



**H.B. 466**

124th General Assembly  
(As Introduced)

Rep. Raga

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**BILL SUMMARY**

- Redefines "air quality facility" under the air quality development authority law, thereby broadening the types of projects that may be financed through the Ohio Air Quality Development Authority, and the types of projects the mortgage payments of which may be insured through a program of the Department of Development.
- Authorizes a tax credit against the corporation franchise tax for expenditures made for any tangible personal property that constitutes any such air quality facility.

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**CONTENT AND OPERATION**

The bill broadens the definition of "air quality facility." Direct effects of the broadened definition are to expand the types of facilities that the Ohio Air Quality Development Authority (OAQDA) may finance under its continuing statutory authority, and to expand the types of projects for which the Director of the Department of Development (DOD) may provide mortgage insurance. The broadened definition also is used in provisions that make up the bulk of the text of the bill and that grant a corporation franchise tax credit for expenditures made for an air quality facility. The analysis that follows describes the broadened definition first, and then discusses its implications for OAQDA and DOD authority, followed by an explanation of the air quality expenditures tax credit.

**Definition of "air quality facility"**

Current law describes the types of facilities that qualify as "air quality facilities" under the air quality development authority law, and the bill modifies those descriptions as follows, in effect adding to the types of facilities that so qualify:

(1) Under current law, an "air quality facility" is any method, property modification or replacement, process, device, structure, or equipment that removes, reduces, prevents, contains, alters, conveys, stores, disperses, or disposes of air contaminants or substances containing air contaminants, or that renders less noxious or reduces the concentration of air contaminants in the ambient air, expressly including, without limitation, facilities and expenditures that qualify as air pollution control facilities under specified federal tax law. The bill adds as an "air quality facility" any method, property modification or replacement, process, device, structure, or equipment that performs any of those specified air cleansing functions *either prior to, during, or subsequent to the combustion of any energy source*. (Sec. 3706.01(G).)

(2) Under current law unchanged by the bill, an "air quality facility" also is any motor vehicle inspection station operated in accordance with Ohio air pollution control law and any equipment used for such inspection (sec. 3706.01(G)(2)).

(3) Under current law, an "air quality facility" is any property or portion of property used for the collection, storage, treatment, utilization, processing, or final disposal of solid waste resulting from any method, process, device, structure, or equipment that removes, reduces, prevents, contains, alters, conveys, stores, disperses, or disposes of air contaminants, or that renders less noxious or reduces the concentration of air contaminants in the ambient air. The bill expressly includes *air contaminants emitted prior to, during, or subsequent to the combustion of an energy source*. (Sec. 3706.01(G)(3).)

(4) Under current law, an "air quality facility" additionally is any property, device, or equipment that promotes the reduction of emissions of air contaminants into the ambient air through energy efficiency or energy conservation improvements. The bill also expressly includes any property, device, or equipment that promotes the reduction of emissions of air contaminants into the ambient air *through the use of a renewable fuel as a primary energy source*. (Sec. 3706.01(G)(4).) The bill defines "renewable fuel" as water, wind, solar, geothermal, or biomass resources (sec. 3706.01(R)).

(5) The bill proposes to include as an "air quality facility" any air quality project for which the Director of Development, under continuing electric restructuring law (sec. 4928.62), authorizes the use of moneys in the Energy Efficiency Revolving Loan Fund created under that law (sec. 3706.01(G)(5)).

(The bill does not define "air quality project," and the term does not explicitly appear in the electric restructuring law. The Energy Efficiency Revolving Loan Fund is funded under statute through a uniform, temporary rider payable, beginning January 1, 2001, by all electric consumers on their electric bills

(sec. 4928.61). As specified in continuing electric restructuring law, the Fund is to be used by the Director of Development to provide financial assistance in the form of a below-market loan, loan guarantee, or linked deposit for a loan for any project that meets all of the following criteria: (a) the project will include an investment in products, technologies, or services, including energy efficiency for low-income housing, for residential, small commercial and small industrial business, local government, education institution, nonprofit entity, or agricultural customers of an electric distribution utility in Ohio or of a municipal electric utility or electric cooperative whose customers participate in the funding of the Fund, (b) the project will improve energy efficiency in a cost-efficient manner using best standards and best practices in the context of the total facility or building, (c) the project will benefit the economic and environmental welfare of the Ohio citizenry, and (d) the receipt of financial assistance is a major factor in the applicant's decision to proceed or invest in the project (sec. 4928.62(A)). To date there appear to be no DOD administrative rules governing this financial assistance program.)

(6) Under current law, an "air quality facility" includes any property or system used in whole or in part for any of the purposes described as current law in (1) to (4) above, whether another purpose also is served. With the bill's addition of an air quality project under (5) above, an "air quality facility" includes any property or system used in whole or in part for any of the purposes described as current law in (1) to (5) above, whether another purpose also is served. (Sec. 3706.01(G).)

(7) Under current law, "air quality facility" includes any property or system that is incidental to, has to do with, or the end purpose of which is, any of the purposes described as current law in (1) to (4) above. With the bill's addition of an air quality project under (5) above, an "air quality facility" includes any property or system that is incidental to, has to do with, or the end purpose of which is, any of the purposes described as current law in (1) to (5) above. (Sec. 3706.01(G).)

(8) The bill proposes to include as an "air quality facility" any structure or equipment used solely for the manufacture of any of the items meeting the description of an "air quality facility" under the bill in (1) to (5) above (sec. 3706.01(G)).

Current law also states that air quality facilities "for industry, commerce, distribution, or research, including public utility companies," are determined to be those that qualify as facilities for the control of pollution and thermal pollution related to air under the provision of the Ohio Constitution authorizing state economic development loans and loan guarantees. The bill removes the phrase "for industry, commerce, distribution, or research, including public utility companies" and states that air quality facilities "located within this state" are

determined to be those that so qualify under the constitutional provision. (Sec. 3706.01(G).)

### **OAQDA financing authority**

The bill's broadened definition of "air quality facility" has the effect of broadening the types of projects that may be financed by the OAQDA under other provisions of air quality development authority law not in the bill. The OAQDA generally has the power to make loans for the acquisition or construction of air quality facility projects; acquire, operate, or improve any such project; and issue revenue bonds and notes for the purpose of paying any part of the cost of any air quality facility project (secs. 3706.04, 3706.041, and 3706.05).

By expanding the definition of "air quality facility," the bill also affects the duty of a public utility under a related law that uses that defined term. Under the related law, a public utility seeking authority from the Public Utilities Commission (PUCO) to issue securities to finance the installation, construction, extension, or improvement of an "air quality facility" must consider the availability of OAQDA financing and must demonstrate to the PUCO that the proposed financing will be obtained on the best terms obtainable (sec. 4905.40(H)).

### **DOD financing authority**

Because development financing law not in the bill uses the term "air quality facility" as defined under the bill, the bill has the effect of broadening the types of projects for which the Director of Development is authorized to use state revenue bond proceeds and other moneys to insure a mortgage under such development financing law. Specifically, the development financing law authorizes the use of the Mortgage Insurance Fund to insure or make advance commitments to insure not more than 90% of any mortgage payment required for specified projects or facilities, including an air quality facility as defined under air quality development authority law (sec. 122.451). The Fund includes moneys allocated by the Director from proceeds resulting from the sale of revenue bonds for development financing purposes and from other specified sources (sec. 122.561).

### **Corporate franchise tax credit for air quality expenditures**

The bill establishes a tax credit against the state corporation franchise tax for air quality expenditures incurred for certain coal-fired electric generating facilities or coal consumption facilities. Details of the tax credit appear below.

### **Bases for the amount of the air quality expenditures tax credit**

"Air quality expenditures" under the bill consist of the "cost" incurred by the "owner" of an "eligible facility" for "air quality equipment" located at an

"eligible facility" and placed in service after the bill's effective date and on or before December 31, 2010. In the case of air quality equipment leased or subleased to the owner of an eligible facility, "air quality expenditures" means, with respect to the lessee or sublessee, an amount equal to that portion of the cost paid or to be paid by the lessee or sublessee at the eligible facility, provided the lessee or sublessee is contractually obligated to amortize at least 80% of those costs through lease payments to be made to the lessor or sublessor and no other person claims the air quality facility tax credit with respect to those expenditures. (Sec. 5733.48(A)(3).)

For purposes of the definition of "air quality expenditures," "air quality equipment" means tangible personal property that constitutes an air quality facility as defined in air quality development authority law (sec. 3706.01) (sec. 5733.48(A)(2)).

Additionally, "cost" has the same meaning as under air quality development authority law (sec. 5733.48(A)(4)). Under that law,

"[c]ost" as applied to an air quality project [under air quality development authority law] means the cost of acquisition and construction, the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, and interests required for such acquisition and construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of acquiring or constructing and equipping a principal office and sub-offices of the authority, the cost of diverting highways, interchange of highways, and access roads to private property, including the cost of land or easements for such access roads, the cost of public utility and common carrier relocation or duplication, the cost of all machinery, furnishings, and equipment, financing charges, interest prior to and during construction and for no more than eighteen months after completion of construction, engineering, expenses of research and development with respect to air quality facilities, legal expenses, plans, specifications, surveys, studies, estimates of cost and revenues, working capital, other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing such project,

administrative expense, and such other expense as may be necessary or incident to the acquisition or construction of the project, the financing of such acquisition or construction, including the amount authorized in the resolution of the authority providing for the issuance of air quality revenue bonds to be paid into any special funds from the proceeds of such bonds, and the financing of the placing of such project in operation. Any obligation, cost, or expense incurred by any governmental agency or person for surveys, borings, preparation of plans and specifications, and other engineering services, or any other cost described above, in connection with the acquisition or construction of a project may be regarded as a part of the cost of that project and may be reimbursed out of the proceeds of air quality revenue bonds as authorized by [Chapter 3706. of the Revised Code]. (Sec. 3706.01(I).)

Additionally, for the purposes of the term "air quality expenditures," the bill provides that an "eligible facility" is any of the following: (a) a coal-fired electric generating facility located in Ohio, (b) a coal-fired electric generating facility that is located outside Ohio and, under specified public utility rate-making law (sec. 4909.15), was included at any time as property used and useful in rendering the public utility service for which rates were fixed and determined under rate-making law (Chapter 4909.), or (c) a coal consumption facility located within Ohio that is owned or operated by an ultimate consumer of electricity that uses more than 45 million kilowatt-hours of electricity each calendar year (sec. 5733.43(A)(1)).

Under the bill, the term "owner" of an eligible facility generally means the owner or operator of an eligible facility that has made air quality expenditures, regardless of whether the owner or operator is subject to the corporation franchise tax (sec. 5733.48(A)(5)).

**Amount of the tax credit; role of the Power Siting Board regarding such amount**

**Overall cap on total allowable credits.** The bill places a cap of \$50 million on the total amount of corporation franchise tax credits claimed in any tax year by all taxpayers for air quality expenditures that are not "exempt expenditures" (sec. 5733.48(B)(2)). Under the bill, "exempt expenditures" are air quality expenditures at an eligible facility that is first placed in service on or after January 1, 2002; or air quality expenditures allocable to any increased generating capacity added on or

after January 1, 2002, to an eligible facility that is placed in service before that date (sec. 5733.48(A)(7)).

The bill specifies that, if the cap is exceeded in any tax year, only the first \$50 million of air quality expenditures tax credits are to be allowed for that tax year, and all other credits for air quality expenditures that are not exempt expenditures must be deferred until the earliest tax year in which the allowance of such credits is no longer deferred. Additionally, among air quality expenditures that are not exempt expenditures, priority must be given to such expenditures for air quality equipment that is first placed in service. Only when all of the available credits allocable to a particular item of air quality equipment have been allowed for a particular tax year will a credit be allowed in that tax year for an item of air quality equipment next placed in service. (Sec. 5733.48(G).)

**Total allowable credit for a taxpayer.** Subject to the overall cap on allowable air quality expenditures tax credits in a tax year, the total allowable amount of an air quality expenditures tax credit authorized by the bill for any taxpayer is the lesser of 66 2/3% of the owner's air quality expenditures or the amount of the present value determination made by the Power Siting Board (PSB) (sec. 5733.48(B)(2)).

Specifically, the bill requires the PSB to determine the present value of the benefits reasonably expected to be realized as the result of installing the air quality equipment for which an air quality expenditures tax credit is to be claimed under the bill, and the present value of the credit with respect to that equipment (sec. 5733.48(F)(1)). If the PSB determines that the present value of such benefits is *not* likely to exceed the present value of the credit, the amount of the credit must be reduced such that its present value is equal to the PSB-determined present value of the benefits. If the credit is not so reduced, the credit is to equal 66 2/3% of the owner's air quality expenditures. (Sec. 5733.48(F)(3).)

Further, the bill specifies that, not later than 45 days after an application is filed, the PSB must issue to the applicant and the Tax Commissioner a written determination of the PSB's findings. If the PSB fails to issue the determination within the required time, the PSB is deemed to have determined that the present value of the benefits is likely to exceed the present value of the credit, and the credit is to be equal to 66 2/3% of the owner's air quality expenditures. (Sec. 5833.48(F)(4).)

The PSB must make its present value determination pursuant to procedures and standards prescribed in the bill, as follows.

**Procedures for a present value determination by the PSB.** The bill requires the owner of an eligible facility to apply to the PSB, on an application

provided by the PSB, for a determination of the present value of an air quality expenditures tax credit (sec. 5733.48(B)(1)). For this purpose, the bill provides that an "owner" includes a person that will be the owner of air quality equipment upon its completion or installation (sec. 5733.48(A)(5)).

The bill requires that the application set forth all of the following: (a) a description of the air quality equipment for which air quality expenditures will be made, (b) a description of the eligible facility, (c) the owner's estimate of the present value of the benefits reasonably expected to be realized from the eligible facility as a result of the proposed air quality expenditures for air quality equipment, together with an explanation of how the present value of those benefits was calculated and any evidence to support that calculation, and (d) the owner's estimate of the tax credit that will be claimed and the present value of that credit (sec. 5733.48(B)(1)).

The bill requires the PSB to review such applications and make present value determinations, and to adopt rules, consistent with the bill's tax credit provisions, establishing the form of an application and the procedures for filing an application (sec. 4906.03(A)(5) and (6), with a technical change to sec. 4906.01).

The bill also provides that a present value determination by the PSB is final and is not subject to appeal. It additionally states that nothing in the bill's tax credit provisions prevents the filing of an application for a determination of present value for air quality equipment that was the subject of a prior PSB determination. (Sec. 5733.48(F)(5).)

**Standards for a present value determination by the PSB.** Under the bill, the PSB must determine present value by using a discount rate it selects that is consistent with any discount rate established at that time by the Tax Commissioner to determine present value for other purposes, or, in the absence of such a rate established by the Tax Commissioner, a discount rate established at that time in the Internal Revenue Code for the purpose of determining present value under the federal income, estate, or gift tax law (sec. 5733.48(F)(1)).

The bill also requires the PSB to adopt rules, consistent with the bill's tax credit provisions, establishing the benefits that are to be considered in making a present value determination (sec. 4906.03(A)(6)). In determining the present value of the benefits reasonably expected to be realized as the result of installing air quality equipment, the bill requires that the PSB consider all of the following: (a) the value of all wages and other compensation from direct and indirect employment, including employment related to the installation of the equipment as well as to the operation of the eligible facility, that is reasonably expected to be created or retained at the eligible facility as a result of installing the equipment, (b) the expected state and local property, corporation franchise, and income tax

revenues resulting from operation of the eligible facility, (c) the benefits associated with the use or continued use of coal at the eligible facility, (d) whether installing the air quality equipment furthers the state policy regarding retail electric service set forth in continuing electric restructuring law (sec. 4928.02), and (e) any other economic benefits set forth in rules adopted by the PSB under the bill, which benefits the PSB considers to be appropriate in its determination. In the case of air quality equipment that is installed to comply with federal or state law, including the federal Clean Air Act, the PSB expressly must assume that the eligible facility at which such equipment is to be installed would cease operating if the equipment is not installed. (Sec. 5733.48(F)(2).)

### **Timing of the tax credit**

The bill provides that the air quality expenditures tax credit is nonrefundable (sec. 5733.48(B)(1)). Under the bill, any credit amount in excess of the corporation franchise tax due, after allowing for any other corporation franchise tax credits in accordance with their statutory order, may be carried forward each tax year until fully used. However, the amount of the excess credit allowed in any such year will be deducted from the balance carried forward. (Sec. 5733.48(C).)

An air quality expenditures tax credit may first be claimed beginning in tax year 2005 (sec. 5733.48(B)(1)). Such credit is the 24th type of credit allowed against the corporation franchise tax. All credits against the corporation franchise tax must be taken by a taxpayer in the order specified in statute, and the bill places the air quality expenditures tax credit in the 23rd position and requires the credit to be taken accordingly. (Secs. 5733.48(C) and 5733.98.)

The owner of an eligible facility claiming an air quality expenditures tax credit must claim 10% of the credit amount for the tax year immediately following the calendar year in which the air quality equipment is first placed in service, and 10% of the credit amount is allowed for each of the ensuing tax years until the credit is fully claimed. Air quality equipment placed in service after the bill's effective date, but prior to January 1, 2004, is to be treated as being placed in service during calendar year 2004. (Sec. 5733.48(B)(2).) The bill prohibits a taxpayer from claiming in any tax year an air quality expenditures tax credit, including any such credit deferred from prior tax years, in excess of 10% of the total amount of the credit authorized for that taxpayer pursuant to the bill (sec. 5733.48(H)).

### **Certification for purposes of the tax credit; role of the OAQDA**

The bill requires the OAQDA to certify to the Tax Commissioner (a) whether property is air quality equipment, and, if so, (b) the date the equipment

was first placed in service, (c) whether expenditures for such equipment constitute air quality expenditures, and (d) whether such expenditures are exempt expenditures. The OAQDA may require the owner to furnish information as is necessary to support a claim for an air quality expenditures tax credit. The bill prohibits such a credit unless such information is provided. (Sec. 5733.48(E).)

**Transferability of the tax credit**

The bill authorizes an owner to assign, sell, trade, or otherwise transfer to any taxpayer all or a portion of the owner's air quality expenditures tax credit by providing written notice of the assignment, sale, trade, or transfer to the Tax Commissioner, in such form as the Commissioner prescribes, at any time prior to the use of the credit. The taxpayer to which the credit is assigned, sold, traded, or otherwise transferred may apply it, and any carried-forward credit amounts, against the corporation franchise tax, to the same extent as if the taxpayer were an owner subject to the tax and entitled to the credit under the bill. (Sec. 5733.48(D).)

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**HISTORY**

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