



MEMORANDUM

TO: Members of the Authority
FROM: Tim Sullivan, Chief Executive Officer
DATE: June 9, 2021
Subject: Approval of Amendments to Existing Offshore Wind Economic Development Tax Credit rules

Summary:

Members of the Board are requested to approve amendments to existing Offshore Wind Economic Development Tax Credit rules and to authorize staff to file the amended rules for promulgation in the New Jersey Register, subject to final review and approval by the Office of the Attorney General and the Office of Administrative Law, and to be adopted and become effective after the public comment period.

Background on the ERA:

On January 7, 2021, Governor Phil Murphy signed the New Jersey Economic Recovery Act of 2020 (ERA) into law. The ERA consists of a package of tax incentives, financing, and grant programs that address the ongoing economic impacts of the COVID-19 pandemic and build a stronger, fairer New Jersey economy.

The ERA includes the creation or modification of 15+ economic development programs, including:

- Tax credits to incentivize job creation and capital investment;
- Investment tools to support and strengthen New Jersey’s innovation economy;
- Tax credits to strengthen New Jersey’s communities including revitalization of brownfields and preservation of historic properties;
- Financial resources for small businesses, including those impacted by the COVID-19 pandemic;
- Support for new supermarkets and healthy food retailers in food desert communities;
- Additional tax credits for film and digital media.
- An expansion of the Offshore Wind Economic Development Tax Credit Program

Background on the Offshore Wind Economic Development Tax Credit Program:

The Offshore Wind Economic Development Act, P.L. 2010, c. 57, as amended by P.L. 2018, c. 17, authorized the New Jersey Economic Development Authority (“NJEDA” or “Authority”) to approve up to \$100 million in tax credits for the development of certain qualified wind energy facilities in wind energy zones.

On October 17, 2018 the Authority adopted [special new rules](#) to implement the program. These rules were subsequently readopted on October 17, 2019 following the completion of the standard rulemaking and comment process.

The current Offshore Wind Economic Development Tax Credit Program, as amended by the ERA, provides tax credits for capital investment in a qualified wind energy facility located in New Jersey. The program is designed to spur employment growth and offshore wind supply chain development as a result of capital investment in land-based offshore wind industry projects.

In order to receive tax credits through the Offshore Wind Economic Development Tax Credit Program, a business must:

- Make or acquire capital investments totaling at least \$50 million in a qualified wind energy facility. If the business is a tenant, the business must lease an area of the qualified wind energy facility that represents at least a \$17.5 million capital investment in the facility.
- Create a minimum of 300 new full-time jobs over the four-year commitment period. A tenant may meet the employment requirements with other tenants at the qualified wind energy facility. A business may create between 150 and 300 new full-time jobs over the commitment period and receive a prorated award.
- Demonstrate a net positive economic benefit to the State.

Limited by a net positive economic benefits test, the tax credits are equal to 100 percent of the business’s qualified capital investments. The credits can be used against corporation business or insurance premiums tax.

The calculation of new full-time employees may include select positions resulting from equipment supply coordination agreements with equipment manufacturers, suppliers, installers, and operators associated with the supply chain required to support the qualified wind energy facility.

Tenants in qualified wind energy facilities may also receive tax credits, if they occupy space in a qualified wind energy facility that proportionally represents at least \$17.5 million of the capital investment in the facility, and, employ at least the minimum number of new, full-time employees in that facility.

Businesses must apply for the tax credits by July 1, 2025 and satisfy the capital investment and employment conditions for award of the credits by July 1, 2028.

Revisions to the Offshore Wind Economic Development Tax Credit Program Rules

The NJEDA is proposing amendments to the Offshore Wind Economic Development Tax Credit Program to implement certain statutory revisions pursuant to section 109 of the ERA.

The primary changes enacted by the law include:

- Adjusting the period over which tax credits are earned and paid out;
- Adjusting the minimum number of jobs required for the program by:
 - Allowing for the Authority to create a pro-rated formula to award credits to projects that create between 150-300 new full-time jobs;
 - Allowing for a project to ramp-up jobs over time;
 - and
- Expanding the eligible geography for the program from seven counties to the entire state.

In addition to providing clarity on how to address the above statutory changes, the proposed amendments also include policy updates on eligible costs, calculating net benefits test parameters, and fees.

Adjusting the period over which tax credits are earned and paid

The Program previously awarded tax credits for approved and certified projects over the course of ten years. The new statute states that the award of a tax credit shall be structured so that the award shall be comprised of four years, each equaling 25 percent of the total value of the tax credit. The statute also states that the amount of the credit shall be taken over a five-year period, at the rate of one-fifth of the total amount of the business's credit for each tax accounting or privilege period of the business.

Accordingly, the proposed amendments to the rules provide the following:

- The four-year period, defined as the *commitment period*, and the corresponding one-fourth award amounts serve as the mechanism by which the award is earned.
- The five-year period, defined as the *eligibility period*, and the corresponding one-fifth award amounts, serve as the mechanism by which the tax credit is taken.

Thus, a business would earn the tax credits over a four-year period but receive the tax credits over the course of five years at a rate of one-fifth of the total amount of the business's credit. However, if a business commits to staying in the State for a longer period of time (e.g., net benefits are calculated based on a 20-year period since the business is signing a 20-years lease), the net benefit calculation will be extended to match the site commitment up to 20 years. In that case, the project commitment period would be extended for the full net benefit term, and the project would be subject to recoupment of tax credits if the business did not meet its commitment requirements. (See below for more details on recoupment.)

Allowing for projects to ramp up jobs over time

The statute and rules previously required that a project create all new full-time jobs before a project could be awarded tax credits. The new statutory language creates a ramp-up mechanism that allows the business to start earning and being paid tax credits if they meet certain minimum numbers of jobs over the first four years of their project. This ramp-up feature is implemented through the definition of “Minimum number of new, full-time employees,” as follows:

- *For the first year of the award, at least a cumulative 100 new, full-time employees compared to the number of full-time employees at the time of application.*
- *For the second year of the award, for a privilege period or taxable year following the first year of the award, at least a cumulative 150 new, full-time employees compared to the number of full-time employees at the time of application.*
- *For the third year of the award, for a privilege period or taxable year following the second year of the award, at least a cumulative 200 new full-time employees compared to the number of full-time employees at the time of application.*
- *For the fourth year of the award, for a privilege period or taxable year following the third year of the award, at least a cumulative 300 new full-time employees compared to the number of full-time employees at the time of application.*

Minimum Number of New Jobs – allowing for projects between 150-300

The statute previously required a minimum threshold of 300 new, full-time employees at a qualified wind energy facility to be eligible for the program. The statute now allows for projects with less than 300 but more than 150 full-time employees to be eligible, but to receive a prorated award. The proposed rules established the prorated award formula as follows:

The amount of the credit allowed for projects approved with less than 300 new full-time employees and at least 150 new full-time employees shall, except as otherwise provided, be equal to the following percentage of the capital investment:

- *150 new, full-time employees compared to the number of full-time employees at the time of application for an award calculated at 50 percent of the capital investment.*
- *200 new, full-time employees compared to the number of full-time employees at the time of application for an award calculated at 65 percent of the capital investment.*
- *250 new, full-time employees compared to the number of full-time employees at the time of application for an award calculated at 85 percent of the capital investment.*

Accordingly, the rule amendments contains a new definition of “Prorated annual minimum number of new full-time employees” to take into account the above minimum for prorated award.

Expanding the eligible geographies

The statute previously defined the eligible geographies only as the southern seven counties in the state. The new statutory language expands that definition to include all counties in the state.

Updates to the Net Positive Economic Benefits Test Parameters:

Historically the Authority has undertaken the net positive economic benefit test analysis within a variety of past programs relying upon a proprietary model that was developed by a third-party, but largely managed in-house. In the interest of greater transparency and consistency the Authority has determined the best approach moving forward for such analysis is to rely upon an external third-party model – IMPLAN – that would not need to be updated or maintained by the

NJEDA. Staff presented the model and its use to the Board as part of the approval of the Emerge program.

The timeframe for the calculation of the net positive economic benefits test starts with the commitment period, which is now four years. As mentioned above, if the company demonstrates a longer commitment to the site, the net benefit period can be extended for the site commitment (up to 20 years) and the company will be required to extend the commitment period correspondingly. If the company does not satisfy its commitment during this extended commitment period, the company is subject to recoupment provisions. The amount of the tax credit award recouped is based on the additional amount of tax credits received due to the extended net benefit period from the time the company fails its commitment through end of the extended commitment period.

The requirement for the net positive economic benefit to equal at least 110 percent of the approved tax credit allocation amount remains the same. The Statutory intent of this program is extremely targeted providing significant subsidy in the form of up-front cost recovery of capital investment to promote catalytic growth in a nascent industry in the State. Given this intent and the relative programmatic difference of a capital investment-based program to a job based program, such as Emerge, the decision was made to leave the requirement for the net positive economic benefit unchanged.

For the purposes of calculation of the net positive economic benefit test, the program previously considered only direct benefits. The proposed rules will now consider indirect benefits if a business does not include new full-time positions resulting from an equipment supply coordination agreement in the calculation of its minimum number of new, full-time employees.

Additionally, the rule amendments make a change in the eligible capital investment that can be included in the net benefit test. Previously, eligible capital investment before application was not included in the net benefit. The rule amendments propose including all eligible capital investment in the net benefit test. While a departure from historical policy within other NJEDA incentive programs, this is consistent with the legislature's decision not to include any material factor finding to support an award.

Clarification of Soft Costs:

The definition of soft costs has been changed to include all costs associated with financing, design, engineering, legal, or real estate commissions, including but not limited to, architect fees, permit fees, loan origination and closing costs, construction management, and freight and shipping delivery but not including early lease termination costs, air fare, mileage, tolls, gas, meals, packing material, marketing, temporary signage, incentive consultant fees, Authority fees, loan interest payments, escrows, or other similar costs. The change is intended to clarify what the Authority will not allow in its evaluation of soft costs that may be included in determining investment size and potential tax credit awards. This is consistent with similar policy put forth within the recently presented Emerge rules.

Rulemaking Process and Accepting Applications

If the Board approves the attached rule amendments, they will be published in the New Jersey Register for a 60-day public comment period, as per normal Administrative Procedures Act process. After the public comment period, the Authority must respond to any formal public comments, and then submit final rule amendments for adoption.

The Authority may accept applications based upon any draft rule amendments approved for publication by the Board prior to the completion of the full Administrative Procedures Act process. However, all applicants will be at risk and will be required to comply with the requirements of the final adopted rules upon the conclusion of the formal comment process.

Compliance with Executive Order 63

In accordance with the Executive Order 63 directive to ensure outreach efforts are made to the public and affected stakeholders for agency rulemaking, the Authority issued a news release advising the public that the draft Offshore Wind Economic Development Tax Credit Program rules were available for review and of the opportunity to provide informal input. NJEDA staff also alerted key offshore wind industry stakeholders directly of this opportunity via email.

Additionally, the public were able to submit written feedback through the NJEDA's Economic Recovery Act transparency website (www.njeda.com/economicrecoveryact) or through the newly established email account (offshorewindtaxcredit@njeda.com) from April 22th through April 29th, 2021.

Chief Compliance Officer Certification of Draft Rule Proposal

Pursuant to Section 101(a) of the Economic Recovery Act, the Authority is required to appoint a Chief Compliance Officer (CCO) to manage the Division of Portfolio Management and Compliance in the Authority. Among other responsibilities, the CCO shall:

(4) prior to the adoption of any rule or regulation by the authority or the board related to the general administration of the programs administered by the authority pursuant to [the ERA] or any other regulation specifically related to the recapture of economic development incentive award values, review and certify that the provisions of program rules or regulations provide the authority with adequate procedures to pursue the recapture of the value of an economic development incentive in the case of substantial noncompliance, fraud, or abuse by the economic development incentive recipient, and that program rules and regulations are sufficient to ensure against economic development incentive fraud, waste, and abuse.

As the Authority has designated Bruce Ciallella as the CCO and in that capacity, Mr. Ciallella has reviewed the proposed amendments to the rules for the Offshore Wind Economic Development Tax Credit Program and is prepared to sign the certification, subject to the Board taking action to approve the same for submission to the New Jersey Office of Administrative Law for publication in an upcoming issue of the New Jersey Register.

Fees

Prior to establishing the proposed fee structure for this program as outlined in the proposed new rules, the Authority conducted an internal review to estimate what the administrative costs to the authority are likely to be to administer the Offshore Wind Economic Development Tax Credit Program. The Authority considered areas cross-organizationally where the Offshore Wind Economic Development Tax Credit Program (as well as other new or modified programs under the ERA) may require staff time, and the estimated percentage of staff time that would be required.

The specific fee structure is outlined in the proposed amendments to the rules, on a tiered basis based on the number of new full-time employees. In response to criticism by the Comptroller that within previous programs where fees were based on a percentage the Authority had a perceived conflict of interest, tiered flat-fee model is being proposed. The two tiers are (i) projects that create less than 300 but more than 150 full-time employees at the qualified wind energy facility, and (ii) projects that create a minimum of 300 full-time employees at the qualified wind energy facility. An applicant for the Offshore Wind Economic Development Tax Credit Program is responsible for a one-time non-refundable application fee on a tiered basis based on the number of new full-time employees. Applicants are also responsible for a non-refundable fee, on a tiered basis, at the time of execution of the non-binding letter of intent. Further, applicants are responsible for annual servicing fees, fees to apply for a tax credit transfer and when seeking any administrative changes, additions or modifications to the tax credit, on a tiered basis, based on the number of full-time employees.

Please refer to the proposed new rules in Appendix A for information on the specific fees and tiered fee amounts.

Recommendation:

The Members of the Board are requested to file the amended rules for promulgation in the New Jersey Register, subject to final review and approval by the Office of the Attorney General and the Office of Administrative Law, and to be adopted and become effective after the public comment period.



Tim Sullivan, CEO

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Appendix A: Offshore Wind Economic Development Tax Credit Rules