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## GUEST POST: Beyond Extenders - What Might the “Blue Wave” Mean for Renewables Tax Legislation?

By Judy Kwok

*The following is Part One of a three part guest post by Judy Kwok, a Member at Mintz's Energy and Sustainability practice, specializing in tax-efficient strategies for renewable energy developers and investors. Prior to joining Mintz, she served as Vice President, Tax Planning and Tax Counsel for GE Energy Financial Services.*

Following the Georgia run-off elections on January 5, the Senate—joining the House and the White House—is now headed for Democratic control. As conventional wisdom associates Democrats with a strong clean energy policy, this development is presumably a good thing for the renewables industry; at the very least, the likelihood of Congress passing vengeful oddities like the [PTC Elimination Act](#) is now greatly diminished. Yet a triple Democratic victory also reminds us that the precise future of renewables tax incentives is somewhat cloudy.

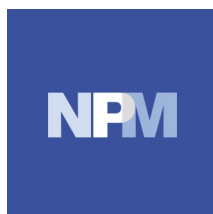


Mere days before the fate of the Senate was decided, President Trump had signed into law [a bipartisan package of tax extenders](#) that included, *inter alia*, extensions of the investment tax credit under section 48 (the “ITC”) and the production tax credit under section 45 (the “PTC”), as well as narrow expansions of the 30% ITC to include offshore wind and waste energy recovery property. While welcomed, this legislation was relatively unambitious, being largely similar to previous last-minute (or even retroactive) extensions that have thrilled renewables tax lawyers for the last two decades. Will the traditional piecemeal approach remain the status quo for years to come—or does a “Blue Wave” portend opportunities to implement a more ambitious overhaul of the renewables tax system? And if there is appetite for more extensive reform, what would that reform be?

The [Biden Plan](#) of July 2020 contained one concrete allusion to the renewables tax regime: it accused Trump of lavishing tax cuts on “multinational companies that encourage offshoring” instead of “supporting more tax credits that keep solar and wind workers employed here at home.” The Biden-era economic policy, at this time, thus has the key advantage of being a *tabula rasa* upon which any number of renewable tax credit fantasies may be imposed. Following the premise that many current tax law realities were once dismissed as wishful thinking, a brief summary of these fantasies follows.

### **Tax Extenders**

Since the original PTC expired in 1999, short-term extensions of the ITC and PTC have formed the cornerstone of renewables tax legislation. The latest extension passed in late 2020, embedded deep in the COVID-19 relief package that is officially known as the [Coronavirus Response and Relief Supplemental Appropriations Act of 2021](#) (the “COVID-19 Economic Relief Bill”), moved the beginning of construction (“BOC”) deadline ahead one year—from January 1, 2021 to January 1, 2022—for the phasing-out 60% wind PTC.



The PTCs for energy produced by closed-loop biomass, open-loop biomass, geothermal, landfill gas, trash, qualified hydropower and marine and hydrokinetic renewable energy facilities were similarly extended by one year, as was the ITC for projects where taxpayers have elected the ITC in lieu of the PTC (including the 18% ITC for electing wind projects).



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In addition, the BOC deadline for each of the 26% solar ITC and the 22% solar ITC has been extended for two years, from January 1, 2021 and January 1, 2022 to January 1, 2023 and January 1, 2024, respectively; the placed in service deadline for these projects has also been extended from January 1, 2024 to January 1, 2026. Similar extensions were also given for fiber-optic solar, qualified fuel cell, and qualified small wind property, as well as for the 10% ITC with respect to ground thermal, qualified microturbine and combined heat and power system property.

Given the above, some would not expect Congress to have much appetite for another round of renewables extenders—at least, until closer to December 2021, when the PTC expires once more. Yet it is worth noting that a proposed five-year extension of the section 45Q carbon capture credit—in the [45Q Carbon Capture, Utilization, and Storage Tax Credit Amendments Act of 2020](#)—is still outstanding. Even for wind and solar, hints and rumors of longer extensions have never been far from developers' minds.





The Sunshine Forever Act would extend the solar ITC by ten years; the more accurately named Renewable Energy Extension Act would extend the solar ITC, as well as the ITC for various other types of renewable energy property, by five years. Most intriguingly, the proposed “clean energy production credit” to replace the PTC—in the Clean Energy for America Act, described below—has no set expiration date, but rather will phase out once national greenhouse gas emissions from electrical production decrease to a specified threshold. Such a concept, in theory, could also be incorporated into an extension of the ITC or the PTC.

### **Offshore Wind**

After years of legislative and regulatory silence, offshore renewables projects finally received their due in the closing days of 2020. The COVID-19 Economic Relief Bill gives “qualified offshore wind facilities”—i.e. wind facilities located in the inland navigable waters of the United States or in the coastal waters of the United States—their own ITC, which has the distinct advantages of not phasing down from 30% and of having a BOC deadline of January 1, 2026 (as opposed to January 1, 2022 for onshore wind projects or January 1, 2024 for other ITC-eligible projects generally).

While the offshore wind ITC was big news, a more immediately useful development for the industry arguably came from the IRS. On New Year’s Eve, the IRS issued Notice 2021-05, which extends the four-year window, within which projects must place in service in order to be deemed to have satisfied the “continuous efforts” or “continuous construction” requirement, to ten years for offshore projects that require the construction of one or more high-voltage transmission lines.





Under current IRS guidance, developers must “begin construction”—i.e., begin physical work or incur capital expenditures equal to 5% of the total project cost—by a specified date in order to qualify for the ITC or the PTC. The default rule is that “continuous construction” or “continuous efforts” (depending on whether construction was begun via physical work or capital expenditures) must continue until the project is completed, and this continuity requirement is deemed to be met if the project is completed in or before the fourth calendar year following the calendar year of BOC (such rule, the “Continuity Safe Harbor”).

Because offshore wind facilities, being cutting-edge projects of deep regulatory and technical complexity, may frequently require several years or more to develop, the Continuity Safe Harbor—even as temporarily extended for COVID-19 delays—posed serious concern to the offshore wind industry, not least because the standard for what constitutes “continuous construction” or “continuous efforts” outside of the Continuity Safe Harbor is not well delineated in IRS guidance. The new IRS guidance, in combination with the new ITC legislation, thus gives offshore developers much-needed breathing room to develop these lengthy and complicated projects.

As far as tax lobbying efforts go, the offshore wind industry appears to have achieved a happy ending for now. Yet the underlying message of the offshore success story—that both Congress and Treasury can rewrite the rules to accommodate aspects of renewable energy that were not yet developed at the time of original writing—suggests that new possibilities are on the horizon.





Even more than for the solar ITC, the notion of an indefinite offshore wind ITC lurks: at least two 2020 proposals, including the Growing Renewable Energy and Efficiency Now Act of 2020 (H.R. 7330) (the “GREEN Act”), which was subsequently incorporated into the Moving Forward Act (H.R. 2), and an amendment introduced by Sen. Ron Wyden (D-OR) (currently the incoming chairman of the Senate Finance Committee) to the Advanced Geothermal Innovation Leadership Act of 2019 (the “Wyden Amendment”), have suggested that the offshore wind ITC should phase out only when the United States has increased its offshore wind capacity to a preset amount.

Intriguingly, in contrast to the offshore wind ITC legislation, Notice 2021-05 is phrased to cover not just offshore wind facilities, but *any* facility that qualifies for the ITC or PTC that is located in U.S. inland navigable waters or coastal waters. Given that the world’s [first offshore solar array](#) was installed early last year in the North Sea, whether an offshore solar ITC lies in the future remains to be seen.

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