

**ORDER OF THE
DEPARTMENT OF AGRICULTURE, TRADE AND
CONSUMER PROTECTION**

CREATING RULES

The Wisconsin Department of Agriculture, Trade and Consumer Protection adopts an order to create chapter ATCP 166 relating to investment tax credits for harvesting or processing woody biomass, and affecting small businesses.

Analysis of Rules

1. Statutes Interpreted.

Sections 71.07 (3rm), 71.28 (3rm), 71.47 (3rm) and 93.547 – as created in 2009 Wisconsin Act 269 and partially renumbered in 2011 Wisconsin Act 32.

2. Statutory Authority.

Sections 227.11 (2) (a) and 93.547 (4).

3. Explanation of Agency Authority.

Section 93.547 (4) of the Statutes requires the Department to promulgate rules for administering a program to certify applicants and allocate to them tax credits for the woody biomass investments addressed in sections 71.07 (3rm), 71.28 (3rm) and 71.47 (3rm) of the Statutes. Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department.

4. Related Statute or Rule.

The Department has rules for several other programs associated with tax credits, but those programs are not targeted specifically to harvesting or processing woody biomass.

5. Summary of Rule.

The rules in this order address (1) the eligibility requirements for applicants; (2) the documentation that must be submitted by applicants to become certified as eligible for the woody biomass investment credit, and to receive acceptance of incurred expenses; (3) the Department's response to the submitted documentation; and (4) filing a claim with the Department of Revenue for the corresponding tax credit.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations.

The 2008 Food, Conservation and Energy Act, P.L. 110-234, included a new, temporary tax credit that is available to qualified cellulosic biofuel producers, some of whom may process woody biomass into a material that is used to produce the biofuel. The credit is \$1.01 per gallon and is available through December 31, 2012.

7. Comparison With Rules in Adjacent States.

Minnesota, Illinois and Iowa have various tax-credit programs, but they were not found to specifically include the woody biomass investment credit addressed in these rules. Michigan was likewise not found to have any similar rules – but its Department of Energy, Labor and Economic Growth administers a Biomass Energy Program that awards grants to universities and public and non-profit organizations for projects which will expand markets for energy and fuel derived from biomass resources, such as woody biomass, or will increase biofuels and bioenergy production and production efficiency in the state.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and consisted of (1) incorporating the criteria in 2009 Wisconsin Act 269; (2) incorporating applicable best practices the Department has developed in administering similar programs for tax-credit verification; (3) soliciting and using input from the Department of Revenue; and (4) reviewing Internet-based sources of related federal, state and private-sector information.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report.

The primary document that was used to determine the effect of the rules on small business was 2009 Wisconsin Act 269. This Act requires the Department to implement a program to certify taxpayers as eligible for the woody biomass investment credit under sections 71.07 (3rm), 71.28 (3rm) and 71.47 (3rm) of the Statutes, and requires the Department to promulgate rules for administering the program. This Act applies its private-sector requirements only to purchasers of woody biomass equipment for which a corresponding tax credit is desired.

10. Effect on Small Business.

The rules are not expected to impose significant costs or other impacts on small businesses because the rules address submittal of documentation only by applicants that choose to pursue tax credits for purchasing equipment which is utilized primarily to harvest or process woody biomass for use as a fuel or as a component of fuel.

11. Agency Contact Person.

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SECTION 1. Chapter ATCP 166 is created to read:

Chapter ATCP 166

WOODY BIOMASS HARVESTING AND PROCESSING CREDIT

ATCP 166.10 Authority and purpose. Pursuant to s. 93.547 (4), Stats., this chapter sets forth the requirements for obtaining both of the following from the department:

(1) A certification that a taxpayer, including a taxpayer who is any of the following, is eligible for the woody biomass harvesting and processing credit under s. 71.07 (3rm), 71.28 (3rm) or 71.47 (3rm), Stats.:

- (a) A partner of a partnership.
- (b) A member of a limited liability company.
- (c) A shareholder of a tax-option corporation.

(2) A determination of the maximum amount of tax credit that may be claimed under this chapter for equipment which is utilized primarily to harvest or process woody biomass for use as a fuel or as a component of fuel.

Note: The statute sections listed in this section address income and franchise tax credits for harvesting or processing woody biomass.

ATCP 166.20 Definitions. In this chapter:

- (1) “Department” means the department of agriculture, trade and consumer protection.
- (2) “Eligible capital investment” includes all expenses incurred in purchasing equipment that is utilized primarily to harvest or process woody biomass for use as a fuel or as a component of fuel, except it does not include any expenses claimed as a federal deduction under 26 USC 162.
- (3) “Used primarily” has the meaning given in s. 71.07 (3rm) (a) 2., Stats.

Note: Section 71.07 (3m) (a) 2. of the Statutes reads as follows: “ ‘Used primarily’ means used to the exclusion of all other uses except for use not exceeding 25 percent of total use.”

(4) “Woody biomass” has the meaning given in s. 71.07 (3m) (a) 3., Stats., and includes boards and other pieces that are cut out of or otherwise made from larger pieces.

Note: Section 71.07 (3m) (a) 3. of the Statutes reads as follows: “ ‘Woody biomass’ means trees and woody plants, including limbs, tops, needles, leaves, and other woody parts, grown in a forest or woodland or on agricultural land.”

ATCP 166.30 Applying for certification and allocation. (1) A taxpayer or one of the following entities may apply for a certification and an allocation for a woody biomass harvesting and processing credit:

- (a) A partnership.
- (b) A limited liability company.
- (c) A tax-option corporation.

(2) Application to the department for a certification and an allocation of the credit shall be made on a valid, department-prescribed form.

Note: The application form that is currently valid can be obtained from the Department at P.O. Box 8911, Madison, WI, 53708-8911, or at www.datcp.wi.gov.

(3) (a) Each application shall include all of the following information:

1. A description of the business operations of the applicant, in relation to the project.
2. A description of the project; including the eligible capital investment, the number of jobs that will be created, and the wages and benefits for those jobs.
3. A description of how the project will promote economic development.
4. Any other information that the department deems necessary to evaluate applications and allocate available tax credits.
5. Any subsequent clarification requested by the department.

(b) No application may include costs incurred in taxable years beginning on or after January 1, 2016.

(4) Each application shall be completed and either postmarked or delivered to the department no sooner than upon completion of the taxable year in which the costs listed in the application were incurred and no later than February 15th of the subsequent taxable year, unless this deadline is extended by the department.

ATCP 166.40 Certifications for applicants, and allocation of tax credits. (1) After receipt of an application submitted under s. Comm 138.30, the department shall issue a certification for an applicant that has met the criteria in s. Comm 138.30.

(2) In conjunction with issuing a certification for an applicant, the department shall determine the maximum amount of tax credit that the applicant may either claim or distribute to its partners, members or shareholders.

Note: Under chapter 71 of the Statutes, the aggregate amount of credits that a taxpayer may claim under this chapter is \$100,000; except that partnerships, limited liability companies, tax-option corporations and other multiple-owner entities are limited to an aggregate of \$100,000 for an entity.

(3) (a) Due to the \$900,000 maximum total established in s. 93.547 (2), Stats., for allocations in each fiscal year, the department may allocate the tax credits in a manner that the department believes is most likely to promote economic development.

Note: Section 93.547 (2) of the Statutes requires the Department to annually “allocate \$450,000 in tax credits to businesses that, individually, have no more than \$5,000,000 in gross receipts from doing business in this state for the taxable year in which the credit is claimed.”

(b) In determining the allocation of tax credits under par. (a), the department shall consider all of the following:

1. The jobs created by the project.
2. The salaries, wages and other employee benefits of the jobs created by the project.
3. The amount of new, eligible capital investment in the project.

(c) The department may prorate some or all of the allocations in order to broaden the potential for promoting economic development and to address the criteria in par. (b).

ATCP 166.50 Notifications. Following completion of the certifications and allocations in s. Comm 138.40, the department shall notify each applicant of the outcome of its application, and shall notify the department of revenue of every certification issued under this chapter and the amount of the tax credit allocated to the applicant.

ATCP 166.60 Claims. A taxpayer may file for a tax credit under this chapter using forms acceptable to the department of revenue.

(END)

EFFECTIVE DATE

Pursuant to s. 227.22 (2) (intro.), Stats., these rules shall become effective on the first day of the month commencing after publication in the Wisconsin administrative register.

Dated this _____ day of _____, 2011.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel, Secretary

File reference: Comm 138/rules A