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*Bill Analysis*  
*Legislative Service Commission*

## **S.B. 32**

127th General Assembly  
(As Introduced)

**Sens. Boccieri, Cafaro, Mason, Gardner**

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### **BILL SUMMARY**

- Authorizes tax credits, exclusions, and deductions for businesses producing alternative fuels, employing "clean coal technologies," or storing, processing, handling, or distributing petroleum products at brownfield or former brownfield sites.
- Authorizes a commercial activity tax (CAT) exclusion for gross receipts generated by selling certain items produced or handled at former brownfield sites, that lasts for ten years and equals 100% of receipts for the first five years and 75% thereafter.
- Authorizes a CAT deduction for the cost of purchasing alternative fuel used in conducting a trade or business.
- Authorizes a refundable credit against the corporation franchise tax beginning in tax year 2007 for any corporation that owns and operates a qualifying facility located wholly or partly on a former brownfield site in Ohio.
- Authorizes a permanent refundable credit against the state income tax for owners of a pass-through entity that owns and operates a qualifying facility located wholly or partly on a former brownfield site in Ohio in 2007 or thereafter.
- Authorizes CAT and state income tax credits for "eligible costs" of a brownfield remediation if the site is redeveloped to accommodate a petroleum, alternative fuel, or "clean coal" facility and the person is issued a covenant not to sue under the Voluntary Action Program.

- Requires the Ohio Environmental Protection Agency to make a completeness determination within ten days after receiving certain air or water pollution control permit or plan-approval applications for brownfield-sited alternative fuel refineries, "clean coal"-powered refineries, and petroleum handling facilities.
- Places a 180-day time limit on the approval of those pollution control permit or plan-approval applications, and prescribes remedies if there is a failure to do so.
- Requires the Ohio Environmental Protection Agency to prescribe the technologies that qualify as "clean coal" technologies for the purpose of the ten-day permit application acknowledgement and 180-day permit approval requirements and the tax benefits.

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## CONTENT AND OPERATION

### *Tax benefits for alternative fuel and petroleum handling facilities*

(R.C. 3745.15(A)(1) and (2), 5733.58(A)(1), and 5751.54(A)(1) to (3))

The bill authorizes business tax credits, exclusions, and deductions for the production of alternative fuel or use of "clean coal technologies" at brownfield or former brownfield sites, to be claimed against the commercial activity tax (CAT), state income tax, or corporation franchise tax. For the purposes of the bill:

"Alternative fuel" means biodiesel, blended biodiesel, blended gasoline, methanol, denatured ethanol, and other alcohols, mixtures containing 85% or more<sup>1</sup> by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels, natural gas, including liquid fuels domestically produced from natural gas, liquefied petroleum gas, hydrogen, coal-derived liquid fuels, fuels (other than alcohol) derived from biological materials, electricity, and any other fuel determined under federal rules to be substantially not petroleum and yielding substantial energy security benefits and substantial environmental benefits.

"Brownfield" means an industrial, commercial, or institutional site that is abandoned, idled, or under-used and where expansion or redevelopment is complicated by known or potential releases of hazardous substances or petroleum. A "former brownfield site" is a brownfield where petroleum or hazardous substances have been contained, removed, or disposed of.

"Clean coal technology" means any technology, including a technology applied at the precombustion, combustion, or postcombustion stage, that achieves significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity or process steam, including fluidized-bed combustion, integrated gasification combined cycle, limestone injection multistage burner, enhanced flue gas desulfurization, coal liquefaction, and coal gasification. The bill requires the Director of Environmental Protection to identify, prescribe, and revise the forms of technology that qualify as clean coal technology (see R.C. 3745.17).

### *Commercial activity tax*

The CAT is imposed on most kinds of entities doing business in Ohio and generating gross receipts of more than \$150,000 from Ohio-sourced business

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<sup>1</sup> The percentage may be as low as 70% if federal rules so provide in order to address cold start, safety, or vehicle functions (see 42 U.S.C. 13211).

activity. The tax base is Ohio-sourced gross receipts, and the tax equals \$150 on the first \$1 million of those receipts plus a percentage of receipts in excess of \$1 million. The percentage is 0.104% through March 2007, 0.156% from April 2007 through March 2008, 0.208% from April 2008 through March 2009, and 0.26% from and after April 2009. Currently, there are more than 25 categories of receipts that are excluded from the tax base.

The bill creates an exclusion and a deduction from the CAT base.

### **Exclusion**

(R.C. 5751.01(F)(2)(aa) and 5751.54(A) and (B))

The CAT exclusion is for business entities producing alternative fuel, using clean coal technology to power manufacturing processes, or storing, processing, or handling or distributing petroleum products, so long as the activity is conducted wholly or partly at a former brownfield site. The exclusion lasts for ten years. In the first five years, the receipts are excluded entirely; in the final five years, 75% of the receipts are excluded. The ten-year period begins in the year in which a taxpayer first becomes a "qualifying taxpayer"--i.e., when the taxpayer first undertakes the activity for which the exclusion is granted.

Specifically, the following receipts qualify for the exclusion to the extent they otherwise would be included in a taxpayer's taxable gross receipts:

--Gross receipts from selling alternative fuel produced at a facility located wholly or partly on a former brownfield site in Ohio.

--Gross receipts from selling tangible personal property that was manufactured at a facility located wholly or partly on a former brownfield site in Ohio, to the extent clean coal technology is used at the site to provide the energy for the manufacturing process.<sup>2</sup> The extent is computed as the percentage of the heat output used to generate energy for all the taxpayer's Ohio manufacturing processes. For example, if the heat output generated by clean coal technology at a former brownfield site and used to energize manufacturing processes at the site constitutes 40% of all the heat output used to energize a taxpayer's manufacturing processes in Ohio, then 40% of the gross receipts from sales of the taxpayer's manufactured property from the former brownfield facility is excluded from the taxpayer's taxable gross receipts. Heat output is measured by British Thermal Units (BTUs), or by any other appropriate unit allowed by the Tax Commissioner. If the energy is provided in such a form that the taxpayer does not know the heat

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<sup>2</sup> For the purposes of this analysis, "manufacturing" includes not only manufacturing but refining, rectifying, and combining processes.

output, the heat output must be estimated using conversion factors reflecting the heat output required to generate that form of energy.

--Gross receipts from selling petroleum or petroleum distillate that is stored, processed, or otherwise handled at, or that is distributed from, a facility located wholly or partly on a former brownfield site; and gross receipts from storing, processing, otherwise handling, or distributing petroleum or petroleum distillates at or from a facility located wholly or partly on a former brownfield site.

In each case, the taxpayer must be the owner and operator of the facility.

**Deduction for alternative fuel purchases**

(R.C. 5751.54(C))

The bill creates a deduction from the CAT base for taxpayers that purchase alternative fuels used in the taxpayer's trade or business. The deduction equals the cost paid for the fuel, but cannot exceed the taxpayer's taxable gross receipts for a tax period.

**Corporation franchise tax**

(R.C. 5733.01(G), 5733.58, and 5733.98)

The bill authorizes a refundable credit against the corporation franchise tax for any corporation that owns and operates any of the following kinds of "qualifying facilities" located wholly or partly on a former brownfield site in Ohio:

--A refinery producing an alternative fuel;

--A manufacturing plant using clean coal technology as an energy source for the manufacturing process (however, the owner cannot be an electric company or a combined company);

--A facility where petroleum or petroleum distillates are stored, processed, or otherwise handled, or where petroleum or petroleum distillates are distributed from, including mobile facilities when they are located at the former brownfield site, but excluding retail fuel dealers' facilities where motor fuel<sup>3</sup> is dispensed.

To claim the credit, the taxpayer must own the facility at some time during the taxpayer's taxable year. The credit is available for tax years 2007 through

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<sup>3</sup> "Motor fuel" means gasoline, diesel fuel, K-1 kerosene, or any other liquid motor fuel, including liquid petroleum gas or liquid natural gas, but excluding substances prepackaged and sold in containers of five gallons or less (R.C. 5735.01, not in the bill).

2009. Under H.B. 66 of the 126th General Assembly, the corporation franchise tax is phased out over five years, ending after 2009, for all corporations other than financial institutions.

The credit equals a percentage of the gross tax due before any other credit is deducted. The credit percentage is computed as a ratio representing the extent of the activity qualifying for the credit. The ratio differs for alternative fuel refineries, manufacturers using clean coal technology, and petroleum handlers, as follows:

--Alternative fuel refiners credit percentage:

$$\frac{\text{Amount of alternative fuel produced at the brownfield facility}}{\text{Amount of all motor fuel the company refines in Ohio}}$$

--Manufacturers credit percentage:

$$\frac{\text{Onsite clean coal-generated energy for manufacturing process}}{\text{All energy for company's manufacturing processes in Ohio}}$$

--Petroleum handlers credit percentage:

$$\frac{\text{Petroleum handled at brownfield site}}{\text{All petroleum handled by company in Ohio}}$$

The credit amount is adjusted to reflect the extent to which a company is engaged in any business other than refining motor fuels, manufacturing, or handling petroleum. The adjustment reduces the credit amount in proportion to the company's total Ohio sales that are generated from activities other than refining motor fuels, manufacturing, or handling petroleum. For the purposes of the adjustment, Ohio sales are measured by the numerator of the company's sales factor, which is used to compute the portion of a company's net income that is subject to the franchise tax, along with property and payroll factors.

Conversely, the credit amount is also adjusted to reflect the extent to which a company is engaged in two or more qualifying businesses (e.g., the company is an alternative fuel refiner and a manufacturer). If this adjustment applies, the adjustment for engaging in any business other than refining motor fuels, manufacturing, or handling petroleum cannot apply. The adjustment reduces the credit amount in proportion to the company's total Ohio sales that are generated from refining motor fuels, manufacturing, or handling petroleum. Also, the deduction must be claimed in the order prescribed by continuing law. If the deduction amount exceeds the corporation franchise tax amount after deducting other credits, the excess must be refunded to the company.

### **State income tax**

(R.C. 5747.71 and 5747.98)

The bill authorizes a refundable credit under the state income tax for owners of a pass-through entity that owns and operates any of the following kinds of "qualifying facilities" located wholly or partly on a former brownfield site in Ohio in 2007 or thereafter:

--A refinery producing an alternative fuel;

--A manufacturing plant using clean coal technology as an energy source for the manufacturing process (however, the entity cannot be an electric company or a combined company);

--A facility where petroleum or petroleum distillates are stored, processed, or otherwise handled, or where petroleum or petroleum distillates are distributed from, including mobile facilities when they are located at the former brownfield site, but excluding retail fuel dealers' facilities where motor fuel is dispensed.

Qualification for the credit is the same as qualification for the corporation franchise tax credit (see above), but the income tax credit is permanent. The income tax credit is computed by multiplying the owner's proportionate share of the entity's net profits by the maximum income tax rate and by the credit percentage. The credit percentage is computed in the same manner as it is for the corporation franchise tax credit, and is subject to the same adjustments if an entity is engaged in more than one business (see above). Also, the credit must be claimed in the order prescribed by continuing law. If the credit amount exceeds the personal income tax amount after deducting other credits, the excess must be refunded to the owner.

### **Tax credits for brownfield remediation by voluntary action**

(R.C. 122.16, 5747.32, and 5751.55)

The bill reenacts, with changes, an expired business tax credit for costs incurred to remediate and redevelop a contaminated "brownfield" site. The reenacted credit allows a person who undertakes the cleanup or remediation of a contaminated site under the Voluntary Action Program to receive a tax credit for a percentage of the cleanup or remediation costs. However, unlike the prior credit, the bill's reenacted credit applies only if the site is redeveloped by a "qualifying facility" being constructed on the site. A qualifying facility is a facility where petroleum or a petroleum-derived substance is refined into motor fuel; where petroleum or a petroleum distillate is stored, distributed, processed, or otherwise handled; where alternative fuel is produced or refined; or where clean coal

technology is used in a manufacturing process to produce tangible personal property. The person who incurs the remediation costs must own the facility.

### **Eligibility**

In addition to being available only for sites where qualifying facilities are to be constructed, the credit is available only for a person that is issued a covenant not to sue under the Voluntary Action Program. A separate credit may be claimed for each covenant not to sue. To receive the credit, the person must enter into an agreement with the Director of Development. The credit may be applied against the CAT or against the state income tax, but the credit allowed under any agreement may be applied against only one of those taxes. The income tax credit is allowed for individuals or for owners of pass-through entities (e.g., S corporations, partnerships, and limited liability companies); each owner is allowed the owner's distributive or proportionate share of the credit allowed under the agreement.

### **Basis of credit and computation**

The credit is computed as a percentage of the "eligible costs" of the voluntary action. The percentage equals 15% of eligible costs if the remediated site is located in an "eligible area" in Ohio, and 10% if the site is anywhere else in Ohio. (Eligible area criteria are explained below.)

"Eligible costs associated with a voluntary action" means any costs incurred in performing remedial activities, and any costs incurred during the period in performing a "phase I" or "phase II" property assessment,<sup>4</sup> as long as the phase I and II assessments resulted in the implementation of the remediation of the contaminated site.

The credit must be claimed over a five-year period, with the taxpayer claiming one-fifth of the credit each of those five years. If a CAT taxpayer is a calendar quarter taxpayer, the taxpayer must claim one-fourth of the credit amount allowed for the calendar year for each quarterly tax period in the calendar quarter. If the amount of the credit claimed for any year exceeds the tax payable with that year's tax return, the taxpayer claiming the credit would not receive a refund for the difference; however, the difference could be carried forward and applied toward taxes payable for the following three years.

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<sup>4</sup> Ohio Environmental Protection Agency (OEPA) rules specify what actions constitute a phase I or phase II property assessment (see OAC 3745-300-06 and 3745-300-07).

The prior credit was limited to \$750,000 per covenant in eligible areas and \$500,000 elsewhere. The reenacted credit has no limit on the credit allowed for each covenant.

### **"Eligible areas"**

In order to qualify for the 15% credit, a taxpayer's covenant not to sue must be issued for a site located in an "eligible area." To be classified as an eligible area, an area must satisfy the definition of a distressed area, labor surplus area, inner city area, or situational distress area (see below). The bill requires the Director of Development, by January 1 of each year, to certify eligible areas for the calendar year that includes that first day of January. Eligible areas are also known as "Priority Investment Areas."<sup>5</sup>

A "distressed area" is either a municipal corporation that has a population of at least 50,000 or a county, that satisfies two of the following criteria: (1) its average rate of unemployment, during the most recent five-year period for which data are available, is equal to at least 125% of the average rate of unemployment of the United States for the same period, (2) it has a per capita income equal to or below 80% of the median county per capita income of the U.S. as determined by the most recent Census Bureau figures, (3) in the case of a municipal corporation, at least 20% of the residents have a total income for the most recent census year below the official poverty line, and (4) in the case of a county, in intercensal years, it has a ratio of transfer payment income to total county income equal to or greater than 25%.

An "inner city area" is a targeted investment area established by a municipal corporation, within its boundaries, that is comprised of the most recent census block tracts that individually have at least 20% of their population at or below state poverty level; census block tracts that are contiguous to those with a 20% poverty level also can be included in an inner city area. An inner city area must be in a municipal corporation that has a population of at least 100,000 and does not meet the criteria of either a labor surplus area or a distressed area.

A "labor surplus area" is an area designated as a labor surplus area by the U.S. Department of Labor.

A "situational distress area" is a county or a municipal corporation that has experienced or is experiencing a closing or downsizing of a major employer that will adversely affect the county's or municipal corporation's economy. In order to

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<sup>5</sup> See [http://www.odod.state.oh.us/research/Reports\\_in\\_maps\\_economic\\_related.htm#G200](http://www.odod.state.oh.us/research/Reports_in_maps_economic_related.htm#G200) for a description and maps.

be designated as a situation distress area, a county or municipal corporation must petition the Director of Development. The petition must include written documentation that demonstrates all of the following: the number of jobs lost by the closing or downsizing; the impact that the job loss would have on the county's or municipal corporation's unemployment rate, as measured by the Director of Job and Family Services; the annual payroll associated with the job loss; the amount of state and local taxes associated with the job loss; and the impact that the losing or downsizing would have on the suppliers located in the county or municipal corporation. A county or municipal corporation can qualify as a situational distress area for no more than 36 months.

### **Aggregate limits on credits**

The total amount of credits issued each year must be limited to \$15 million. If the total amount of credits granted in any year is less than \$15 million, the difference is added to the amount that can be granted in the following year. If a taxpayer enters into more than one agreement, the taxpayer can aggregate the amount of those credits each year. A taxpayer must claim the credit in the order provided in current law. The amount of the credit that a taxpayer may claim each year shall be the amount indicated on its tax credit certificate issued by the Director of Development.

### **Application for credit and agreement**

A separate application is required, and a separate credit granted, for each covenant not to sue. The application must be accompanied by proof, satisfactory to the Director, that a covenant not to sue has been issued. Applications must state the eligible costs for which the credit is being claimed. The certified professional that submitted that no-further-action letter for the remediated site must verify the eligible costs. Applicants for the credit must request the certified professional to submit an affidavit verifying the costs directly to the Director.

The Director may enter into a tax credit agreement with each applicant that satisfies the requirements for the credit. In determining whether to grant a credit, the Director can consider the extent to which political subdivisions and other units of government will cooperate with the applicant to develop the remediated site.

### **Prohibition against relocating employment positions**

Applicants for credits also must commit not to allow the remediated site to be used in a manner that would cause the relocation of employment positions to the site from elsewhere in Ohio, unless the Director waives the prohibition for the applicant. The prohibition is binding on the applicant for five years after the tax credit is entered into, or for the number of years the applicant is entitled to claim

the credit, whichever is less. For the purposes of the prohibition, the movement of an employment position from one political subdivision to another is considered a relocation of an employment position. However, the transfer of an individual employee from one political subdivision to another is not a relocation if the individual's employment position in the first political subdivision is refilled.

The Director may waive the prohibition if he or she determines both of the following exist: (1) the board of county commissioners, the board of township trustees, or the legislative authority of the municipal corporation from which the employment positions would be relocated has been notified of the possible relocation, and (2) the site from which the employment positions would be relocated is inadequate to meet market and industry conditions, expansion plans, consolidation plans, or other business considerations affecting the relocating employer.

### **Cessation of credit**

Any one of several occurrences may lead to the cessation of a tax credit. A taxpayer (or a pass-through entity through which the credit is claimed) is barred from claiming the credit if any of the following occurs:

- (1) The taxpayer or pass-through entity enters into a "compliance schedule agreement" under the law governing voluntary actions (i.e., it has fallen behind the stipulated schedule for remediation);
- (2) The taxpayer or pass-through entity's covenant not to sue is revoked;
- (3) The taxpayer or pass-through entity's covenant not to sue is voided;
- (4) The taxpayer or pass-through entity permits the eligible site to be used in such a manner as to cause employment positions to be relocated from elsewhere in Ohio, in violation of the tax credit agreement.

If a taxpayer or pass-through entity loses its right to a credit because it has entered into a compliance schedule agreement, but subsequently returns the contaminated site to compliance under the compliance agreement, it may resume claiming the credit for the year after the year in which the Director of Environmental Protection determines that the site has been returned to applicable standards.

If a taxpayer or pass-through entity, through a lawsuit or settlement of a lawsuit recovers at least 75% of its eligible voluntary action costs, it must stop claiming any remaining credit it is entitled to (including any amounts carried forward from prior years).

### **Annual reporting**

A taxpayer or pass-through entity claiming a tax credit must provide the following to the Director of Development each year:

(1) The status of all litigation to recover eligible voluntary action costs that the taxpayer or entity has been a party to during the previous year;

(2) Confirmation that the covenant not to sue has not been revoked or voided;

(3) Confirmation that the taxpayer or entity has not permitted the site to be used in such a manner as to cause relocation of employment positions in violation of the tax credit agreement;

(4) Any other information the Director requires to perform the Director's duties regarding the credit.

### **Pollution control permits and waste disposal system plans**

The bill establishes time limits for processing and approving air pollution control permits and sewage and liquid industrial waste disposal system plans for alternative fuel refineries and petroleum handling or processing facilities located at brownfield or former brownfield sites. Refineries designed to utilize clean coal technology as an energy source for producing petroleum or an alternative fuel also qualify. In addition, the bill authorizes air pollution control permit applications for such facilities to be consolidated.

### **Ten-day permit application completeness review**

(R.C. 3745.15)

When the OEPA receives an application for an air pollution control installation or modification permit, or receives plans for sewage or industrial waste systems, the bill requires the OEPA to send written notice acknowledging receipt of the application to the applicant within ten business days after the application was received. The acknowledgement notice must indicate whether the application includes all the information required for the OEPA to perform a technical review. If the application is not complete, the acknowledgement must describe the information that is missing from the application. If the acknowledgement is not provided within ten business days after the OEPA receives the application, the bill states that the application is considered complete in all material respects on the 11th day after the OEPA receives it.

**180-day permit approval period**

(R.C. 3745.16)

The bill requires the OEPA to send written approval or denial to an applicant of each air pollution control permit application and each sewage or industrial waste disposal plan within 180 days after a completed application or plan is received if the permit or plan pertains to a qualifying refinery or facility located at a brownfield or former brownfield site. (For this purpose, an application is "complete" if it is either determined complete or considered complete under the ten-day completeness determination described immediately above.) If the OEPA fails to do so, the application fee may not be collected, and the applicant may initiate a civil action to obtain a court judgment ordering the OEPA to take final action approving or denying the application. An applicant may request, and the OEPA may grant, a specified extension of the 180-day period; the request and the extension agreement must be in writing. If an extension is granted, the waiver of the application fee does not apply unless the applicant and the OEPA agree to the fee waiver in the extension agreement.

**Consolidated air pollution control permit applications**

(R.C. 3745.16(D))

The bill authorizes an applicant for air pollution control installation or modification permits to request that the OEPA consolidate or group multiple applications for individual air contaminant sources if the sources are at a qualifying refinery or facility on a brownfield or former brownfield site. The stated purpose of the consolidation is to reduce the unnecessary paperwork and administrative burden to the OEPA and the applicant. However, the application fees for the various applications are not to be reduced because of the consolidation.

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**HISTORY**

ACTION	DATE
Introduced	02-20-07

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