



Green Strategies Bulletin



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Bricker & Eckler LLP

100 South Third Street
Columbus, Ohio 43215-4291

Phone 614 . 227 . 2300
Fax 614 . 227 . 2390
info@bricker.com
www.bricker.com

COLUMBUS | CLEVELAND
CINCINNATI-DAYTON

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Ohio's Advanced Energy Tax Reform Emergency Rules Now Effective; Application Online

A Summary of Administrative Code Chapter OAC 122:[23]

On June 17, 2010, Ohio Governor Ted Strickland signed Senate Bill 232, which significantly reduces the tax burden on advanced energy projects in the state of Ohio. Sponsored by Senator Chris Widener (R-Springfield), SB 232 took effect immediately.

On September 29, 2010, Governor Strickland signed an executive order implementing the new law's administrative rules. As "emergency rules," the rules are also effective immediately. However, emergency rules sunset after 90 days, unless in the meantime the rules have been re-adopted according to the normal rule-making procedures. We will continue to monitor that permanent rule-making process as it moves ahead. We summarize the emergency rules below.

Terms Defined

As used in these rules, "applicant" means a person who applies to the director of the Department of Development for certification of an energy project as a qualified energy project. The term also includes a person who receives a certification and any subsequent owner or lessee pursuant to a sale and leaseback transaction of the qualified energy project.

Application Process for Certification

In General. The application for certification will be made available on the ODOD website.

See <http://development.ohio.gov/Business/AlternativeEnergyTaxExemption.htm>. The application is not considered complete until ODOD receives a signed, hard copy along with a CD electronic version of the signed application and required attachments. § 122:23-1-03(A). Applications must be submitted to ODOD no later than the close of business on the last day for application and will not be considered submitted without all necessary information and supporting documentation. §§ 122:23-1-03(B) and 122:23-1-03(C). However, the rules recognize that it may not be feasible to submit all required attachments with the application, and therefore, the rules allow applicants to receive a "conditional certificate" and to defer submission of certain attachments (as discussed later in this summary).

Information for Application for Certification.

The application must identify the location of any tangible personal property or real property that is part of the energy project by county, taxing units and permanent parcel number. The application must also provide a mailing address for the board of county commissioners of each county and for each taxing unit listed in the application. Additionally, the applicant must submit information regarding the location of tangible personal property constituting the energy facility in detail sufficient for the county auditor to determine the real property entitled to tax exemption. § 122:23-1-03(C).

Supporting Documentation for Application for Certification. The application for certification must be accompanied by the following supporting documentation:

- **Construction Date:** Documentation evidencing the date on which construction or installation of the energy facility begins. This can be accomplished with documentation from the power siting board showing the date on which an application for a certificate under R.C. 4906.20 was filed. § 122:23-1-03(D)(1).
- **Placed-In-Service Date:** A certificate from the applicant stating that no portion of the facility supplied electricity before December 31, 2009. § 122:23-1-03(D)(2).
- **Regulatory Compliance:** Documentation evidencing compliance with “all applicable regulations,” including a certificate stating that all requisite licenses, permits and other approvals have been obtained or will be obtained as and when required; a list of all such licenses, permits or other approvals; a copy of each obtained license, permit or other approvals; and the status for those licenses, permits or other approvals not obtained at the time the application for certification is submitted. § 122:23-1-03(D)(3).
- **First Responders:** A list of fire and emergency responders for each jurisdiction that any part of the energy project is located and a certificate from such fire and emergency responders confirming that the applicant has consulted with the responders in developing a training plan for response to emergency situations related to the energy project. § 122:23-1-03(D)(4). The applicant may defer submission of this certificate and obtain a “conditional certificate,” as discussed later in this summary.
- **Offer to Sell Power/RECs:** A certificate stating that the applicant has complied with the provisions of R.C. 5727.75(F)(8) regarding offers to sell power or renewable energy credits from the energy project to electric distribution utilities or electric services companies. This requirement does not apply to any application for certification filed after the expiration of all requests for proposal issued by electric distribution utilities and electric service companies on or before December 31, 2010. § 122:23-1-03(D)(5). The applicant may also defer submission of this certificate and obtain a “conditional certificate,” as discussed later in this summary.

University Partnership: For projects with a nameplate capacity greater than two megawatts, applicants must submit evidence of a relationship with a

member of the university system or person offering an apprenticeship program that complies with the workforce training rules in R.C. 5727.75(F)(7). § 122:23-1-03(E). The applicant may defer submission of this evidence and obtain a “conditional certificate,” as discussed later in this summary.

County Commission Approval: For projects with a nameplate capacity of five megawatts or greater, applicants must also satisfy the following requirements:

- ODOD receives from at least one board of county commissioners where the energy project is located a certified copy of a resolution that approves the application for certification or declares the county to be an alternative energy zone¹. § 122:23-1-03(F)(1).
- ODOD receives a certificate from the county engineer for each county where the energy project is located to certify compliance with the provisions of R.C. 5727.75(F)(4) regarding the repair, rebuilding, and reinforcement of roads, bridges, and culverts. § 122:23-1-03(F)(2). The applicant may defer submission of this certificate and obtain a “conditional certificate,” as discussed below.
- ODOD receives a certificate from fire and emergency responders for each jurisdiction where the energy project is located, that the applicant has equipped, or has developed in consultation with such responders a plan for equipping, the fire and emergency responders with the appropriate equipment to respond to emergency situations related to the energy project. § 122:23-1-03(F)(3). The applicant may defer submission of this certificate and obtain a “conditional certificate,” as discussed below.

Conditional Certificate. Notwithstanding the requirements for a complete application under § 122:23-1-03(A) and (B), the rules allow for an applicant to defer submission of certain items of required supporting documentation and obtain a “conditional certificate.” Conditional certification will remain in effect generally only for a maximum period of 90 days. Upon expiration of this period of time, the conditional certificate expires automatically. Requirements for conditional certificate requirements are as follows:

- **First Responder Certificate:** A conditional certificate may be issued where the applicant has not yet submitted the first responder certificate described in § 122:23-1-03(D)(4). The application must, however, include a list of such fire

and emergency responders. The first responder certificate must be received by ODOD the earlier of (1) the date that is 90 days after the conditional certificate is issued or (2) the date the energy project is placed in service. In addition, the applicant must certify that the training plan for emergency situations related to the energy project was implemented prior to the date of the first construction activities at the energy project site. § 122:23-1-03(G)(1).

- **Certificate for Offer to Sell Power/RECs:** A conditional certificate may be issued where the applicant has not yet submitted the certificate for offer to sell power/RECs described in § 122:23-1-03(D)(5). Such certificate must be received by ODOD with the construction completion report described in § 122:23-1-05(E) on the due date of such construction completion report. § 122:23-1-03(G)(2).
- **University Partnership:** A conditional certificate may be issued where the applicant has not yet submitted evidence of a relationship with a member of the university system. Such evidence must be received by ODOD the earlier of (1) the date that is 90 days after the conditional certificate is issued or (2) the date the energy project is placed in service. § 122:23-1-03(G)(3).
- **County Commission Approval.** A conditional certificate may be issued where the applicant has not yet submitted the certificate(s) of the county engineer(s) and related agreements as described in § 122:23-1-03(F)(2). Such documentation must be received by ODOD the earlier of (1) the date that is 90 days after the conditional certificate is issued or (2) the date the energy project is placed in service. § 122:23-1-03(G)(4). Additionally, the applicant must certify that the agreement(s) regarding any repair, reinforcement, or rebuilding of roads, bridges, and culverts necessary for construction were in effect prior to the date of the first construction activities at the project site.
- **Emergency Equipment Plan.** A conditional certificate may be issued where the applicant has not yet submitted the certificate from fire and emergency responders for an equipment plan as described in § 122:23-1-03(F)(3). The application must, however, include a list of such fire and emergency responders. The certificate must be received by ODOD the earlier of (1) the date that is 90 days after the conditional certificate is issued or (2) the date the energy project is placed in service. § 122:23-1-03(G)(5).

Communication with Local Jurisdictions and Qualified Energy Project Certificate

Approval by County Commissioners. For projects with a nameplate capacity of five megawatts or greater, ODOD will forward the application to each of the County Commissions and the taxing authority for each taxing unit where any part of the energy project is located. § 122:23-1-04(A). The Commissioners may approve or reject the exemption and have 30 days in which to vote. § 122:23-1-04(B). Failure to approve an application within 30 days constitutes a denial. ODOD will send a notice of the denial to the applicant, the County Commissioners, and the taxing authority for each taxing unit where any part of the energy project is located. § 122:23-1-04(C). The applicant may resubmit its application for certification if the 30-day period has not yet expired.

Issuance of Certificate. When it determines that an application for certification has satisfied all the requirements under R.C. 5727.75, ODOD will issue a certificate which identifies the applicant and each county, taxing unit and permanent parcel number where any part of the project is located, and a sufficiently detailed description of the tangible personal property and real property to be exempted from taxation. § 122:23-1-04(D). ODOD then provides a copy of the certificate to the applicant, the county commissioners and auditor of each county where any part of the energy project is located. Upon receipt of the certificate, the county auditor places the real property described in the certificate on the exempt list. § 122:23-1-04(E).

Construction Reporting

The applicant must file construction progress reports with ODOD by March 1 of each year during which any construction or installation of the energy project occurs. § 122:23-1-05(A). Each construction progress report must include the following:

- **Capacity:** The project's nameplate capacity. § 122:23-1-05(A).
- **Status:** The status of construction. § 122:23-1-05(A).
- **Employment Report:** A report describing the total number of full-time equivalent employees working on the construction during the reporting period, the total number of such full-time employees domiciled in Ohio, the number of days that construction was in progress, and the

number of days and hours worked by each individual employed in the construction of the energy project. § 122:23-1-05(C).

- Documentation: Supporting documentation for the employment report, including a list of individuals employed in the construction during the reporting period, their residence addresses, and a certificate from each employee with an Ohio address that he or she is Ohio-domiciled. The applicant must retain these records for a period of at least three years after the energy project is placed in service and make them available to ODOD upon request. § 122:23-1-05(D).
- Completion Report: Construction completion report within 90 days after the energy project is placed-in-service. This report must include the date of construction completion, each permanent parcel number for real property where any part of the energy project is located, and the status of any repair or rebuilding of roads, bridges or culverts. § 122:23-1-05(E). The construction completion report must also include an appendix of tangible personal property to be exempt, the cost of each such item of tangible personal property, and the county in which the item of tangible personal property is located. § 122:23-1-05(G).

Amount of Annual Service Payments

Annual Service Payments. The annual PILOT payments made for qualified energy projects is calculated according to the ratio of Ohio-domiciled full-time equivalent employees to total full-time equivalent employees during the construction of the energy facility. The data to be used in this calculation is provided to ODOD by the applicant's employment information included in the construction completion report. § 122:23-1-06(A).

Estimate of Employees. Where the project does not require certification from the power siting board under R.C. 4906.20, ODOD will project the number of full-time equivalent employees to be employed on the construction or installation of the project. In order to do so, the applicant must submit to ODOD a plan that provides a reasonable estimate of the number of individuals to be employees and the duration of their employment and a calculation of full-time equivalent employees to be employed based on such estimates. § 122:23-1-06(B).

Form of Receipt. ODOD must publish a form of receipt to be used by county treasurers to certify receipt or non-receipt of annual service payments. § 122:23-1-06(C).

Continuing Compliance with Requirements for Exemption

Annual Nameplate Capacity Report. The applicant must file an annual nameplate capacity report with ODOD on March 1 of each year following any calendar year during which an exemption under R.C. 5727.75 is in effect for the energy project. § 122:23-1-07(A). The annual nameplate capacity report must include the following:

- Regulatory Approvals: A certificate that all requisite licenses, permits and other approvals have been obtained or will be obtained as and when required; a list of all such licenses, permits or other approvals; a copy of each obtained license, permit or other approvals; and the status for those licenses, permits or other approvals not obtained at the time the application for certification is submitted. § 122:23-1-07(B)(1).
- Service Payments: Documentation that the applicant has made annual service payments as required by R.C. 5727.75(G) and, if applicable, any other additional payments required by a board of county commissioners where any part of the energy project is located. § 122:23-1-07(B)(2).
- Road Repair: For projects with a nameplate capacity of five megawatts or greater, a certificate from each county engineer regarding the repair, rebuilding, and reinforcement of roads, bridges and culverts that continue beyond the completion of construction. § 122:23-1-07(B)(3).
- Training First Responders: For projects with a nameplate capacity of five megawatts or greater, a report of training activities and a certificate from any fire or emergency responders, where the applicant has agreed with such fire or emergency responders to a training plan that continues beyond the completion of construction of the energy project. § 122:23-1-07(B)(4).
- Equipping First Responders: For projects with a nameplate capacity of five megawatts or greater, a report of equipment provided to and a certificate of fire or emergency responders, where the applicant has agreed with such fire or emergency responders to an equipment plan that continues beyond the completion of the construction of the energy project. § 122:23-1-07(B)(5).
- University Partnership: For projects with a nameplate capacity of two megawatts or greater, a report of the status of the workforce training relationship and a certificate from the educational institution or apprenticeship program, where the

Green Strategies Group

Maria J. Armstrong, Chair
614 . 227 . 8821
marmstrong@bricker.com

Sally W. Bloomfield
614 . 227 . 2368
sbloomfield@bricker.com

Scott W. Davis
614 . 227 . 4879
sdavis@bricker.com

Susan B. Greenberger
614 . 227 . 8848
sgreenberger@bricker.com

Warren I. Grody
614 . 227 . 2332
wgrody@bricker.com

Raymond C. Headen
216 . 523 . 5471
rheaden@bricker.com

Gregory J. Lestini
614 . 227 . 4893
glestini@bricker.com

Gordon F. Litt
614 . 227 . 2305
glitt@bricker.com

Frank L. Merrill
614 . 227 . 8871
fmerrill@bricker.com

Thomas J. O'Brien
614 . 227 . 235
tobrien@bricker.com

Terrence O'Donnell
614 . 227 . 2345
todonnell@bricker.com

David A. Rogers
614 . 227 . 2367
drogers@bricker.com

Mary R. True
614 . 227 . 4873
mtrue@bricker.com

Kurtis A. Tunnell
614 . 227 . 8837
ktunnell@bricker.com

Matthew W. Warnock
614 . 227 . 2388
mwarnock@bricker.com

Charles H. Waterman III
614 . 227 . 2378
cwaterman@bricker.com

applicant has an arrangement with such educational institution or apprenticeship program that continues beyond the completion of the construction of the energy project. § 122:23-1-07(B)(6).

- **Ownership:** Report of change of ownership, if any, of the qualified energy project, which must include the identity of the transferee, the date of ownership change, nature of transaction in which the property comprising the energy project was transferred; description of property transferred, and acquisition price paid by the transferee. § 122:23-1-07(C).
- **Decommissioning:** Report of decommissioning of any part of the project during the period covered by the annual nameplate capacity report, which must include an appendix listing each item of tangible personal property decommissioned during the reporting period and the original cost and year of placement into service of each such item of tangible personal property. § 122:23-1-07(D).

Signature; Failure to Report; Trade Secrets

Signature. The application and each report must certify the information contained therein is true, correct, and complete. § 122:23-1-08(A).

Failure to Report. Should an applicant fail to submit any reports required by R.C. 5727.75, ODOD will send written notice of noncompliance. If the applicant does not cure the noncompliance, ODOD may initiate the process to revoke certification. If information omitted from a report is a certificate to be provided by a third party, and the certificate is omitted due to lack of response to a timely request for such information for a reason other than the applicant's noncompliance with requirements related to the certification, ODOD will not consider the report to be delinquent if the applicant includes in the report a copy of the request made to the third party for the certificate, pursues the request for the certificate diligently, and provides a copy of the certificate to ODOD promptly upon receipt. § 122:23-1-8(B).

Trade Secrets. Information qualifying as a trade secret under Ohio law may be exempt from release as a public record. The applicant should make trade secret information known in its application by placing

an asterisk before and after each line containing trade secret information and underlining the information considered to be trade secret. § 122:23-1-08(C).

Revocation of Certification by Director

Notice of Investigation for Noncompliance. Failure to comply with the requirements provided in R.C. 5727.75 or the rules may result in revocation of certification. § 122:23-1-09(A). The director must send a notice to the applicant that it is investigating noncompliance and an opportunity to respond. The applicant has 30 days to respond to this notice. § 122:23-1-09(A).

Curing Noncompliance. Where the director determines that the applicant is noncompliant with R.C. 5727.75 or the rules, the applicant has 60 days to cure the noncompliance. § 122:23-1-09(B).

Notice of Intention to Revoke. If the applicant fails to cure noncompliance with R.C. 5727.75 or the rules, the director may notify the applicant of the director's intention to revoke certification if the director determines that the noncompliance is material. The director will deliver any notice of intention to revoke in writing. § 122:23-1-09(C). The applicant must respond in writing to the notice of intention to revoke within 30 days.

Hearing. In the applicant's written response pursuant to § 122:23-1-09(C), the applicant may also request a hearing on the proposed revocation. § 122:23-1-09(D). If a hearing is not requested, the director must make a final determination regarding the revocation based on the written record. § 122:23-1-09(E). The hearing must be conducted in a manner that complies with R.C. 119.09.

Footnote

¹ Note that each county in which a project is located must sign off in order for the exemption to apply to the equipment located in that particular county.

For additional information about SB 232, please contact Terrence O'Donnell at 614.227.2345/todonnell@bricker.com, Mark Engel at 513.870.6565/mengel@bricker.com or Nellie So at 614.227.4827/nelso@bricker.com.