Date Complaint Filed</u>	<u>Current Status</u>	<u>Notes</u>
<i>ARRA Energy Co., I et al.</i>	Solar	02-12-2010	Dismissed.	Jurisdiction. Valuation/qualification issues.
<i>Clean Fuel, LLC</i>	Open-loop biomass	02-03-2012	Suspended re criminal case.	Biodiesel qualification & used parts.
<i>LCM Energy Solutions</i>	Solar	05-08-2012	Trial 04/26/16.	Cost basis and valuation issues. <u>Counterclaim for false claims.</u>
<i>Nevada Controls, LLC</i>	Various	12-07-2012 Am. 08-12-2013	Dismissed.	Failure to file applications.
<i>W.E. Partners II, LLC</i>	Open-loop biomass	01-22-2013	Summary Judgment. Opinion 01-12-15. Appeal 02-09-15.	Cogeneration qualification.
<i>Sequoia Pacific Solar I, LLC</i>	Solar	02-22-2013 Amended 11-01-2013	Discovery. 10/09/15 Fact. 02/17/16 Expert.	Cost basis and valuation issues.
<i>Alta Wind I Owner-Lessor C, et al.</i>	Wind	06-14-2013 (seven additional complaints filed)	Discovery. 09/25/15 Fact. 01/15/16 Expert.	Cost basis and valuation issues.
<i>Blue Heron Properties, LLC</i>	Solar	07-24-2013	Discovery. Bankruptcy.	Cost basis and valuation issues. Treasury "benchmarks" for solar.
<i>RP1 Fuel Cell LLC, et al.</i>	Fuel cell/ Trash facility	08-06-2013	Trial 07/14/15. Opinion 03/31/15. Appeal 06/17/15.	Wastewater sludge/digester gas. Gas conditioning equipment qualification.
<i>Windpower Partners 1993, LLC; Vasco Winds, LLC</i>	Wind	09-18-2013 09-18-2013	Settlement.	Cost basis and valuation issues.
<i>California Ridge Wind Energy LLC</i>	Wind	03-28-2014	Discovery. 12/01/15 Fact.	Cost basis and valuation issues. Related-party cost issues.
<i>Bishop Hill Energy LLC</i>	Wind	03-28-2014	Discovery. 12/01/15 Fact.	Cost basis and valuation issues. Related-party cost issues.
<i>Fire Island Wind, LLC</i>	Wind	05-12-2014	Discovery. 12/31/15 Fact. 02/22/16 Expert.	Qualification of costs related to navigational aid facility per FAA.
<i>Ampersand Chowchilla Biomass, LLC, et al.</i>	Biomass	09-10-2014	Discovery. 11/02/15 Fact. 03/02/16 Expert.	Placed-in-service date issues.
<i>GUSC Energy, LLC</i>	Biomass	12-22-2014	Discovery. 12/21/15 Fact. 02/22/16 Expert.	Cogeneration qualification.
<i>Genesis Solar, LLC</i>	Solar	03-17-2015	Discovery. 06/20/16 Fact. 10/05/16 Expert.	Qualified property; capitalized cost issues for large-scale solar.
<i>Meadwestvaco Virginia Corp.</i>	Biomass	04-08-2015	Discovery. 06/03/16 Fact. 09/06/16 Expert.	Use of steam in pulp & paper mill operations.

© 2015 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.