

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: ENVIRONMENTAL RECLAMATION & RECYCLING, L.L.C.	DOCKET NO. DRU-07-1
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DECLARATORY ORDER

(Issued August 2, 2007)

On June 8, 2007, Environmental Reclamation & Recycling, L.L.C. (Environmental Reclamation), filed with the Utilities Board (Board) a petition for a declaratory order related to the definition of an "eligible renewable energy facility" as defined in Iowa Code chapter 476C and whether certain refuse conversion facilities meet the definition. Environmental Reclamation filed additional information related to its petition on June 27, 2007.

On June 27, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to the petition for declaratory order that included Consumer Advocate's comments on the issues raised in the petition. Pursuant to 199 IAC 4.3(1), Consumer Advocate qualifies as an intervenor in this proceeding.

On July 3, 2007, the Board issued an order inviting any other persons interested in the issues that are the subject of the petition for declaratory order to file comments on or before July 18, 2007. No additional comments or responses were

filed. The July 3, 2007, order also stated the Board would rule on Environmental Reclamation's declaratory order petition within the 60-day time limit provided by Iowa Code § 17A.9(8); that is, by August 7, 2007.

BACKGROUND

In 2005 the Iowa General Assembly enacted legislation (Senate File 390) creating a production tax credit program for energy produced by smaller wind and other renewable energy facilities (Iowa Code chapter 476C). In 2006 the General Assembly enacted additional legislation (SF 2399) that, among other things, increased the maximum amount of capacity eligible under Iowa Code chapter 476C (from 90 MW to 180 MW for wind projects and from 10 MW to 20 MW for other renewable energy projects) and added a new eligibility category of 167 billion British thermal units (BTUs) for "heat for a commercial purpose." Of this additional 167 billion BTU eligibility, 55 billion BTUs were specifically reserved for "a refuse conversion facility for processed, engineered fuel from a multi-county solid waste management planning area."

On April 12, 2007, Environmental Reclamation filed an application under Iowa Code chapter 476C requesting eligibility for 55 billion BTUs of "heat for a commercial purpose" for their Des Moines facility, which converts waste wood from construction and demolition sites to refuse-derived fuel pellets usable to fire commercial and industrial boilers. On May 2, 2007, Board staff submitted a memorandum to the Board recommending the application be denied without prejudice. The

recommendation was based on the language of chapter 476C with respect to definitions for "heat for a commercial purpose," "purchaser of renewable energy," and "refuse conversion facility;" along with uncertainty about the applicant's ability to produce sufficient documentation showing that "heat for a commercial purpose" had been produced by an "eligible renewable energy facility" and sold to a "purchaser of renewable energy."

On May 7, 2007, prior to a Board ruling on its staff's recommendation, Environmental Reclamation filed an application for extension of time. In that request, Environmental Reclamation asked the Board to consider Environmental Reclamation's application incomplete and allow it until June 8, 2007, to determine whether it should file a petition for a declaratory order. The Board granted Environmental Reclamation's request and extended the time for review until 30 days after the Board's ruling on a petition for a declaratory order, or until June 8, 2007 (if Environmental Reclamation filed no petition for declaratory order by that date). On June 8, 2007, Environmental Reclamation filed the petition for a declaratory order that is the subject of this order.

ENVIRONMENTAL RECLAMATION'S POSITION

Environmental Reclamation asks the Board to determine that its facility, which produces refuse-derived fuel pellets, is an "eligible renewable energy facility" as defined in Iowa Code § 476C1(6), making Environmental Reclamation a "producer of renewable energy" as defined in Iowa Code § 476C.1(11). Environmental

Reclamation notes that the definition of "refuse conversion facility" in Iowa Code § 476C.1(13) is "a facility in this state that converts solid waste into fuel that can be burned to generate heat for a commercial purpose" (emphasis added), which does not require that the facility actually convert the fuel to heat in order to qualify for renewable energy tax credits. Environmental Reclamation asserts that if the Legislature had intended for the facility to both produce fuel and convert the fuel to heat, it would have clearly said so.

Environmental Reclamation also asks the Board to determine that a signed agreement to purchase its fuel pellets, including a statement that the purchaser will burn the product to produce heat for a commercial purpose, constitutes an "agreement to purchase . . . heat for a commercial purpose" under Iowa Code § 476C.4(1)"c." Environmental Reclamation further asks the Board to determine that documentation showing: a) the number of pounds of fuel pellets produced, b) the BTUs per pound (as shown in the example analysis filed by Environmental Reclamation on June 27, 2007), and c) the number of pounds purchased and burned by the purchaser, is "sufficient documentation" of renewable energy sales for purposes of Iowa Code § 476C.4(1)"d."

Environmental Reclamation urges the Board to liberally interpret any statutory ambiguity in Environmental Reclamation's favor, stating that the legislative intent was to include refuse conversion facilities such as the facility owned by Environmental Reclamation. Environmental Reclamation lays out what it believes to be the

legislative history of both Senate File 390 and Senate File 2399 and asserts that changes to include refuse conversion facilities were due to efforts of Environmental Reclamation's lobbyists working with the Senate Ways and Means Committee as Senate File 2399 was being developed.

Environmental Reclamation's additional information, filed on June 27, 2007, includes a signed affidavit from a state senator who served on the Senate Ways and Means Committee during the 2006 session. In his affidavit, The Senator acknowledges that the addition of refuse conversion facilities was at the request of Environmental Reclamation's lobbyist and states that he understood that Environmental Reclamation would only produce the refuse-derived fuel and that someone else would burn the product to produce "heat for a commercial purpose."

CONSUMER ADVOCATE'S POSITION

In its response filed on June 27, 2007, Consumer Advocate notes that Environmental Reclamation's refuse conversion facility does not fit neatly into the Iowa Code chapter 476C requirements and definitions and, therefore, creates questions about the eligibility of Environmental Reclamation for chapter 476C tax credits. However, based on the additional information filed by Environmental Reclamation addressing, among other things, the legislative intent in passing Senate File 2399, Consumer Advocate has no objection to the matters requested in Environmental Reclamation's petition for declaratory order.

DISCUSSION

In its filings, Environmental Recycling identifies its facility as a "refuse conversion facility for processed, engineered fuel from a multi-county solid waste management planning area," for which a 55 billion BTU subset of the 167 billion BTU eligibility is specifically reserved. Thus, Environmental Reclamation indicates that its 55 billion BTU eligibility application would satisfy the 55 billion BTU reservation requirement under Iowa Code § 476C.3(4), if it is deemed to be an eligible facility.

As Environmental Reclamation acknowledges, the statutory language of Iowa Code chapter 476C is ambiguous regarding the nature of the separate eligibility category for 167 billion BTUs of "heat for a commercial purpose" and requires a liberal interpretation to reach the conclusion that the production of refuse-derived fuel pellets is equivalent to "heat for a commercial purpose." An example of why this interpretation is otherwise difficult can be found in Iowa Code § 476C.1(12), which states:

"Purchaser of renewable energy" means a person who buys electric energy, **hydrogen fuel, methane gas or other biogas used to generate electricity**, or heat for a commercial purpose from an eligible renewable energy facility. (Emphasis added).

In order to qualify for tax credits, there must be a "purchaser of renewable energy." Absent a liberal interpretation of this definition, and applying the same logic Environmental Reclamation applies to the definition of "refuse conversion facility" above, one could argue that the Legislature did not intend for purchasers of refuse-

derived fuel pellets to be regarded as "purchasers of renewable energy," as it explicitly provided for purchasers of hydrogen fuel, methane gas, or other biogas.

The Board believes that the purposes and intent of chapter 476C are consistent with a construction which allows production of refuse-derived fuel pellets from Environmental Reclamation's facility to be equivalent to producing "heat for a commercial purpose," for purposes of the separate 167 billion BTU eligibility category. Because Environmental Reclamation will produce "heat for a commercial purpose" it follows that purchasers of refuse-derived fuel pellets from Environmental Reclamation's facility are "purchasers of renewable energy" under Iowa Code § 476C.1(12). With these determinations, Environmental Reclamation's application for eligibility filed on April 12, 2007, can be approved pursuant to Iowa Code § 476C.3. The Board notes that while its statutory interpretation is consistent with the Senator's views regarding legislative intent, the Board does not rely on his interpretation in construing the statute. Ruthven Consolidated School District v. Emmetsburg Community School District, 382 N.W.2d 136, 140 (Iowa 1986).

As a footnote, it should be pointed out that no one has presented evidence or argument that the General Assembly intended this statutory interpretation to be applied beyond the separate eligibility category for 167 billion BTUs of "heat for a commercial purpose." If, in fact, the Legislature had intended a broader application of this interpretation to include the increased 20 MW of eligibility for "all other

facilities," there would have been no need for the separate 167 billion BTU category. The Board's declaratory order is limited to the 167 million BTU category.

In summary, the Board is making the following determinations:

1. In producing refuse-derived fuel pellets for purposes of the separate eligibility category for 167 billion BTUs of "heat for a commercial purpose" under Iowa Code § 476C.3(4), Environmental Reclamation's facility would be an "eligible renewable energy facility" as defined in Iowa Code § 476C.1(6).
2. In producing refuse-derived fuel pellets for purposes of the separate eligibility category for 167 billion BTUs of "heat for a commercial purpose" under Iowa Code § 476C.3(4), Environmental Reclamation would be a "producer of renewable energy" as defined in Iowa Code § 476C.1(11).
3. Purchasers of refuse-derived fuel pellets from Environmental Reclamation's eligible facility would be regarded as "purchasers of renewable energy" under Iowa Code § 476C.1(12).
4. Environmental Reclamation's application meets the requirements for preliminary eligibility under Iowa Code § 476C.3, for the 55 billion BTUs of heat for a commercial purpose "reserved for an eligible facility that is a refuse conversion facility for processed, engineered fuel from a multi-county solid waste management planning area." This eligibility is for a discrete total amount of renewable energy (i.e., 55 billion BTUs) produced and sold from Environmental Reclamation's facility.

In addition, the Board determines that Environmental Reclamation's proposed documentation, with one addition, will satisfy the requirements of Iowa Code §§ 476C.4(1)"c" and "d." Specifically, required documentation must include:

1. A signed agreement to purchase Environmental Reclamation's fuel pellets, including a statement that the purchaser will burn the product to produce heat for a commercial purpose, would constitute an "agreement to purchase . . . heat for a commercial purpose" under Iowa Code § 476C.4(1)"c."

2. In addition, the following would constitute "sufficient documentation" of renewable energy sales under Iowa Code § 476C.4(1)"d:"

a) The number of pounds of fuel pellets produced and sold by Environmental Reclamation;

b) The BTUs per pound (as shown in the example analysis filed by Environmental Reclamation on June 27, 2007);

c) The number of pounds purchased and burned by the purchaser;
and

d) Actual sales invoices documenting sales in BTUs, rather than pounds of fuel pellets, to facilitate final processing of Environmental Reclamation's tax credit applications by the Iowa Department of Revenue.

This item of documentation was not included in Environmental Reclamation's proposal.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The request for declaratory ruling filed by Environmental Reclamation & Recycling, L.L.C., on June 8, 2007, and supplemented on June 27, 2007, is granted to the extent discussed in this order.
2. Any argument in the pleadings not specifically addressed in this order is rejected as not being of sufficient persuasiveness to warrant comments.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 2nd day of August, 2007.