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NEW PUBLIC PARTICIPATION REQUIREMENTS UNDER THE 2008 CAFO REGULATIONS

by Terence J. Centner*

Alleged pollution from concentrated animal feeding operations (CAFOs) led to new federal regulations in 2003 that were challenged in *Waterkeeper Alliance, Inc. v. EPA*.[1] One of the issues considered in *Waterkeeper* involved the public's right to participate in the development of National Pollutant Discharge Elimination System (NPDES) permits. The environmental petitioners claimed that Congress intended that the public would have a meaningful role in the implementation of the Clean Water Act through an opportunity for public hearing before the approval of any NPDES permit.[2] The court agreed and found that the federal CAFO regulations deprived the public of the opportunity for regulatory participation by effectively shielding the nutrient management plans from public scrutiny. A similar conclusion was subsequently reached by a Michigan court in analyzing discharges sanctioned under a general permit pursuant to Michigan's state CAFO regulations.[3]

In response to the *Waterkeeper* decision, the EPA adopted new federal CAFO regulations in 2008.[4] The 2008 provisions enumerate greater public participation before permitting authorities may authorize discharges of pollutants from CAFOs. While these regulations only apply to CAFOs, the Waterkeeper and Sierra Club decisions raise questions about public participation provided for permittees of other discharges under NPDES permits.

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TAX PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

by Roger A. McEowen*

Overview

Pushed through the Congress with little debate based on claims that matters would be "catastrophic" if passage was not immediate, and without an opportunity for members of the Congress to actually read the text of the legislation, the Congress passed the massive spending bill, H.R. 1, (The American Recovery and Reinvestment Act of 2009 (Act), Pub. L. No. 111-5). While passage was swift, the signing of the Act into law was not immediate – occurring four days after the Act passed both bodies of the Congress.

The Act contains 575 pages of tax provisions. Many of the provisions are individual credits that will likely have little-to-no immediate stimulative effect and targeted tax benefits that appear to be so narrow as to be largely ineffective economically at the present time. That is why it is a bit inaccurate to call the Act a "stimulus" bill. In addition, the non-tax portion of the Act contains massive amounts of spending for social programs largely unrelated to the

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For CAFOs, the federal regulations allow agricultural stormwater discharges. However, to qualify as an agricultural stormwater discharge, a permittee must apply manure, litter, or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients.[5] Nutrient management plans thereby constitute the documentation that delineates how permittees are structuring their operations so that their discharges qualify as agricultural stormwater discharges. Any discharge other than an agricultural stormwater discharge is prohibited by the federal regulations unless it occurs as authorized under a permit. Each CAFO must develop and implement a nutrient management plan containing all applicable effluent limitations. Since effluent limitations must be included in each NPDES permit,[6] the nutrient management plan must also be included in a CAFO's NPDES permit application.

Under the 2008 CAFO regulations, permit applicants are required to submit a nutrient management plan.[7] With the submission of the components of a nutrient management plan, the public will have an opportunity to evaluate the effluent standards set forth in the application. After a permit is approved, the information in the permit will allow the public to evaluate whether the permittee is complying with the permit conditions.

Some discharges from CAFOs are authorized through "notices of intent" under general permits. Regulators have adopted general permits to allow permitting authorities to regulate large numbers of similar dischargers. A permitting authority adopts a general permit with an opportunity for public input, and then employs notices of intent to establish effluent limitations for each applicant.

Because notices of intent delineate management plans containing the applicant's effluent limitations, a permitting authority needs to provide an opportunity for some type of meaningful public input on each plan. Any regulatory scheme that deprives the public of the opportunity to participate in the development of effluent limitations violates the Clean Water Act's public participation requirements.[8]

With respect to notices of intent under general permits, the 2008 CAFO regulations delineate new requirements concerning their approval. Each notice of intent must include a nutrient management plan that is made available for public review.[9] The procedures for draft permits are adopted for notices of intent.[10] Permitting authorities are required to respond to significant comments and may require revisions to submitted nutrient management plans. These provisions definitively establish opportunities for public participation for each notice of intent submitted by a CAFO under a general permit.

Public Participation for Other Categories of Dischargers

The judicial pronouncements on the CAFO regulations do not require public participation in the development of effluent limitations for other dischargers under NPDES permits. These include discharges from stormwater, construction activities, oil and gas extraction, water treatment facilities, coal mining activities, and sewage treatment facilities. However, given the interpretation of the Clean Water Act's public participation requirements by the *Waterkeeper* court, state permitting authorities may need to revise their NPDES regulations for other categories of discharges. A glance at permitting regulations in two states for construction stormwater runoff suggests that the opportunities for public participation in the development of effluent limitations under various state NPDES permitting programs are inadequate.

Notices of intent under Louisiana's water discharge permit for stormwater associated with construction[11] require applicants to certify that a stormwater pollution prevention plan has been prepared, but no plan is filed.[12] This means there is no review of applicants' effluent limitations by the permitting authority and no opportunity for the public to participate in the development of effluent limitations. Furthermore, applicants are able to commence discharging two days after the notice of intent was submitted. These provisions do not appear to comply with the public participation requirements of the Clean Water Act.

A proposed general permit for construction stormwater in Maryland also discloses problems in providing for public participation. The proposed general permit omitted to provide an opportunity for public notice, comment, and hearing on individual applications.[13] This permit is being challenged by environmental groups for several reasons including failure to provide requisite levels of public participation.[14] Pending resolution of the challenge, the state has no general permit for construction activities.

Public participation requirements delineated in the Clean Water Act were intended to help effectuate the goals of restoring and maintaining the integrity of the nation's waters. Under statutory and regulatory provisions, permitting authorities oversee the development and implementation of effluent limitations. Supplementing this oversight by permitting authorities is a requirement that the public be able to participate in establishing effluent limitations. Efforts to require greater public participation might be encouraged to reduce pollutant discharges.

ENDNOTES

[1] 399 F.3d 486 (2d Cir. 2005).

[2] 33 U.S.C. §§ 1342(a), 1342(b) (2000).

[3] Sierra Club Mackinac Chapter v. Department of Environmental Quality, 747 N.W.2d 321 (Mich. Ct. App. 2008).

[4] Environmental Protection Agency, Revised national pollutant discharge elimination system permit regulation and effluent limitations guidelines and standards for concentrated animal feeding operations in response to the Waterkeeper decision; final rule, 73 Fed. Reg.70418 (2008).

[5] *Id*. 122.23.

[6] 33 U.S.C. § 1311 (2000).

[7] 40 C.F.R. § 122.42(e) (2008).

[8] Waterkeeper, 399 F.3d at 503.

[9] 40 C.F.R. § 122.23(h) (2008).

[10] *Id*.

[11] Louisiana Department of Environmental Quality, Water discharge permit: Stormwater associated with construction (CSW-G) (2009).

[12] Louisiana Department of Environmental Quality, LPDES notice of intent (NOI) to discharge stormwater associated with construction activity greater than 5 acres (2009).

[13] Maryland Department of the Environment, General permit for stormwater associated with construction activity, General NPDES Permit No. MDR10 (2009).

[14] University of Maryland Environmental Law Clinic, Letter of Jane F. Barrett to Maryland Department of the Environment, December 31, 2008.

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economy. To facilitate the massive spending contained in the Act (it is the largest spending bill in U.S. history), the Act raises the U.S. debt limit to over $12 trillion.

Here is a summary of the major tax provisions of the Act, H.R. 1, Pub. L. No. 111-5:

Individual Income Tax Provisions

Extension of enhanced expense method depreciation amount. The I.R.C. § 179 amount which was increased to $250,000 for 2008, dropped to $133,000 for 2009 (inflation adjusted). The Act restores the $250,000 amount for 2009. **Act, Sec. 1202, amending I.R.C. §179(b)(7)**.

Note: Remember, IRS allows an expense method depreciation election to be made or revoked on an amended return through 2010. The issuance of Treasury Regulations are not necessary for the election to either be made or revoked on an amended return (through 2010). That provides great flexibility with respect to the use of expense method depreciation, a provision that applies to many assets used on a farm or ranch

Extension of "bonus" depreciation. First-year bonus depreciation was reenacted for 2008, and the Act extends first-year "bonus" depreciation through 2009 (including the $800,000 beginning of the phase-out). The provision extends bonus depreciation through 2010 for certain long-lived and transportation property. The provision also allows corporations the ability to accelerate AMT and research credits in lieu of bonus depreciation through 2009. The amount eligible for acceleration is capped at the lesser of six percent of historic AMT and R&D credits or $30 million. **Act, Sec. 1201, amending I.R.C. §168(k)(2) and I.R.C. §168(k)4)**.

Estimated tax relief for 2009. Under current law, individuals with business income avoid the estimated tax underpayment penalty by paying at least 90 percent of the current year's tax liability or 100 percent of the prior year tax liability (110 percent for taxpayers with prior year adjusted gross income (AGI) in excess of $150,000). The Act reduces the 100 percent and 110 percent amounts to 90 percent, and applies the estimated tax relief to individuals with 2008 AGI up to $500,000 who had more than 50 percent of their 2008 income from a small business. The provision defers to the Treasury Secretary the authority to certify what income counts as being attributable to a "small business," which the Act defines as one with fewer than 500 employees for the calendar year ending with or within 2008. Act, Sec. 1212, amending I.R.C. §6654(d). Effective for tax years beginning in 2009.

AMT "patch" for 2009. The Act increases the exemption from alternative minimum tax (AMT) for 2009 to $70,950 for taxpayers filing jointly and $46,700 for unmarried taxpayers. Without the extension, the 2009 exemption was scheduled to be $45,000 for taxpayers filing jointly and $33,750 for unmarried taxpayers. Also for 2009, the Act extends the allowance of numerous personal credits in computing the AMT (i.e., certain nonrefundable credits can be claimed against AMT). **Act, Secs. 1011 and 1012, amending I.R.C. §26(a)(2) and I.R.C. §55(d)(1)**.

Expansion of first-time homebuyer credit. The Act expands the first-time homebuyer "credit" that was enacted in 2008. The original provision was contained in The Housing and Economic Recovery Act of 2008 and defined a first-time homebuyer as a person (or spouse) that has had no ownership of a "principal residence" during the three-year period before the day the principal residence was purchased. As originally enacted, the credit was limited to eligible taxpayers that purchase a home in 2008 and 2009 equivalent to 10 percent of the purchase price of the home capped at $7,500 ($3,750 for married persons filing separately). But, the original provision had several limitations - the property must be acquired on or after April 9, 2008 and before July 1, 2009; if the taxpayer is building the residence, the taxpayer must occupy the residence by July 1, 2009; the credit phased-out for taxpayers with AGI in excess of $75,000 ($150,000 for married persons filing jointly) over a $20,000 range (so, the credit is eliminated at AGI of $95,000 ($170,000 for married persons filing jointly)); the credit is inapplicable if the taxpayer buys the residence from a spouse, ancestor or lineal descendant; the residence cannot be acquired by gift or inheritance; the credit is not available to a non-resident alien. Also, the original provision contained a recapture provision - the credit had to be paid back as an additional tax, but without interest, over 15 years, beginning with the second year after the credit is taken. If the credit is utilized for the purchase of a residence, any sale of the residence within 15 years of its purchase triggers recapture of any portion of the credit not yet recaptured. For homes purchased through November 30, 2009 eligible taxpayers can claim the credit on an amended 2008 tax return.

The Act increases the credit to $8,000 and extends the deadline to buy the house through November of 2009. Also, the Act eliminates the repayment requirement (recapture) for homes purchased from January 1, 2009, through November 30, 2009 if the taxpayer uses the home as the taxpayer's principal residence for 36 months from the date of purchase.

The Act allows homebuyers to use the credit if they buy a home financed with mortgage revenue bonds, but only starting in 2009. In addition, the credit is refundable. That means that a taxpayer gets the full benefit of the credit even if the amount of the credit the taxpayer qualifies for exceeds the taxpayer's tax liability for the year. **Act, Sec. 1006, amending various subsections of I.R.C. §36**.

Note: For homes purchased through November of 2009, a taxpayer may elect to claim the credit on the taxpayer's 2008 Form 1040. If the home is purchased after the taxpayer's 2008 tax return is filed, the taxpayer may file an amended 2008 return in order to receive the refund sooner.

Individual income tax credit. For 2009 and 2010 only, the Act creates a refundable income tax credit (as a reduction in quarterly estimated tax payments, change in withholding or tax refund) for individuals pegged at the lesser of 6.2 percent of the taxpayer's earned income or $400 (single filers; $800 for joint filers). The credit phase-out range is AGI of $75,000-$95,000 for single filers and $150,000-$190,000 for joint filers. **Act, Sec. 1001 creating new I.R.C. §36A**.

"Economic recovery" payment. The Act provides for a one-time payment of $250 for taxpayers that were eligible for the following benefits during November or December of 2008 or January of 2009: social security, railroad retirement, veterans' disability compensation or pension, and supplemental security income. The payment reduces the

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amount of any refundable individual income tax credit that the taxpayer receives under Section 1001 of the Act. Act, Sec. 2201.

Refundable credit for government retirees. The Act, for 2009 only, provides a credit of $250 ($500 for married persons filing jointly if both spouses are otherwise eligible) for retirees who receive a government pension or annuity from work not covered by Social Security and who were not eligible to receive the one-time economic recovery payment of Section 2201 of the Act. The credit is refundable, so taxpayers with little or no earned income will qualify for the credit. **Act, Sec. 2202**.

Expanded Credit for Educational Expenses. For academic periods beginning in 2009 or 2010 only, the Act increases the Hope Scholarship Credit (the increased amount is called the "American Opportunity Tax Credit") to a maximum of $2,500 year for qualified higher education expenses. The credit is computed as 100 percent of eligible expenses up to $2,000 plus 25 percent of up to the next $2,000 of expenses (thus, the credit is capped at $2,500). The credit can be used for expenses incurred in up to four years of study. The Act also expands the kinds of expenses eligible in figuring the credit to include "course materials." The credit phases out for taxpayers with modified AGI between $80,000 and $90,000 for single filers, or $160,000 and $180,000 for married persons filing jointly. The credit cannot be claimed by a child unless the child provides more than half of their own support. In addition, 40 percent of the credit is refundable and may be applied against the taxpayer's AMT liability. Taxpayers that are eligible for the enhanced education credits as a result of the Midwest Disaster Relief provisions enacted into law in 2008 may elect to waive the application of the credit. **Act, Sec. 1004, amending I.R.C. §25A**.

Expansion of Section 529 plans. The Act expands the definition of "qualified higher expenses" for purposes of "Section 529" plans to include expenses that are paid or incurred in 2009 or 2010 for the purchase of computer technology or equipment or Internet access and related services if the technology, equipment or services are to be used by the beneficiary of the Section 529 account and the beneficiary's family during any of the years the beneficiary is enrolled at an eligible institution. Thus, tax-free withdrawals can be made from Section 529 accounts to pay for computers, computer-related technology and Internet access for qualified use by beneficiaries in 2009 and 2010. **Act, Sec. 1005, amending I.R.C. §529(e)(3)(A)**.

Modification of the Earned Income Tax Credit (EIC). For tax years beginning in 2009 and 2010, the Act increases the phase-out range of the EITC for married taxpayers filing jointly to eliminate the marriage penalty. In addition, the Act increases the credit percentage of the EITC for families with three or more qualifying children from 40 percent to 45 percent of the taxpayer's first $12,750 of earned income. **Act, Sec. 1002, amending I.R.C. §32(b)**.

Partial exclusion of unemployment benefits. For 2009 only, the Act excludes from a taxpayer's gross income the first $2,400 of unemployment compensation (equating, at the maximum, to approximately eight months worth of unemployment benefits). **Act, Sec. 1007, amending I.R.C. §85**.

Modification of child tax credit. For tax years beginning in 2009 and 2010 only, the Act increases the portion of the child tax credit that is refundable for 2009 and 2010 to 15 percent of the taxpayer's adjusted gross income in excess of $3,000 (down from $8,500) up to the child credit amount (if the total amount of the child credit exceeds the taxpayer's regular tax and AMT liability). **Act, Sec. 1003, amending I.R.C. §24(d)**.

COBRA coverage. The Act contains a provision designed to provide financial assistance to persons who lost their jobs on or after September 1, 2008 through December 31, 2009 who want to continue their group health coverage. The bill uses credits against payroll tax to reimburse employers for subsidizing 65 percent of the premium for COBRA continuing coverage for up to nine months. **Act, Sec. 1899F**.

Above-the-line deduction for sales and excise tax on new vehicles. The Act provides for an above-the-line deduction for sales and excise tax applicable to the purchase of a new vehicle with a gross vehicle weight of up to 8,500 pounds, motorcycles and motor homes. For a calendar-year taxpayer, the provision applies to purchases occurring on or after February 17, 2009 through December 31, 2009. For a fiscal year taxpayer, the provision applies to purchases of new vehicles occurring post-February 16, 2009 in tax years ending before 2010. The provision phases out for taxpayers with a single filing status at $125,000-$135,000 and $250,000-$260,000 for married taxpayers filing jointly. However, the provision does not apply to any part of the sales and excise tax attributable to the purchase price over $49,500. While the deduction is available for taxpayers that do not itemize (as an increased standard deduction) the deduction is not allowed if the taxpayer takes an itemized deduction for state and local sales tax (in lieu of income taxes). **Act, Sec. 1008, amending I.R.C. §164(a) by adding I.R.C. §164(a)(6)**.

Business Tax Provisions

Corporate tax breaks for the issuance of "applicable high-yield debt obligations." Under current law, interest deductions for corporations that issue high-yield debt obligations are reduced if the indebtedness has an interest rate that is six or more percentage points higher than the applicable federal rate. The Act provides limited relief by suspending the rules of I.R.C. §163(e)(5) for certain obligations issued in debt-for-debt exchanges from September 1, 2008, through the end of 2009. The suspension does not apply to newly issued debt and the IRS is given the authority to suspend the rules beyond 2009 and to use a rate higher than the applicable federal rate for obligations issued after 2009. Act, Sec. 1232, amending I.R.C. §163(e)(5).

Reporting of debt forgiveness income over five years. The Act provides businesses the ability to elect to defer the reporting of debt forgiveness income incurred on reacquisition of a debt instrument during 2009 or 2010. The provision specifies that, for reacquisitions occurring in 2009 or 2010, any resulting debt forgiveness income can be reported ratably over a five year period beginning in 2014. In other words, eligible businesses may recognize debt forgiveness income for up to 10 years (tax deferral for either the first four or five years and ratable income recognition over the next five years). C corporations and individuals that conduct a trade or business are eligible for the provision. But, there is a catch. If the taxpayer elects to apply the deferral provision, the taxpayer may not apply any of the major exceptions to debt discharge income contained in the Code (such as for insolvency, bankruptcy, qualified farm indebtedness or qualified real property business debt) with respect to the amount discharged for the tax year of the election or any subsequent year. In addition, death, liquidation or sale of substantially all of the

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taxpayer's assets, cessation of the taxpayer's business or liquidation in bankruptcy will result in acceleration of the deferred income. In addition, if the debt forgiveness creates an original issue discount (OID) obligation, the OID deduction is also deferred. **Act, Sec. 1231, amending I.R.C. §108 by adding subsection (i)**.

Note: The provision does nothing to change the Treasury's position taken in the Treasury Regulations which creates phantom income to a buyer of a bad loan that then restructures the loan. That position makes it more difficult for a lender to restructure troubled loan portfolios. See Treas. Reg. §1.1001-3. What the Act merely does is allow the debtor to report the debt forgiveness income over five years.

Temporary reduction in "built-in gains" (BIG) tax recognition period. For tax years beginning in 2009 and 2010, the Act shortens from 10 to seven years the holding period for assets subject to the BIG tax that is imposed on appreciated assets after a C corporation elects S corporation status. Under prior law, I.R.C. §1374 applied a 35 percent BIG tax rate for gain on property that a C corporation owned at the time the corporation made an election to be treated as an S corporation for tax purposes. The tax applies if the S corporation disposes of the property in a taxable transaction within 10 years of the S election. The Act reduces the 10 year period to seven years for built-in-gain recognized in 2009 or 2010. To get the reduced seven-year period, the seventh taxable year in the recognition period must precede either 2009 or 2010. Thus, any immediate impact of the provision will be limited to C corporations with built-in-gain property that elected S treatment in 2000-2002. The reduced recognition period is not reduced for S corporation elections made in 2009 or 2010. Act, Sec. 1261, amending I.R.C. §1374(d)(7).

Reversal of IRS Notice 2008-83. The Act reverses the IRS's waiver of the "built-in loss" limitation for bad debts of newly-acquired banks. In late 2008, IRS issued Notice 2008-83 in which it stated that the I.R.C. §382 limits would not apply to bad debt deductions taken by newly acquired banks. The provision is effective as of January 16, 2009. Act, Sec. 1261.

Note: The 2008 IRS notice was very beneficial to the Wells Fargo/Wachovia acquisition transaction that occurred in recent months.

Net operating losses. The Act allows small businesses that have losses in tax years ending in 2008 (or, at the taxpayer's election, tax years beginning in 2008) to apply the loss to previous years' income for up to five years (rather than two) before the year in which the loss takes place (the twenty year carryforward rule still applies). The idea behind the provision is to allow businesses who have current losses the ability to carry back those losses for up to five years (rather than two) and apply the loss against income in those earlier years and file an amended return to get a tax refund – cash in hand now that can be spent stimulating the economy. A small business (including sole proprietorships and individual members of pass-through entities) is defined as a business with average gross receipts (or, for members of pass-through entities, the member's share of income) for the prior three years not in excess of $15 million. The five-year carryback is allowed for computing AMT, but the 90 percent limit contained in I.R.C. § 56(d)(1)(A)(i)(11) (which prevents taxpayers from completely eliminating prior year tax liability with an NOL carryover remains in place for the five-year carrybacks. Also, a business that had already made an NOL election can revoke the election within 60 days of the date the election was made to utilize the provision. **Act, Sec.1211, amending I.R.C. §§172(b)(1) and 448(c)**.

Note: The provision applies to partnerships (as a pass-through entity). But, a partnership cannot have a net operating loss (a partnership is not a taxpayer). So, will the loss for the entity, when passed through to an owner, result in an NOL for the owner that can be carried back five years? Apparently, but the drafters of the provision did not mention that little quirk (betting they never thought of it). Another problem with the provision is that it does not specify how to handle the situation when a pass-through entity's gross receipts exceeds $15 million, but an individual owner's share does not exceed the limit. Will the $15 million limit be applied at the entity level or the owner level? The statute does not address this question either and it is not mentioned in the committee reports.

Comment: Limiting the provision to businesses with gross receipts under $15 million will prevent many middle-to-large businesses from utilizing the provision. Consequently, the stimulative effect of the provision is thereby diminished.

Expansion of Work Opportunity Tax Credit (WOTC). The Act expands the reach of the WOTC, which provides businesses up to a $2,400 credit to hire employees from particular groups (typically disadvantaged), by adding unemployed veterans discharged in 2008, 2009 or 2010 and "disconnected youth aged of 16 to 25 who lack basic skills and haven't been regularly employed or in school for the last six months who begin employment in 2009 or 2010. Act, Sec. 1221, amending I.R.C. § 51(d).

Energy-Related Provisions

Advanced energy credit. The Act creates an investment tax credit in the amount of 30 percent of qualified expenditures in a "qualifying advanced energy project." That is a project that re-equips, expands or establishes a manufacturing facility for the production of the following:

- Property designed to be used to produce energy from "renewable" resources (sun, wind and geothermal deposits);"
- Fuel cells, microturbines, or energy storage systems for use with electric or hybrid electric motor vehicles;
- Electric grids to support the transmission of intermittent sources of "renewable" energy;
- Property designed to capture or sequester carbon dioxide emissions;
- Property designed to refine or blend "renewable" fuels or to produce energy conservation technologies;
- New qualified plug-in electric drive motor vehicles, qualified plug-in electric vehicles or components designed for use with such vehicles; and
- Other advanced energy property designed to reduce greenhouse gas emissions

Eligible property must be depreciable tangible personal property or other depreciable tangible property that is used as an integral part of the qualified investment credit facility. The Act specifies that up to $2.3 billion credits can be certified. The credit is not allowed for any qualified investment for which a credit is allowed under I.R.C. §§48, 48A or 48B. **Act, Sec. 1302, amending I.R.C. §46 by adding subparagraph (5) and creating I.R.C. §48C**.

Energy-efficient improvements to existing homes. The Act extends through 2010, the existing tax credits for improvements to energy-efficient existing homes. The Act also increases the credit from to 30 percent

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(up from 10 percent) of the amount paid or incurred for qualified energy efficient improvements. The Act also replaces the item-by- item dollar caps with an overall $1,500 cap on all qualified property. In addition, the Act modifies the existing standards for energy-efficient building property (i.e., electric heat pumps, central air conditioners, water heaters, wood stoves, natural gas, propane and oil furnaces, natural gas and oil hot water boilers, propane furnace, propane hot water boiler, exterior windows, doors and skylights, and insulation). **Act, Sec. 1121, amending I.R.C. §25C**.

Credit for alternative fueling property. The Act increases the existing alternative refueling property credit (non-hydrogen property) from 30 percent to 50 percent, and increases the cap from $30,000 to $50,000. The Act keeps the hydrogen refueling pumps credit at 30 percent, but raises the cap to $200,000. The Act also increases the credit from 30 to 50 percent for individuals and raises that cap to $2,000 (from $1,000) for non-hydrogen property placed in service in 2009 and 2010. **Act, Sec. 1123, amending I.R.C. §30C(e)**.

Extension of credit for electricity produced from renewable resources. The Act extends the credit for electricity produced from wind through 2012, and 2013 for other renewable sources, such as biomass facilities, geothermal and solar. **Act, Sec. 1101, amending I.R.C. §45(d)**.

Investment credit in lieu of production credit. The Act allows owners of facilities that produce electricity from wind, open and closed-loop biomass, geothermal, small irrigation, hydropower, landfill gas, waste-to-energy, and marine renewable to claim a 30 percent investment tax credit for property placed in service in 2009-2012 for wind facilities, and 2009-2013 for property placed in service for the other type of facilities. The investment tax credit, if claimed, is in lieu of the renewable energy production tax credit that would otherwise be allowable. **Act, Sec. 1102, amending I.R.C. §48(a)**.

Small wind energy property. The Act eliminates the dollar limitation on the otherwise available credit for small wind energy property. **Act, Sec. 1103(a), amending I.R.C. §48(c)(4)**.

Plug-in vehicle credit. The Act increases the base amount $2,500 tax credit for plug-in vehicles if the vehicle is purchased after 2009 and draws propulsion from a battery with at least 5 KwH capacity. The credit is increased by $417 for each qualified vehicle which draws propulsion from a battery with at least 5 KwH of capacity, plus another $417 for each KwH of capacity in excess of 5 KwH up to 16 KwH (not to exceed $5,000). The full credit is available through the end of the first calendar quarter in which the vehicle manufacturer has sold 200,000 units of the vehicle. The credit is reduced in following calendar quarters. The Act also provides for a new credit (capped at $2,500) of 10 percent of the cost of low-speed vehicles, motorcycles and 3-wheeled vehicles that would otherwise be classified as a qualified plug-in vehicle but for the fact that they are low speed or do not have four wheels, for purchases made after February 17, 2009 through 2011. In addition, the Act provides a credit (through 2011) against the costs incurred in converting a vehicle into a plug-in vehicle through a conversion kit. This credit is pegged at 10 percent of the cost of conversion that does not exceed $40,000. The income tax basis in a vehicle used in a trade or business is reduced by any credit amount that is claimed with respect to such converted vehicle. For vehicles used by a tax-exempt entity or governmental entity, the credit belongs to the vehicle seller. **Act, Secs. 1141, 1142 and 1143, amending I.R.C. §§ 30 and §30D**.

Carbon sequestration. The Act clarifies that a taxpayer claiming the carbon dioxide capture tax credit must be permanently stored in a geologic formation. **Act, Sec. 1131, amending I.R.C. §45Q(a)(2)**.

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From the Executive Director:

NEW ONLINE AGRICULTURAL LAW AALA LISTSERV

All current members should have received a notice of access to the new AALA/NALC listserv. A few excellent questions have already been posted and discussed. If you are not receiving posting from the listserv, send an e-mail to RobertA@aglaw-assn.org and I will get you signed up.

2009 ANNUAL CONFERENCE

A reminder that the dates of the 2009 Annual Agricultural Law Symposium have been changed from October 16-17, 2009 to September 25-26, 2009. President-elect Ted Feitshans has almost completed planning a very extensive program with a wide variety of topics and issues to be covered in a year of change and challenge for agriculture and agricultural law. If you would like to help with a presentation, contact Ted at ted_feitshans@ncsu.edu.

Robert P. Achenbach, Jr., AALA Executive Director