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Bill Analysis
Legislative Service Commission

Sub. S.B. 144

124th General Assembly

(As Reported by H. Agriculture & Natural Resources)

Sens. Mumper, Jordan, Spada, Mead, DiDonato, Amstutz, Austria, Randy Gardner, Robert Gardner, Harris, Hottinger, Jacobson, Oelslager, Wachtmann, White, Carnes, Ryan, Prentiss

Reps. Faber, Grendell, Aslanides, Metzger, Carmichael, Krupinski, Redfern, Rhine, Distel, Seaver, Barrett, Reinhard, Niehaus, Boccieri, Damschroder, Core, Wolpert, Kearns

BILL SUMMARY

- Creates the Ethanol Incentive Board whose sole duty is to review the business plan submitted to it by an owner of an ethanol production plant who desires investors in the plant to be eligible for a nonrefundable tax credit for their investments.
- Allows, for a specified period of time, a nonrefundable tax credit against corporation franchise or personal income tax liability for an investor in an ethanol production plant for which a certificate of approval of the plant's business plan has been issued by the Board.
- Provides that the tax credit is equal to 50% of the money invested in such a plant, not to exceed \$5,000.
- Includes ethanol or other biofuel production plants in the types of air quality facilities for which the Ohio Air Quality Development Authority may issue bonds or make loans or grants.
- Specifies that when ethanol is blended or mixed into gasoline that is sold or offered for sale to the public, a retail dealer of gasoline is not required to disclose either the fact that the gasoline contains ethanol or the percentage of ethanol that is contained in the gasoline.
- Declares an emergency.

CONTENT AND OPERATION

Ethanol production plants--overview

The bill creates a nonrefundable tax credit for corporation franchise or income tax taxpayers who invest money in an ethanol production plant located in Ohio if the plant's business plan is approved by the Ethanol Incentive Board created by the bill. The bill also adds ethanol plants to the types of "air quality facilities" for which the Ohio Air Quality Development Authority may make loans and grants and issue bonds under its existing law.

For purposes of the bill's provisions governing the tax credits and the Ethanol Incentive Board, "ethanol" is defined as fermentation ethyl alcohol derived from agricultural products, including potatoes, cereal, grains, cheese whey, and sugar beets; forest products; or other renewable resources, including residue and waste generated from the production, processing, and marketing of agricultural products, forest products, and other renewable resources, that meets all of the specifications in the American Society for Testing and Materials (ASTM) specification D 4806-88 and is denatured as specified in Parts 20 and 21 of Title 27 of the Code of Federal Regulations (secs. 901.13(A)(1), 5733.46(A)(1), and 5747.75(A)(1)). For purposes of the bill's provisions involving the Authority, "ethanol" is defined to include all of those items plus fermentation ethyl alcohol derived from biomass resources (sec. 3706.01(S)).¹

Ethanol Incentive Board

Composition

The bill creates the Ethanol Incentive Board, consisting of the following five members: the Director of Agriculture, who serves as chairperson of the Board; the Director of Development; the Executive Director of the Ohio Air Quality Development Authority; one member appointed by the Speaker of the House of Representatives; and one member appointed by the President of the Senate. Initial appointments to the Board must be made within 30 days of the bill's effective date. Vacancies must be filled in the same manner provided for original appointments. Board members are to serve without compensation.

Under the bill, the Board is to meet and conduct its business as directed by the chairperson. The Board ceases to exist January 1, 2014. (Sec. 901.13(B).)

¹ Merriam Webster's Collegiate Dictionary, *Tenth Edition*, defines "biomass" as "plant materials and animal waste used especially as a source of fuel."

Review and approval of business plans; requirements for the plans

The Board's sole duty is to review applications submitted to it to determine whether an applicant's business plan for a "facility," meaning an ethanol production plant that will be located in Ohio, satisfies statutory requirements (sec. 901.13(A)(2) and (C)). If the Board approves an application, the Board must issue a certificate of approval, and any taxpayer that invests money in the facility for which a certificate has been issued may claim a tax credit for the investment in accordance with the bill's tax credit provisions (see "**Tax credits for investments in ethanol plants**," below) (sec. 901.13(D)). The Board may approve an application only if it determines, by the affirmative vote of all Board members, that an applicant's business plan for a facility meets the requirements established by the bill (sec. 901.13(C)).

The owner of a facility may apply to the Board, on an application provided by the Director of Agriculture, for approval of the facility's business plan. Within 60 days of receipt of an application, the Board is required to determine whether the applicant's business plan meets the following requirements:

- (1) The business plan is for the construction and operation of a facility;
- (2) The business plan contains detailed information regarding the availability and price of corn in the area where the facility will be located; the availability and cost of energy needed for operation of the facility; the availability of water and waste disposal systems in the area where the facility will be located; and the availability of labor and a qualified site manager for the facility;
- (3) The business plan analyzes any proposed marketing agreements for the products produced by the facility;
- (4) The facility to be constructed and operated under the business plan is majority-owned by Ohio farmers or will be prior to the first day the facility commences production; and
- (5) The business plan meets any other requirements established by the Board under rules adopted under the bill. (Sec. 901.13(D).)

The Board is required to notify the Tax Commissioner of any certificate of approval issued under the bill, within ten days of its issuance (sec. 901.13(F)).

Business plan not a public record

Any business plan submitted to the Board under the bill is not a public record under continuing law that requires public offices to make certain records available for inspection and copying (sec. 901.13(E)).

Rulemaking

The bill requires the Director of Agriculture, in consultation with the Director of Development, to adopt rules necessary to implement the bill's provisions governing the Ethanol Incentive Board, including rules prescribing procedures and forms for administering the provisions. The rules must be adopted in accordance with the Administrative Procedure Act. (Sec. 901.13(G).)

Board not subject to review by the Sunset Review Committee

The bill provides that the Board is not an agency for purposes of continuing law that requires that boards and agencies expire unless they are reviewed by the Sunset Review Committee and renewed by the passage of a bill (sec. 901.13(H)).

Tax credits for investments in ethanol plants

Credit eligibility; amount of credit

The bill creates a nonrefundable credit against the corporation franchise and personal income taxes for a taxpayer that invests money in an ethanol production plant for which a certificate of approval has been issued (certified ethanol plant) by the Ethanol Incentive Board. The amount of the credit equals 50% of the money the taxpayer invests in a certified ethanol plant, but the credit amount cannot exceed \$5,000. The credit against the corporation franchise tax is available beginning in tax year 2003 and ending in tax year 2013. The credit against the personal income tax is available beginning in taxable year 2002 and ending in taxable year 2012. Because the two taxes are structured differently, the years in which the credit against each tax is available appear to be different, but actually both credits apply to the same years of investment. (Secs. 5733.46(A)(2) and (B) and 5747.75(A)(2) and (B).)

Claiming the credit; three-year carry forward

The bill requires that the credit against the corporation franchise tax be claimed in the tax year immediately following the calendar year in which the investment in a certified ethanol plant was made (sec. 5733.46(B)). The credit against the personal income tax must be claimed for the taxable year during which the investment was made (sec. 5747.75(B)). The taxpayer must claim the credit in the same order existing law prescribes for claiming nonrefundable corporation franchise or personal income tax credits (secs. 5733.46(C), 5733.98(A), 5747.75(C), and 5747.98(A)). Any credit amount in excess of the corporation franchise or personal income tax due, after allowing for any other credits preceding it in that prescribed order, may be carried forward for three years, but

the amount of the excess credit allowed in any such year must be deducted from the balance carried forward to the next year (secs. 5733.46(C) and 5747.75(C)).

If the taxpayer is subject to the personal income tax and is a direct or indirect investor in a pass-through entity (e.g., S corporations, partnerships, some limited liability companies, and certain trusts) that has made an investment in a certified ethanol plant, the taxpayer may claim its proportionate or distributive share of the credit (sec. 5747.75(D)).

Under the bill, the Tax Commissioner may require that the taxpayer furnish information as is necessary to support the claim for the tax credit, and no credit will be allowed unless the information is provided (secs. 5733.46(D) and 5747.75(E)).

Ohio Air Quality Development Authority

General responsibilities of the Authority

Under continuing law, the Ohio Air Quality Development Authority operates to promote the conservation of clean air and the prevention of pollution of it. To accomplish this, the Authority, along with its other powers, may make loans and grants to governmental agencies for the acquisition or construction of "air quality facilities" and may make loans and issue air quality revenue bonds for air quality facilities for industry, commerce, distribution, or research, including public utility companies. Property that is part of an air quality facility is not subject to taxes or assessments so long as the bonds or notes issued to finance the costs of the facility are outstanding. In addition, the transfer of the property to the person to whom a loan or installment or conditional sale with respect to the facility is made is not subject to the state sales or use tax. (Chapter 3706., not in the bill.)

Ethanol production plants as air quality facilities

The bill amends the definition of "air quality facility" to include ethanol or other biofuel facilities, including any equipment used at an ethanol or other biofuel facility for the production of ethanol or other biofuels (sec. 3706.01(G), (R), and (S)). The bill defines "biofuel" as any fuel that is made from cellulosic biomass resources, including renewable organic matter, crop waste residue, wood, aquatic plants and other crops, animal waste, solid waste, or sludge, and that is used for the production of energy for transportation or other purposes (sec. 3706.01(T)). This change enables the Authority to make loans and issue bonds for ethanol or other biofuel facilities that meet the requirements for such financing established in the Authority's existing law. However, it should be noted that a biofuel facility is not eligible for the tax credit established by the bill.

For purposes of the law governing the Authority, the bill defines "ethanol" to include all the items listed in that definition under "*Ethanol production plants--overview*," above, and also adds biomass resources to that definition (sec. 3706.01(S)). Thus, under the bill, the Authority may make loans and issue bonds to facilities that produce fermentation ethyl alcohol derived from biomass resources and that meet the requirements for such financing established in the Authority's existing law. However, such a facility is not eligible for the tax credit established by the bill because the definition of "ethanol" for purposes of the tax credit does not contain the reference to biomass resources (secs. 5733.46(A)(1) and 5747.75(A)(1)).

Nondisclosure of gasoline blended with ethanol

The bill specifies that when ethanol is blended or mixed into gasoline that is sold or offered for sale to the public, it is not an unfair or deceptive act or practice in connection with a consumer transaction for a retail dealer to fail to disclose either the fact that the gasoline contains ethanol or the percentage of ethanol that is contained in the gasoline (sec. 1345.021(B)). The bill defines "retail dealer" as a person who owns, operates, controls, or supervises an establishment at which gasoline is sold or offered for sale to the public (sec. 1345.021(A)).

The bill specifies that a retail dealer cannot be required to disclose the fact that gasoline contains ethanol and cannot be required to disclose the percentage of ethanol in the gasoline by any law, rule, resolution, or ordinance of any agency or department of the state or any political subdivision of the state (sec. 1345.021(D)). The bill thus supersedes an existing administrative rule that requires such disclosure to be made via a printed sign or label that must be affixed to retail gasoline dispensing pumps (O.A.C. 109:4-3-18, not in the bill).

Under the bill, if a retail dealer elects to disclose the fact that gasoline contains ethanol or the percentage of ethanol that is contained in the gasoline, the dealer may make that disclosure in any form, using any type of sign or label and any size or style of letters, at the retail dealer's discretion (sec. 1345.021(C)).

Emergency clause

Stating that the bill is vital to stimulating the state's economy and to promoting its number one industry, agriculture, and that it is imperative that it take effect in time for the spring planting season, the bill declares an emergency. (Section 3.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	07-10-01	p. 813
Reported, S. Ways & Means	01-16-02	P. 1318
Passed Senate (33-0)	01-16-02	p. 1320
Reported, H. Agriculture & Natural Resources	02-14-02	pp. 1404-1405

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