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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 741
DEPARTMENT OF TRANSPORTATION
RAIL DIVISION

FILED

10/31/2023 7:38 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Standards to Determine Project Eligibility and Application Procedures for Short Line Railroad Rehabilitation Tax Credits

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 11/21/2023 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

ODOT is amending these rules in compliance with 2023 Legislature's House Bill 3406.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

The 2023 Legislation (HB 3406), which can be found on the oregonlegislature.gov website; existing ORS (315.591-315.606) and OAR (741-030), which can be found on the oregonlegislature.gov and sos.oregon.gov websites, respectively.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The amendments to these rules will not affect racial equity in this state.

FISCAL AND ECONOMIC IMPACT:

We expect that these rules will have little to no fiscal or economic impact to ODOT. The law allows ODOT to collect fees from applicants to recoup our costs, so the effect should be to break even.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

None.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The only businesses impacted by the rules are the short line railroads. ODOT sought and received input from them as we developed the original rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

These amendments are to align the rules with recent legislation; no input from an advisory committee was needed.

RULES PROPOSED:

741-030-0020, 741-030-0025, 741-030-0030, 741-030-0040, 741-030-0050, 741-030-0055, 741-030-0060

AMEND: 741-030-0020

RULE SUMMARY: Definitions in sections (11) and (12) are deleted because HB 3406 eliminated tiers.

CHANGES TO RULE:

741-030-0020

Definitions

For the purposes of this division of administrative rules, the following terms shall have the following definitions, unless the context clearly indicates otherwise:¶

(1) "Costs that are directly related to the work necessary to maintain, reconstruct or replace infrastructure" include costs for materials, labor, and equipment. It does not include fees or costs imposed by the Department for work relating to the preliminary or final certification process.¶

(2) "Department" is as defined in ORS 184.610(2).¶

(23) "Director" is as defined in ORS 184.610(3).¶

(34) "Infrastructure" includes items listed in ORS 315.591(1) and also includes signals, tunnels, structures, and other ancillary items adjacent to the main line track, sidings, or industrial leads.¶

(5) "Main line track" means a segment of track used for the movement of trains between the initial and final terminals of a railroad.¶

(46) "Person" is as defined in ORS 174.100(6).¶

(7) "Program" means the Short Line Railroad Rehabilitation Tax Credit program as authorized by Or. Laws 2019, ch. 579 RS 315.591 - 315.603 and implemented by Chapter 741, Division 30 of the administrative rules to administer the Short Line Railroad Rehabilitation Tax Credit.¶

(58) "Infrastructure" includes items listed in Or. Laws 2019, ch. 579 ¶7(1) and also includes signals, tunnels, structures, and other ancillary items adjacent to the Short line main line track, sidings, or industrial leads.¶

(6) "Person" is as defined in ORS 174.100(6) RS 315.591(2).¶

(79) "Short line railroad rehabilitation project costs" is as defined in Or. Laws 2019, ch. 579 ¶7(3).¶

(8) "Short line railroad" is as defined in Or. Laws 2019, ¶(7)(2).¶

(9) "Costs that are directly related to the work necessary to maintain, reconstruct or replace infrastructure" include costs for materials, labor, and equipment. It does not include fees or costs imposed by the Department for work relating to the preliminary or final certification process.¶

(10) "Short line railroad track" means an applicant's main line track within the state of Oregon.¶

(11) "Tier I short line railroad" is as defined in Or. Laws 2019, ch. 579 ¶7(5).¶

(12) "Tier II short line railroad" is as defined in Or. Laws 2019, ch. 579 ¶7(6) RS 315.591(4).¶

(10) "Short line railroad track" means an applicant's main line track within the state of Oregon.

Statutory/Other Authority: ORS 184.619, 823.011, Or. Laws 2019, ch. 579 ¶9(1) and ¶10(3) 315.593, 315.597

Statutes/Other Implemented: Or. Laws 2019, ch. 579, ¶6-17 RS 315.591 - 315.603

AMEND: 741-030-0025

RULE SUMMARY: Because several of the short line railroads requested an extension to the application deadline, we changed section (3), also making the language more plain.

CHANGES TO RULE:

741-030-0025

Preliminary Certification Application Submission Periods

(1) For the year 2020, applicants may submit their application for preliminary certification for short line railroad rehabilitation tax credits, beginning on January 1 and ending on July 31.¶

(2) For the year 2021, applicants may submit their application for preliminary certification beginning on January 1, 2021, and ending on February 28, 2021.¶

(3) For the ~~2021-2023~~ biennium (July 1, 2021 – June 30, 2023) and the biennium thereafter subsequent years, applicants may submit their application annually for preliminary certification ~~between August 1 and December 31 of each odd-numbered year, and during a six-month period between June~~ August 1 and July 31 of each even-numbered year annually.¶

(4) For any biennium in which the Department determines that the \$4 million tax credit limitation in ORS 315.603 will not be exceeded, the Director may reopen or extend the application period.¶

(5) Each short line railroad may submit no more than one project application per year.

Statutory/Other Authority: ORS 184.619, 823.011, ~~Or. Laws 2019, ch. 579, 29(1) and 210(3)~~ 315.593, 315.597

Statutes/Other Implemented: ~~Or. Laws 2019, ch. 579, 26-17~~ RS 315.591 - 315.603

AMEND: 741-030-0030

RULE SUMMARY: Because HB 3406 eliminated tiers, we eliminated references to Tier I and Tier II in section (1).

Also, because HB 3406 adds language citing the federal 45G tax credit, we added text and example as section (5).

CHANGES TO RULE:

741-030-0030

Preliminary Certification Applicant Eligibility

(1) To be eligible for preliminary certification, the applicant must be either:~~¶~~

~~(a) A Tier I short line railroad; or ¶~~

~~(b) A Tier II short line railroad. ¶~~

(2) The applicant must own or lease infrastructure located in Oregon. ¶

(3) The applicant's rehabilitation project costs must be directly related to the work necessary to maintain, reconstruct or replace infrastructure in Oregon and be described in the application with quantities, cost types (materials, labor and equipment), and with estimated costs. ¶

(4) The applicant cannot apply for a tax credit for rehabilitation project costs that are funded by or used to qualify for any state or federal grants, or costs that are used to ~~claim a federal tax credit~~ qualify for a federal tax credit. ¶

(5) Regardless of whether the applicant applies for the federal tax credit under section 45G of the Internal Revenue Code, the amount applicant is eligible to qualify for under the federal tax credit shall be deducted from the applicant's rehabilitation project costs before calculating the applicant's Oregon tax credit. ¶

Example: Acme Railroad owns (or leases) 100 miles of mainline track in Oregon. One year, Acme spends \$1,000,000 in railroad rehabilitation project costs. ¶

$\$3,500 \times 100 \text{ miles} / 0.40 = \$875,000$ (the portion of its project costs which would qualify Acme for its maximal federal tax credit of \$350,000). ¶

$\$1,000,000 - \$875,000 = \$125,000$ (the remainder which can be used in applying for the Oregon tax credit). ¶

In this example, Acme would be eligible for a \$62,500 Oregon tax credit (50% of \$125,000).

Statutory/Other Authority: ORS 184.619, 823.011, Or. Laws 2019, ch. 579 ~~¶9(1)~~ and ~~¶10(3)~~ 315.593, 315.597

Statutes/Other Implemented: Or. Laws 2019, ch. 579, ~~¶6-17~~ RS 315.591 - 315.603

AMEND: 741-030-0040

RULE SUMMARY: Because HB 3406 eliminates tiers, we eliminated references to Tier I and Tier II in section (3)(a).

Also, HB 3406 adds a provision citing the federal 45G tax credit, so additional text was added to section (3)(d).

CHANGES TO RULE:

741-030-0040

Preliminary Certification Application

- (1) Applicants requesting preliminary certification for a short line rehabilitation tax credit must submit their request during the application submission periods specified in OAR 741-030-0025.¶
- (2) Applicants requesting preliminary certification for a short line rehabilitation tax credit must apply on the Department-approved form (Short Line Railroad Rehabilitation Tax Credit Application for Preliminary Certification).¶
- (3) The application must also include a certification, executed by an authorized representative of the short line railroad, that certifies that the applicant's project meets the requirements for a short line railroad project set forth in ~~Or. Laws 2019, ch. 579~~RS 315.591 - 315.603 and this division of administrative rules. The representative's certification must be a sworn statement attesting to the truth of the certification and attesting to the following:¶
- (a) That the railroad is ~~either a Tier I or Tier II~~a short line railroad; ¶
- (b) That the leased or owned infrastructure on which the rehabilitation tax credit would be based is located in Oregon;¶
- (c) The railroad mileposts that are adjacent to the leased or owned infrastructure;¶
- (d) That rehabilitation costs are not funded by or used to qualify for any state or federal grants, or used to claim a federal tax credit (Regardless of whether the applicant applies for the federal tax credit under section 45G of the Internal Revenue Code, the amount applicant is eligible to qualify for under the federal tax credit shall be deducted from the applicant's rehabilitation project costs before calculating the applicant's Oregon tax credit.); and¶
- (e) That the applicant is current on all state and local taxes, fees and assessments.
- Statutory/Other Authority: ORS 184.619, 823.011, ~~Or. Laws 2019, ch. 579~~29(1) and 10(3)315.593, 315.597
- Statutes/Other Implemented: ~~Or. Laws 2019, ch. 579, 26-17~~RS 315.591 - 315.603

AMEND: 741-030-0050

RULE SUMMARY: Made edit to section (3) due to changes by HB 3406.

CHANGES TO RULE:

741-030-0050

Preliminary Certification Review and Calculation of Potential Tax Credit

(1) Project applications will be reviewed for compliance with the requirements of ~~Or Laws 2019, ch. 579~~RS 315.591 - 315.603 and the administrative rules of Chapter 741, Division 30. Upon receipt of an application for preliminary certification, the Department will determine whether the proposed project is eligible for a Short Line Railroad Rehabilitation Tax credit.¶

(2) No later than 60 days after receipt of an application for preliminary certification, the Department will:¶

(a) Issue a preliminary certification with the potential amount of the tax credit; or¶

(b) Reject the application if the project is not eligible; or¶

(c) Require the applicant to submit additional information as may be necessary. Applicants will have 15 business days from the Department's notice requiring additional information to respond.¶

(3) The department will use the procedure provided in ~~Or Laws 2019, ch. 579~~RS 315.595 to calculate the potential amount of the tax credit when issuing a preliminary certification. The department will use the tax credit ~~prioritization rules of Or Laws 2019, ch. 579~~allocation method provided in ORS 315.595 if the total amount of potential tax credits exceeds the total amount of potential tax credits allowed for any biennium.

Statutory/Other Authority: ORS 184.619, 823.011, ~~Or Laws 2019, ch. 579~~§ 10(3) 315.593, 315.597

Statutes/Other Implemented: ~~Or Laws 2019, ch. 579, § 6-17~~RS 315.591 - 315.603

AMEND: 741-030-0055

RULE SUMMARY: Because HB 3406 eliminates tiers, we deleted "either" and "Tier I or Tier II" from section (3)(a).

Also, HB 3406 adds a provision citing the federal 45G tax credit, so additional text was added to section (3)(d).

CHANGES TO RULE:

741-030-0055

Amendment of a Preliminary Certification

- (1) If any change to the project as described in the preliminary certification occurs, an applicant must file a written amendment request with the Department prior to the completion of the rehabilitation project to amend a preliminary certification.¶¶
- (2) The amendment request must be submitted on the Department-approved form (Short Line Railroad Rehabilitation Tax Credit Application for Preliminary Certification Amendment) and describe the changes to the project and reasons for the changes, including changes in rehabilitation project costs, project design, and any associated railroad mileposts.¶¶
- (3) The application must also include a certification, executed by an authorized representative of the short line railroad, that certifies that the applicant's project meets the requirements for a short line railroad project set forth in Or. Laws 2019, ch. 579 RS 315.591 - 315.603 and this division of administrative rules. The representative's certification must be a sworn statement attesting to the truth of the certification and attesting to the following:¶¶
 - (a) That the railroad is ~~either a Tier I or Tier II~~ a short line railroad;¶¶
 - (b) That the leased or owned infrastructure on which the rehabilitation tax credit would be based is located in Oregon;¶¶
 - (c) The railroad mileposts that are adjacent to the leased or owned infrastructure;¶¶
 - (d) That the rehabilitation project costs are not funded by or used to qualify for any state or federal grants, or used to claim a federal tax credit (Regardless of whether the applicant applies for the federal tax credit under section 45G of the Internal Revenue Code, the amount applicant is eligible to qualify for under the federal tax credit shall be deducted from the applicant's rehabilitation project costs before calculating the applicant's Oregon tax credit.); and¶¶
 - (e) That the applicant is current on all state and local taxes, fees and assessments.¶¶
- (4) If the amendment request does not include information needed to demonstrate compliance with any applicable rules or standards, the Department will provide the applicant a written notice relating to the information needed to make the request complete. If the applicant does not provide all of the requested information to the Department within 30 days of the notice, the amendment request with outstanding information will expire and no changes will be made to the preliminary certification.¶¶
- (5) If the Department determines the amendment request complies with applicable rules or standards, the Department will issue an amended preliminary certification with the potential amount of the tax credit. The certification may contain new or amended conditions and requirements.¶¶
- (6) If the amendment request does not comply with applicable statutes, rules or standards, the Department will issue an order that denies the change and provide written reasons for the denial.

Statutory/Other Authority: ORS 184.619, 823.011, Or. Laws 2019, ch. 579 § 1(1) and § 10(3) 315.593, 315.597

Statutes/Other Implemented: Or. Laws 2019, ch. 579, § 6-17 RS 315.591 - 315.603

AMEND: 741-030-0060

RULE SUMMARY: Because HB 3406 eliminates tiers, we deleted "either" and "Tier I or Tier II" from section (1)(c)(A).

Also, HB 3406 includes provisions related to the federal 45G tax credit, so edits were made to section (1)(c)(D).

CHANGES TO RULE:

741-030-0060

Final Certification Application and Review

- (1) The following requirements must be met in order for the applicant to receive final certification: ¶
- (a) Applicants with completed projects must have a valid preliminary certification for a short line railroad rehabilitation tax credit. The short line railroad rehabilitation project must be completed as described in the preliminary certification, and in accordance with ~~Or. Laws 2019, ch. 579~~ RS 315.591 - 315.603 and Chapter 741, Division 30 of the administrative rules. Any changes to a preliminary certification must be made through the amendment process outlined in these rules and must be completed prior to the project completion date. ¶
- (b) Applicants must apply on the Department-approved form (Short Line Railroad Rehabilitation Tax Credit Application for Final Certification). ¶
- (c) The application must include a certification, executed by an authorized representative of the short line railroad, that certifies that the applicant's project meets the requirements for a short line railroad project set forth in ~~Or. Laws 2019, ch. 579~~ RS 315.591 - 315.603 and this division of administrative rules. The representative's certification must be a sworn statement attesting to the truth of the certification and attesting to the following: ¶
- (A) That the railroad is ~~either a Tier I or Tier II~~ a short line railroad; ¶
- (B) That the leased or owned infrastructure on which the rehabilitation tax credit would be based is located in Oregon; ¶
- (C) The railroad mileposts that are adjacent to the leased or owned infrastructure; ¶
- (D) That the rehabilitation project costs are not funded by or used to qualify for any state or federal grants, or used to claim a federal tax credit (Regardless of whether the applicant applies for the federal tax credit under section 45G of the Internal Revenue Code, the amount applicant is eligible to qualify for under the federal tax credit shall be deducted from the applicant's rehabilitation project costs before calculating the applicant's Oregon tax credit.); ¶
- (E) The actual eligible costs of the completed maintenance, reconstruction or replacement of infrastructure in Oregon; and ¶
- (F) That the applicant is current on all state and local taxes, fees and assessments. ¶
- (d) Applicants must provide documentation of rehabilitation project actual costs indicating the date they were paid or incurred, which may include canceled checks, invoices or receipts, binding contracts or agreements, or other documentation that evidence that such costs were properly paid or incurred for the project described in the preliminary certification and represent eligible costs under these rules. ¶
- (2) The Department may inspect the infrastructure, at the Department's discretion, to ensure the project is eligible for the tax credit. ¶
- (3) After an application for final certification is received, the Department will determine whether the application is complete. An application is incomplete if it does not include information needed to demonstrate substantive compliance with any applicable standards and preliminary certification conditions adopted by the Department. If it is incomplete, the Department will provide the applicant a written explanation describing deficiencies. Upon receipt of a request for additional information from the Department, applicants will have 15 business days to respond. If the application is complete, the Department will process the application. Within 60 days after a completed application for final certification is received, the Department will either approve or deny the application. ¶
- (4) If the Department approves the application, the Department will issue a final certification, which states the amount of certified costs and the amount of the tax credit. ¶
- (5) An applicant that has been awarded a final certification may transfer the credit as provided in ~~Or. Laws 2019, ch. 579~~ RS 315.591 - 315.603.
- Statutory/Other Authority: ~~ORS 184.619, 823.011, Or. Laws 2019, ch. 579~~ 29(1) and 310(3) 315.593, 315.597
- Statutes/Other Implemented: ~~Or. Laws 2019, ch. 579, 26-17~~ RS 315.591 - 315.603