

**TITLE 3            TAXATION**  
**CHAPTER 13       BUSINESS TAX CREDITS**  
**PART 19           RENEWABLE ENERGY PRODUCTION TAX CREDIT**

**3.13.19.1           ISSUING AGENCY:** Energy, Minerals and Natural Resources Department.  
[3.13.19.1 NMAC - N, 3-15-03]

**3.13.19.2           SCOPE:** This part applies to the application and certification procedures for administration of the renewable energy production tax credit.  
[3.13.19.2 NMAC - N, 3-15-03]

**3.13.19.3           STATUTORY AUTHORITY:** These rules are established under the authority of NMSA 1978, Sections 7-2A-19 and 9-1-5E.  
[3.13.19.3 NMAC - N, 3-15-03; A, 03-31-06]

**3.13.19.4           DURATION:** Permanent.  
[3.13.19.4 NMAC - N, 3-15-03]

**3.13.19.5           EFFECTIVE DATE:** March 15, 2003 unless a later date is cited at the end of a section.  
[3.13.19.5 NMAC - N, 3-15-03]

**3.13.19.6           OBJECTIVE:** This part's objective is to establish procedures for administering the renewable energy production tax credit.  
[3.13.19.6 NMAC - N, 3-15-03; A, 03-31-06]

**3.13.19.7           DEFINITIONS:**

A.        "Applicant" means a business entity that holds title to a qualifying energy generator or leases property upon which a qualified energy generator operates from a county or municipality pursuant to an industrial revenue bond, or plans to develop a qualified energy generator and will hold title to the qualified energy generator or lease property upon which the qualified energy generator operates from a county or municipality pursuant to an industrial revenue bond at the time the division certifies that the facility is a qualified energy generator, and that applies to receive the renewable energy production tax credit pursuant to this part for itself or on other taxpayers' behalf.

B.        "Biomass" means agricultural or animal waste; thinnings from trees less than 15 inches in diameter; slash and brush; lumber mill or sawmill residues; and salt cedar and other phreatophytes removed from watersheds or river basins;

C.        "Confidential information" means information included in the renewable energy production tax credit application package or that the department requires the applicant to submit as part of the approval process that the applicant requests in writing to be held confidential.

D.        "Department" means the energy, minerals and natural resources department.

E.        "Director" means the director or head of the department's energy conservation and management division.

F.        "Division" means the department's energy conservation and management division.

G.        "Five percent ownership" means New Mexico corporate income taxpayers that individually or collectively, directly or indirectly, own at least five percent of a qualified energy generator or of the total capitalized cost to construct a qualified energy generator; and are entitled to receive at least five percent of cash distributed to owners of the qualified energy generator over its useful life.

H.        "Generating capacity" means a qualified energy generator's nominal rated electrical power output (nameplate capacity) in megawatts during optimum resource conditions, as the generator's manufacturer specifies. Generating capacity shall be at least 10 megawatts. If the prevailing resource conditions at a project site are insufficient for a qualified energy generator to attain full nameplate capacity output at the time the division issues the certification, the power output shall be that which corresponds to at least 10 megawatts nominal rating according to the equipment manufacturer's published performance ratings for those prevailing conditions.

I.        "Interconnection agreement" means an agreement allowing the applicant to interconnect the qualified energy generator, of a specified type and size, to a suitable electric transmission or distribution line.

J. "Land rights agreement" means an agreement providing the applicant with control of land and the rights necessary to construct and operate a qualified energy generator.

K. "Notice of allocation" means a form the division prescribes that an applicant completes indicating the allocation of its or another entity's right to claim the tax credit to one or more taxpayers and each taxpayer's interest in the qualified energy generator.

L. "Power purchase agreement" means an agreement that binds an applicant to provide power at a specified price and a buyer to purchase power from the qualified energy generator.

M. "Project finance agreement" means an agreement that binds a capable entity to provide the financing necessary for a qualified energy generator's construction.

N. "Qualified energy generator" means a facility with at least 10 megawatts generating capacity located in New Mexico that produces electricity using a qualified energy resource and that sells electricity to an unrelated person.

O. "Qualified energy resource" means a resource that generates electrical energy by means of a fluidized bed technology or similar low-emissions technology or a zero-emissions generation technology that has substantial long-term production potential and that uses only the following energy sources: solar light, solar heat, wind, or biomass.

P. "Renewable energy production tax credit application package" or "application package" means the application documents submitted by an applicant to the division for certification to receive the renewable energy production tax credit.

Q. "Secretary" means the head of the department.

R. "Tax credit" means the renewable energy production tax credit.

S. "Unrelated person" means a person who is not a partner or joint venture participant who owns more than 50 percent of the profit interest or capital interest in the partnership or joint venture; shareholder who owns more than 50 percent of the shares, subsidiary, or parent company; or a trade or business that is under common control. If a corporation is a member of an affiliated group of corporations filing a consolidated tax return, the division will treat the corporation as selling electricity to an unrelated person if another member of the affiliated group sells the electricity to the person.

[3.13.19.7 NMAC - N, 3-15-03; A, 1-15-04; A, 03-31-06]

### **3.13.19.8 GENERAL PROVISIONS:**

A. Only those taxpayers that meet the requirements of 3.13.19.14 NMAC are eligible for a tax credit.

B. A proposed project shall meet these required milestones. If a project fails to meet a milestone, the division shall reject the application.

(1) Applicant submits a complete renewable energy production tax credit application package to the division.

(2) Construction of a qualified energy generator shall commence within 12 months of the application's approval. The applicant shall meet this requirement by entering into a construction contract and by the placement of a permanent, physical part of the facility, such as a poured concrete foundation. Applicant shall submit to the division a copy of the contract accompanied by a letter certifying that such construction has occurred.

(3) A qualified energy generator shall generate electrical power and achieve commercial operation, demonstrating at least 10 megawatts generating capacity, within 24 months of the division's approval of the application.

(4) Within 24 months of the application's approval, the applicant shall submit to the division:

(a) the name of the qualified energy generator;

(b) electric output meter readings documenting commercial operation and indicating at least 10 megawatts output;

(c) a copy of the bill of sale or other documentation sufficient to evidence a sale of the power indicating the amount of electrical energy produced, precise time period of production, and the name of the buyer of the electricity; and

(d) records to verify that the applicant is selling to unrelated persons.

C. NMSA 1978, Section 7-2A-19 limits the power production of a qualified energy generator eligible for a tax credit to 400,000 megawatt-hours per year. It also limits the eligible power production of all qualified energy generators to 2,000,000 megawatt-hours per year. When the 2,000,000 megawatt-hours limit is reached based on the total of applications approved, the division will no longer approve applications, but will accept them for future consideration in the event that approved facilities are not completed on schedule and tax credit becomes available. The division shall keep a record of the order of receipt of all applications.

[3.13.19.8 NMAC - N, 3-15-03; A, 1-15-04; A, 03-31-06]

**3.13.19.9 APPLICATION:**

- A. A renewable energy production tax credit application form can be obtained from the division.
- B. An applicant shall submit an application package to the division.
- C. The application package shall consist of a completed renewable energy production tax credit application form, with the following required attachments:
  - (1) a copy of the land rights agreement;
  - (2) a copy of the interconnection agreement or a system impact study agreement between the applicant and the interconnect utility, or its functional equivalent; and
  - (3) a copy of the power purchase agreement, project finance agreement, or evidence of self-financing.
- D. The division shall return an incomplete application to the applicant.

[3.13.19.9 NMAC - N, 3-15-03; A, 03-31-06]

**3.13.19.10 APPLICATION REVIEW PROCESS:**

- A. The division shall consider applications in the order received, according to the day it receives them, but not the time of day. The division shall give applications it receives on the same day equal consideration. If the division approves applications it received on the same day and they would exceed the overall limit of tax credit availability, then the division shall divide the available credit among those applications on a prorated, per megawatt-hour basis.
- B. The division shall approve or reject an application within 30 days following its receipt of the application package, or if the division requires more time it shall notify the applicant of the reason and shall approve or reject the application as soon as possible.
- C. The division shall review the application package to determine if the proposed generator will be a qualified energy generator and if the requisite documentation specified in Subsection C of 3.13.19.9 NMAC, above, is valid.
- D. The division shall check the accuracy of the applicant's estimated annual production potential and make any necessary adjustments to ensure the potential is reasonably achievable. The limit of the qualified energy generator's energy production eligible for the tax credit for the taxable year shall be the lesser of: the estimate the division approves, or 400,000 megawatt-hours, or the eligible electricity remaining of the 2,000,000 megawatt-hours total for the state.
- E. If the division finds that the application package meets the required criteria and tax credit is available, the division shall approve the application. The division shall approve the application by issuing a letter to the applicant, which shall include the limit of the qualified energy generator's annual production eligible for the tax credit.
- F. The division shall reject an application that is not complete or correct, does not meet the criteria for approval or fails to meet a required milestone. The division's rejection letter shall state the reasons why it rejected the application. The applicant may resubmit the application package for the rejected project. The division shall place the resubmitted application in the review schedule as if it were a new project.

[3.13.19.10 NMAC - N, 3-15-03; A, 1-15-04; A, 03-31-06]

**3.13.19.11 CONFIDENTIALITY REQUESTS, WAIVERS, REVIEWS AND APPEALS:**

- A. An applicant may request in writing that the department hold materials submitted as part of the application package and certification process confidential pursuant to NMSA 1978, Section 71-2-8. The applicant shall address the request to the director.
- B. An applicant may request in writing that the director waive any provision of the application unless NMSA 1978, Section 7-2A-19 requires the provision. The applicant shall address the request to the director, and include the facts and circumstances that support a waiver.
- C. The applicant shall have the right to request in writing review of the director's decision to reject an application or review of the division's adjustments to the annual production estimate. The applicant shall address the request to the director and include the reasons that the director should review the decision.
- D. Any person having an interest that the request does or may adversely affect may oppose an applicant's request to hold materials an applicant has submitted as part of an application package confidential or the director grant an applicant's request to waive a provision of the application. The person shall submit the opposition in writing, within 10 days of the request, to the director and send a copy to the applicant. The opposition shall

include the reasons that the department should not hold the information confidential or that the director should not grant the waiver.

(1) The director shall consider the request and the opposition, if any. The director may hold a hearing and appoint a hearing officer to conduct the hearing. The director shall send a final decision to the applicant and any person or entity opposing the request within 20 days after receiving the request, the opposition, if the request is opposed, or the date the hearing is held.

(2) The applicant or the person or entity opposing the request may appeal in writing to the secretary a director's decision. The notice of appeal shall include the reasons that the secretary should overturn the director's decision.

E. The secretary shall consider any appeal from a director's decision. The applicant must file the appeal and the reasons for with the secretary within 10 working days of the director's issuance of his decision. The secretary may hold a hearing and appoint a hearing officer to conduct the hearing. The secretary shall send a final decision to the appellant within 20 days after receiving the request or the date the hearing concludes.

[3.13.19.11 NMAC - N, 3-15-03; A, 03-31-06]

### **3.13.19.12 CERTIFICATION:**

A. When a qualified energy generator, for which the division has approved a tax credit application package, produces power and it is sold to an unrelated person, then the applicant may request certification from the division. If the applicant is different from the original applicant then the new applicant shall submit a revised application form to the division indicating who is eligible for the tax credit. The qualified energy generator must demonstrate at least 10 megawatts generating capacity. The applicant shall submit:

(1) the name of the qualified energy generator;

(2) electric power output meter readings indicating at least 10 megawatts generating capacity;

(3) a copy of the bill of sale or equivalent documentation indicating the amount of electrical energy the qualified energy generator produced, precise time period of production, and the name and relationship, if any, of the buyer of the electricity; and

(4) a notice of allocation indicating the allocation of the right to claim the tax credit and evidence of each taxpayers' ownership interest.

B. For purposes of monitoring the applicant's compliance with this part, the division or its authorized representative shall have the right to visit a qualified energy generator upon giving the applicant five days notice.

C. If the division finds that a qualified energy generator, for which it has approved an application package, meets this part's criteria, the division shall issue a certificate to the applicant stating that the facility is an eligible qualified energy generator, the facility's estimated annual production potential and the limit of that facility's energy production eligible for the tax credit.

[3.13.19.12 NMAC - N, 3-15-03; A, 1-15-04; A, 03-31-06]

### **3.13.19.13 CLAIMING THE TAX CREDIT:**

A. To claim the renewable energy production tax credit, a taxpayer shall submit to the New Mexico taxation and revenue department the certificate the department issued to the applicant stating that the facility is an eligible qualified energy generator, a copy of the certificate the department issued to the taxpayer showing the taxpayer's right to claim all or a portion of the tax credit, documentation showing the taxpayer's ownership interest in the qualified energy generator, documentation of the amount of energy the qualified energy generator produced in the taxable year, and any other information the taxation and revenue department may require to determine the amount of the credit due to each taxpayer claiming the credit.

B. If the amount of tax credit the taxpayer claims exceeds the taxpayer's corporate income tax liability, the taxpayer may carry the excess forward for up to five consecutive taxable years.

C. Once the department has certified a facility as a qualified energy generator eligible for the tax credit taxpayers retain the original date of application for tax credits for that facility until either the qualified energy generator is out of production for more than six consecutive months in a year or until the qualified energy generator's 10-year eligibility has expired.

[3.13.19.13 NMAC - N, 3-15-03; A, 03-31-06]

### **3.13.19.14 ALLOCATION OF TAX CREDIT:**

A. A business entity may allocate a taxpayer all or a portion of the right to claim a tax credit without regard to proportional ownership if:

(1) the taxpayer owns an interest in a business entity that is taxed for federal income tax purposes as a partnership;

(2) the business entity (a) is the applicant; (b) owns an interest in the business entity, the applicant, that is also taxed for federal income tax purposes as a partnership; or (c) owns, through one or more intermediate business entities that are each taxed for federal income tax purposes as a partnership, an interest in a business entity, the applicant, as described in (b); and

(3) the taxpayer and all other taxpayers a business entity allocates a right to claim the renewable energy production tax credit pursuant to this section collectively have at least a five percent ownership interest in the applicant's qualified energy generator; collective ownership means that a business entity, which may be a partnership or have subsidiary business entities, owns at least a five percent interest in the qualified energy generator; a business entity that owns at least a five percent interest in the qualified energy generator may receive the right to all of a tax credit, but shall only allocate that right to its subsidiaries or partners based upon their actual ownership interest in the business entity; for example, the business entity owning the five percent interest is a partnership comprised of three business entities; one business entity owns a 40 percent interest in the business and the other two business entities each own a 30 percent interest; 90 percent of the tax credit is allocated to the business entity that owns a five percent interest in the qualified energy generator; the partner owning 40 percent is entitled to 36 percent of the total tax credit and the other two partners are each entitled to 27 percent of the total tax credit.

B. In order to allocate all or a portion of the right to claim a renewable energy production tax credit, a business entity shall notify the applicant of its allocation. The applicant shall then compile each business entity's allocation and submit the notice of the allocation with documentation of each taxpayer's ownership interest to the department on forms the department provides.

C. Upon receiving the notice of allocation from the applicant, the department shall promptly certify the allocation in writing to the applicant and any taxpayer receiving the allocation if the taxpayer meets the criteria in Subsection A of 3.13.19.14 NMAC. A taxpayer receiving an allocation shall be entitled to claim all such tax credit allocated to it that was generated during the tax year.

D. If ownership of a business entity that has been allocated a right to claim all or a portion of the right to claim a tax credit changes, the replacement owner shall be entitled to claim the tax credit. The applicant may submit a revised notice of allocation only once in a calendar year and in no event later than December 31 of the calendar year for the revised allocation.

[3.13.19.14 NMAC - N, 03-31-06]

### **3.13.19.15 DETERMINATION OF WHETHER A GENERATOR IS A SEPARATE FACILITY:**

When determining whether a generator is a separate facility or is one of several generators located in the same geographical location (e.g. mesa, section of land) that comprise a single facility, the division shall consider the following factors that indicate whether or not the generators are operated as separate facilities. The division shall consider factors such as whether the same corporate entity holds title to or leases property from a county or municipality pursuant to an industrial revenue bond where the generating infrastructure is located; whether the same buyer is purchasing the electricity the generators produce; whether the generators have different interconnection agreements or system impact study agreements; whether the generators have different power purchase or project finance agreements; whether the generator is connected with other generators before entering the main transmission line; and any other factor the director deems relevant to the determination.

[3.13.19.15 NMAC - N, 03-31-06]

### **HISTORY OF 3.13.19 NMAC:**

**Pre-NMAC History:** None.

**History of Repealed Material:** [RESERVED]