

A Renewable Energy Law Update

Oregon Department of Energy Issues Temporary Rules Modifying the Business Energy Tax Credit Program

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Oregon's Department of Energy ("Department") has issued temporary rules to modify the Business Energy Tax Credit ("BETC") program for renewable energy projects and to address criticisms about the breadth of the credits. The rules are effective from November 3, 2009, until May 1, 2010.

Gov. Kulongoski requested a review of the BETC rules in early August 2009 when he vetoed a house bill that would have significantly reduced the tax credit for larger scale energy generation projects. The Governor also signed into law two related measures – one directing the Department to conduct an economic analysis on renewable energy projects that qualify for the BETC to better understand the state's return on the investment in the BETC program, and the other scheduling the BETC program for sunset in 2012, if the legislature does not extend the program by the end of the 2011 session. The Department plans to issue permanent BETC rules after the 2010 special session is completed. Following are several notable changes to the BETC program included in the temporary rules:

- **Separate and Distinct Facility** –
 - Multiple projects are now deemed to be a single "facility" eligible for only one BETC if three or more factors are present, including (1) the projects are located on one or more adjacent parcels of land, (2) the projects share operating facilities including access roads, parking and substations not owned by third party utilities, (3) the projects have been recognized as a single facility in other permitting or application processes, and (4) construction of the projects is performed under one contract or multiple contracts executed within one year;
 - To qualify separate phases of multi-phase projects as separate facilities, the applicant must also demonstrate that the phases are not interdependent in purpose or in the manner in which they will be owned, financed, constructed, operated or maintained.
- **Grants Not Eligible Costs** – Costs that are directly or indirectly offset with federal or local grants or fee waivers cannot be included in the BETC-eligible costs, and previously certified costs will be reduced by the amount of any federal grant received in connection with the facility.

- **Revocation** – The Department Director now has expanded authority to revoke pre-certifications or certifications already issued under certain narrow conditions, including if the applicant is unable to demonstrate "that the facility is economically viable without the receipt of BETC." While this basis for rejection of an application appears quite broad, the Department has stated informally that it intends the provision to prevent use of the BETC to subsidize financially shaky businesses, and not to deny the BETC to individual projects on the ground that the BETC is a critical element of the project financing.
- **Cost Overruns** – The administrative rule allowing a BETC applicant to obtain final certification for actual costs up to 10 percent higher than preliminary certified costs is deleted. The effect of this is not clear, since the cost-overrun rule is statutory.
- **Performance Standards** – Binding performance standards for generation projects, similar to those already existing for manufacturing facilities, are added.
- **Applicability** – The temporary rules state that they apply to all applications for which no "final determination" has been made, as well as applications where a final determination has already been made but where the Department finds "that its failure to apply the new criteria set forth in these rules may hamper the Department's efforts to reduce the costs of the BETC program."

The temporary rules also narrow the BETC for gasoline hybrid vehicles to apply only to those designed for electrical plug-in recharging.

The intent of the changes in the rules is not clear in all instances because the process for issuance of temporary rules does not include any public input. There also is significant uncertainty about whether further changes will be made to the BETC program in the 2010 legislative special session.

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