

WSR 21-11-100
EXPEDITED RULES
DEPARTMENT OF COMMERCE
[Filed May 19, 2021, 9:34 a.m.]

Title of Rule and Other Identifying Information: Chapter 365-135 WAC, Bond cap allocation, amendments to WAC 365-135-035 (1), (2), 365-135-070 (1)(a), (4), (5), (6).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This rule change will adjust six references within the existing WAC provisions from September 1 to July 1. This will allow for earlier reallocation of unutilized bond cap from initial set-aside categories to applicants in other categories reducing wait times for projects to proceed. This will assist with maximizing utilization of bond cap during the calendar year.

The change to WAC 365-135-035(1) amends the date (from September 1 to July 1) after which housing programs and projects are given priority for the first fifty percent of released/reallocated volume cap.

The change to WAC 365-135-035(2) amends the date (from September 1 to July 1) of the provision which indicates that applicants from all other categories will be considered for allocation of released/reallocated volume cap.

The change to WAC 365-135-070 (1)(a) amends the date (from September 1 to July 1) when an exempt facility applicant may be awarded more than thirty percent of the initial set-aside for exempt facility projects.

The change to WAC 365-135-070(4) amends the date (from September 1 to July 1) at which the application criteria for exempt facility applicants are softened.

The change to WAC 365-135-070(5) amends the date (from September 1 to July 1) when exempt facility projects may receive an allocation to convert taxable financing to tax-exempt financing.

The change to WAC 365-135-070(6) amends the date (from September 1 to July 1) when four tiers of limitations on the proportion of volume cap allocation to total project cost can be waived.

Reasons Supporting Proposal: These changes will provide conformance with the provisions of chapter 39.86 RCW which were amended in 2010 to alter release/reallocation dates for initial bond cap set-asides from September 1 to July 1. These changes will ensure that the framework and intent that existed in the rules prior to the amendments to the code in 2010 are restored.

Without the change to WAC 365-135-035(1) housing programs may receive less than fifty percent of released/reallocated volume cap. This is inconsistent with the WAC framework and intent that existed prior to RCW changes in 2010 and the amendment would bring consistency with the pre-2010 rules.

Without the change to WAC 365-135-035(2) applicants from various categories do not have explicit authorization under the rules for reallocation of initial set-asides in other underutilized categories. This is inconsistent with the WAC framework and intent that existed prior to RCW changes in 2010 and the amendment would bring consistency with the pre-2010 rules.

Without the change to WAC 365-135-070 (1)(a) amends the date (from September 1 to July 1) an exempt facility applicant is inhibited from immediate consideration for released cap. As a result, exempt facility projects are at a disadvantage in competing for released volume

cap in comparison to other categories in a manner that did not occur prior to the 2010 amendments to chapter 39.86 RCW.

Without the change to WAC 365-135-070(4) the strict criteria for exempt facility applicants are maintained for a period after the general release date in a manner inconsistent with the pre-2010 framework.

Without the change to WAC 365-135-070(5) the date when an exempt facility project may receive an allocation to convert taxable financing to tax exempt financing occurs two months after the general release date. As a result, these projects are at a disadvantage in competing for released volume cap in comparison to other categories in a manner that did not occur prior to the 2010 amendments to chapter 39.86 RCW.

Without the change to WAC 365-135-070(6) the date when four tiers of limitations on the proportion of volume cap allocation to total project cost are waived occurs two months after the general release date. As a result, these projects are at a disadvantage in competing for released volume cap in comparison to other categories in a manner that did not occur prior to the 2010 amendments to chapter 39.86 RCW.

Statutory Authority for Adoption: RCW 34.05.353 (1)(b) and (d).

Statute Being Implemented: Chapter 39.86 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of commerce, governmental.

Name of Agency Personnel Responsible for Drafting: Allan Johnson, 1011 Plum Street S.E., Olympia, WA 98504, 360-725-5033.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: This will affect timing of release/reallocation dates but will not change the overall amount of private activity volume cap. It may assist in maximizing use of volume cap within a specific calendar year.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.

Content is explicitly and specifically dictated by statute.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The proposed WAC amendments will bring the rules into conformance with the code revisions adopted in 2010 that changed the release dates for initial set-asides from September 1 of each year to July 1 of each year.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Amber Siefer, Department of Commerce, 1011 Plum Street S.E., Olympia, WA

98504-2525, phone 360-522-0101, email amber.siefer@commerce.wa.gov,
AND RECEIVED BY July 19, 2021.

May 19, 2021
Amber Siefer
Rules Coordinator

OTS-3071.1

AMENDATORY SECTION (Amending WSR 10-07-128, filed 3/23/10, effective 4/23/10)

WAC 365-135-035 Reallocations. (1) Housing programs and projects will be given priority for the first fifty percent of the annual tax exempt private activity bond cap available after (~~September~~) July 1st each year because of the need for affordable housing, the program's ability to serve lower-income households, its contribution to and support of economic development and long-term benefits that may be achieved.

(2) Bond cap will consider other categories of applications including industrial development bonds, exempt facilities, public utility districts, and student loans for allocation from the remaining bond cap available after (~~September~~) July 1st.

(a) The program will consider and then evaluate and balance the public benefits listed in statute and in rule in making allocation decisions. Allocations will be based upon the likelihood of a project achieving the highest overall public purposes and the degree to which a project:

(i) Provides an economic boost to an economically distressed community (based on the three-year unemployment figures from employment security);

(ii) Creates or retains jobs that pay higher than the median wage for the county in which it is located, in sustainable industries, particularly for lower-income persons;

(iii) Retains or expands the local tax base;

(iv) Encourages and facilitates the provision of student loans for institutions of higher education;

(v) Reduces environmental pollution;

(vi) Facilitates investments in new manufacturing technologies enabling Washington industries to stay competitive;

(vii) Diverts solid waste from disposal and manufactures it into value-added products;

(viii) Encourages the environmentally sound handling of solid waste using best management's practices; or

(ix) Produces competitively priced energy for use in the state.

(b) The criteria in this section and other applicable criteria otherwise established in statute and rule shall not be considered as ranked in any particular order but shall be weighed and balanced for each application and among applications in making allocation decisions.

(3) For the purposes of qualified energy conservation bonds, the federal code and U.S. Department of Treasury guidance contained in IRS Notice 2009-29 allow formula allocations to be reallocated to the

state and passed on by the state to other issuers. An originally awarded locality may designate other issuing localities within the jurisdiction of the originally awarded locality to use all or a portion of its original allocation by any procedure mutually acceptable to both parties, on condition that the originally awarded locality provides documentation of the designation to the department within thirty days of making the designation and ensures that all other department requests for documentation are met. The following procedures will apply to qualified energy conservation bond reallocations:

(a) An originally awarded locality that intends to use its original allocation or intends to designate another issuer within the jurisdiction of the originally awarded locality to use the original allocation must file a *Notice of Intent* form with the department by January 1, 2010.

(b) An originally awarded locality that has chosen to decline its original allocation may affirmatively reallocate to the state by submitting an appropriately marked *Notice of Intent* form.

(i) The form must be signed by the official(s) of the jurisdiction authorized to execute the form pursuant to a resolution declining the allocation adopted by the jurisdiction's governing body; and

(ii) The form and the resolution declining the allocation must be delivered to the department by January 1, 2010.

(c) An originally awarded locality that has used the *Notice of Intent* form to express its intent to use its original allocation may amend the *Notice of Intent* at a later time if it is determined that the locality is unable to use the allocation and has decided to reallocate to the state.

(d) An originally awarded locality intending to use its original allocation must provide the department with project information and supporting documents by February 1, 2010. Supporting documents include *Bond Counsel* and *Underwriter Statement of Intent* forms, or equivalent, at the discretion of the bond cap manager, and a certified copy of an inducement resolution by the governing board. A locality may request an extension if filed by February 1, 2010.

(e) If an originally awarded locality has not provided the department with the documents required by subsections (1), (2) or (4) of this section or has not issued bonds or requested an extension by June 1, 2010, the department may issue a *Notice of Intent to Reallocate*, informing the locality of the intent to reallocate the original allocation to another locality.

(f) An originally awarded locality will have fifteen days from receipt of a *Notice of Intent to Reallocate* to respond to the department with the required documentation or to ask the department to reconsider the reallocation determination.

(g) The department will respond to a request to reconsider a reallocation determination within ten business days with a decision by the assistant director of the local government division or designee to grant an extended time in which the issuing jurisdiction must demonstrate progress toward a qualified energy conservation bond issuance, or a decision to go forward with reallocation of the authority. The length of the time extension shall be determined at the discretion of the assistant director.

(4) For the purposes of recovery zone economic development bond and recovery zone facility bond allocations, an originally awarded locality may designate other issuing localities within the jurisdiction of the originally awarded locality to use all or a portion of its original allocation by any procedure mutually acceptable to both par-

ties, on condition that the originally awarded locality provides documentation of the designation to the department within thirty days of making the designation and ensures that all other department requests for documentation are met.

If an originally awarded locality is not able to or chooses not to use its original allocation or to offer it to another issuer within the jurisdiction of the originally awarded locality, the authority may be waived. Waived recovery zone economic development bond or recovery zone facility bond authority may be reallocated by the department to other issuing localities. In addition, if an originally awarded locality does not respond to the department's requests for information regarding its intent to use its original allocation or progress in moving toward issuance by the federal deadline, the department may deem the allocation to have been waived.

In such cases, federal code provisions and U.S. Department of Treasury guidance in IRS Notice 2009-50 allow original allocations to be waived then reallocated by the state to other issuing localities. The following procedures will apply to any reallocations of waived recovery zone economic development bond or recovery zone facility bond authority:

(a) An originally awarded locality that intends to use its original allocation or intends to designate another issuer within the jurisdiction of the originally awarded locality to use the original allocation must file a Notice of Intent form with the department by January 1, 2010.

(b) An originally awarded locality that has chosen to decline its original allocation may affirmatively waive the allocation for reallocation by the state by submitting an appropriately marked *Notice of Intent* form.

(i) The form must be signed by the official(s) of the jurisdiction authorized to execute the form pursuant to a resolution declining the allocation adopted by the jurisdiction's governing body; and

(ii) The form and the resolution declining the allocation must be delivered to the department by January 1, 2010.

(c) An originally awarded locality that has used the *Notice of Intent* form to express its intent to use its original allocation may amend the *Notice of Intent* at a later time if it is determined that the locality is unable to use its original allocation and has decided to waive the allocation for reallocation by the state.

(d) An originally awarded locality intending to use its original allocation must provide the department with project information and supporting documents by February 1, 2010. Supporting documents include *Bond Counsel* and *Underwriter Statement of Intent* forms, or equivalent, at the discretion of the bond cap manager, and a certified copy of an inducement resolution by the governing board. A locality may request an extension if filed by February 1, 2010.

(e) If an originally awarded locality has not provided the department with the documents required by subsections (1), (2) or (4) of this section or has not issued bonds or requested an extension by June 1, 2010, the department may issue a *Notice of Intent to Reallocate*, informing the locality of the intent to deem the original allocation to have been waived and to reallocate it to another locality.

(f) An originally awarded locality will have fifteen days from receipt of a *Notice of Intent to Reallocate* to respond to the department with the required documentation or to ask the department to reconsider its waiver and reallocation determination.

(g) The department will respond to the request to reconsider its waiver and reallocation determination within ten business days with a decision by the assistant director of the local government division to grant an extended time in which the issuing jurisdiction must demonstrate progress toward a recovery zone economic development bond or recovery zone facility bond issuance, or a decision to go forward with waiver and reallocation of the authority. The length of the time extension shall be determined at the discretion of the assistant director.

(h) All recovery zone bonds must be issued by the deadlines established in the code.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. WSR 10-07-128, § 365-135-035, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). WSR 97-02-093, § 365-135-035, filed 1/2/97, effective 2/2/97.]

AMENDATORY SECTION (Amending WSR 97-02-093, filed 1/2/97, effective 2/2/97)

WAC 365-135-070 Criteria for exempt facility bonds. (1) In addition to the state statute, the following guidelines will be used as criteria for evaluating exempt facility requests:

(a) Until (~~September~~) July 1st of each year, any one exempt facility project may not receive more than thirty percent of the initial allocation amount available in the exempt facility category.

(b) The level of unemployment in a particular community within a county, to the extent that figures are available from the Washington state employment security department.

(c) The number of direct jobs and secondary or spin-off jobs expected to be generated by the project.

(d) The degree to which the project proposes to provide jobs for lower-income persons from the community.

(e) The number of jobs created in proportion to the amount of the bond cap allocation.

(f) The proportionate number of persons in relationship to the size of the community who will benefit from the project.

(g) The degree to which the project provides an economic boost to an economically distressed community (based on the three-year unemployment figures from employment security).

(h) The degree to which the project retains or expands the local tax base.

(i) The degree to which the project reduces environmental pollution.

(j) The degree to which the project diverts solid waste from disposal and manufactures it into value-added products.

(k) The degree to which the project produces energy at a lower cost than alternative or existing energy sources.

(l) The environmental benefit of the project to the particular community, the county or the state.

(m) The availability of bond cap from the exempt facility category.

(n) Recognize and accommodate the unique timing, and issuance needs of large scale projects that may require allocations in more than one year.

(o) Projects that result in publicly owned facilities over privately owned facilities.

(2) Exempt facility applications will not be considered for allocation until:

(a) The department receives:

(i) A list of all permits required to complete the project and the date each permit application was submitted to and/or granted by the appropriate authority;

(ii) A copy of any environmental impact statements; and

(b) Significant progress is demonstrated in securing project financing.

(3) The criteria in this section and other applicable criteria otherwise established in rule and statute shall not be considered as ranked in any particular order but shall be weighed and balanced for each application and among applications in making allocation decisions.

(4) After (~~September~~) July 1st of each year, the department may approve an allocation amount prior to the issuer completing all of the criteria listed above.

(5) Exempt facility projects may receive an allocation in order to convert taxable financing to tax-exempt financing, but only in January or (~~September~~) July of any year. The request for conversion will be compared against other requests for conversion and current exempt facility applications. Projects that use the Washington economic development finance authority to complete their financing will have priority over projects in obtaining future allocations to convert to tax-exempt financing. Conversion is only allowed within the federal guidelines of one year after the project comes online or two calendar years after the Washington economic development finance authority financing is approved, whichever comes first.

(6) Exempt facility projects up to \$50,000,000 may receive an allocation for up to one hundred percent of the total project cost. Projects from \$50,000,001 to \$75,000,000 may receive an allocation for up to ninety percent of the total project cost. Projects from \$75,000,001 to \$100,000,000 may receive an allocation for up to eighty percent of the total project cost. Projects over \$100,000,000 may receive an allocation for up to seventy percent of the total project cost. A project may obtain additional allocation above these percentages after (~~September~~) July 1st of the last year of eligibility only if the total demand for cap is lower than the amount available.

[Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2) (g). WSR 97-02-093, § 365-135-070, filed 1/2/97, effective 2/2/97. Statutory Authority: Chapter 39.86 RCW. WSR 93-13-012 (Order 93-05), § 365-135-070, filed 6/7/93, effective 1/1/94.]