

# WEST VIRGINIA LEGISLATURE

## 2019 REGULAR SESSION

Introduced

### House Bill 2726

FISCAL  
NOTE

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AND ANDERSON

[Introduced January 29, 2019; Referred  
to the Committee on Energy then Finance.]

1 A BILL to amend and reenact §11-13Q-3, §11-13Q-7, and §11-13Q-19 of the Code of West  
2 Virginia, 1931, as amended, all relating to entitling natural resource producers to the  
3 economic opportunity tax credit; allowing the credit to be used to offset the severance tax;  
4 establishing conditions; and modifying definitions.

*Be it enacted by the Legislature of West Virginia:*

## **ARTICLE 13Q. ECONOMIC OPPORTUNITY TAX CREDIT.**

### **§11-13Q-3. Definitions.**

1 (a) *General.* -- When used in this article, or in the administration of this article, terms  
2 defined in §11-13Q-3(b) of this code have the meanings ascribed to them by this section, unless  
3 a different meaning is clearly required by either the context in which the term is used, or by specific  
4 definition, in this article.

5 (b) *Terms defined.*

6 (1) *Business.* -- The term "business" means any activity which is engaged in by any person  
7 in this state which is taxable under §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*, §11-  
8 23-1 *et seq.* or §11-24-1 *et seq.* of this code (or any combination of those articles of this chapter).

9 (2) *Business expansion.* -- The term "business expansion" means capital investment in a  
10 new or expanded business facility in this state.

11 (3) *Business facility.* -- The term "business facility" means any factory, mill, plant, refinery,  
12 warehouse, building or complex of buildings located within this state, including the land on which  
13 it is located, and all machinery, equipment and other real and personal property located at or  
14 within the facility, used in connection with the operation of the facility, in a business that is taxable  
15 in this state, and all site preparation and start-up costs of the taxpayer for the business facility  
16 which it capitalizes for federal income tax purposes.

17 (4) *Commissioner or Tax Commissioner.* -- The terms "commissioner" and "Tax  
18 Commissioner" are used interchangeably herein and mean the Tax Commissioner of the State of  
19 West Virginia, or his or her designee.

20 (5) *Compensation*. -- The term "compensation" means wages, salaries, commissions and  
21 any other form of remuneration paid to employees for personal services.

22 (6) *Controlled group*. -- The term "controlled group" means one or more chains of  
23 corporations connected through stock ownership with a common parent corporation if stock  
24 possessing at least fifty percent of the voting power of all classes of stock of each of the  
25 corporations is owned directly or indirectly by one or more of the corporations; and the common  
26 parent owns directly stock possessing at least 50 percent of the voting power of all classes of  
27 stock of at least one of the other corporations.

28 (7) *Corporation*. -- The term "corporation" means any corporation, joint-stock company or  
29 association, and any business conducted by a trustee or trustees wherein interest or ownership  
30 is evidenced by a certificate of interest or ownership or similar written instrument.

31 (8) *Designee*. -- The term "designee" in the phrase "or his or her designee," when used in  
32 reference to the commissioner, means any officer or employee of the State Tax Department duly  
33 authorized by the commissioner directly, or indirectly by one or more redelegations of authority,  
34 to perform the functions mentioned or described in this article.

35 (9) *Eligible taxpayer*. -- The term "eligible taxpayer" means any person who makes  
36 qualified investment in a new or expanded business facility located in this state and creates at  
37 least the required number of new jobs and who is subject to any of the taxes imposed by §11-13-  
38 1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*, §11-23-1 *et seq.* and §11-24-1 *et seq.* of this code  
39 (or any combination of those articles). "Eligible taxpayer" shall also include an affiliated group of  
40 taxpayers if the group ~~elects to file a consolidated~~ files a combined corporation net income tax  
41 return under §11-24-1 *et seq.* of this code.

42 (10) *Expanded facility*. -- The term "expanded facility" means any business facility (other  
43 than a new or replacement business facility) resulting from the acquisition, construction,  
44 reconstruction, installation or erection of improvements or additions to existing property if the  
45 improvements or additions are purchased on or after January 1, 2003, but only to the extent of

46 the taxpayer's qualified investment in the improvements or additions.

47 (11) *Includes and including.* -- The terms "includes" and "including," when used in a  
48 definition contained in this article, shall not be considered to exclude other things otherwise within  
49 the meaning of the term defined.

50 (12) *Leased property.* -- The term "leased property" does not include property which the  
51 taxpayer is required to show on its books and records as an asset under generally accepted  
52 principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments  
53 for federal income tax purposes, the property shall be treated as purchased property under this  
54 section.

55 (13) *New business facility.* -- The term "new business facility" means a business facility  
56 which satisfies all the requirements of §11-13Q-3(b)(13)(A), §11-13Q-3(b)(13)(B), §11-13Q-  
57 3(b)(13)(C), and §11-13Q-3(b)(13)(D) of this code.

58 (A) The facility is employed by the taxpayer in the conduct of a business the net income  
59 of which is or would be taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code. The facility  
60 is not considered a new business facility in the hands of the taxpayer if the taxpayer's only activity  
61 with respect to the facility is to lease it to another person or persons.

62 (B) The facility is purchased by, or leased to, the taxpayer on or after January 1, 2003.

63 (C) The facility was not purchased or leased by the taxpayer from a related person. The  
64 commissioner may waive this requirement if the facility was acquired from a related party for its  
65 fair market value and the acquisition was not tax motivated.

66 (D) The facility was not in service or use during the ninety days immediately prior to  
67 transfer of the title to the facility, or prior to the commencement of the term of the lease of the  
68 facility: *Provided*, That this ninety-day period may be waived by the commissioner if the  
69 commissioner determines that persons employed at the facility may be treated as "new  
70 employees" as that term is defined in this subsection.

71 (14) *New employee.* --

72 (A) The term “new employee” means a person residing and domiciled in this state, hired  
73 by the taxpayer to fill a position or a job in this state which previously did not exist in the taxpayer's  
74 business enterprise in this state prior to the date on which the taxpayer's qualified investment is  
75 placed in service or use in this state. In no case may the number of new employees directly  
76 attributable to the investment for purposes of this credit exceed the total net increase in the  
77 taxpayer's employment in this state: *Provided*, That the commissioner may require that the net  
78 increase in the taxpayer's employment in this state be determined and certified for the taxpayer's  
79 controlled group: *Provided, however*, That persons filling jobs saved as a direct result of  
80 taxpayer's qualified investment in property purchased or leased for business expansion may be  
81 treated as new employees filling new jobs if the taxpayer certifies the material facts to the  
82 commissioner and the commissioner expressly finds that:

83 (i) But for the new employer purchasing the assets of a business in bankruptcy under  
84 chapter seven or eleven of the United States bankruptcy code and the new employer making  
85 qualified investment in property purchased or leased for business expansion, the assets would  
86 have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved  
87 would have been lost; or

88 (ii) But for the taxpayer's qualified investment in property purchased or leased for business  
89 expansion in this state, the taxpayer would have closed its business facility in this state and the  
90 employees of the taxpayer located at the facility would have lost their jobs: *Provided*, That the  
91 commissioner may not make this certification unless the commissioner finds that the taxpayer is  
92 insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer's business facility was destroyed,  
93 in whole or in significant part, by fire, flood or other act of God.

94 (B) A person is considered to be a “new employee” only if the person's duties in connection  
95 with the operation of the business facility are on:

96 (i) A regular, full-time and permanent basis:

97 (I) “Full-time employment” means employment for at least 140 hours per month at a wage

98 not less than the prevailing state or federal minimum wage, depending on which minimum wage  
99 provision is applicable to the business;

100 (II) "Permanent employment" does not include employment that is temporary or seasonal  
101 and therefore the wages, salaries and other compensation paid to the temporary or seasonal  
102 employees will not be considered for purposes of §11-13Q-5 and §11-13Q-5 7 of this code; or

103 (ii) A regular, part-time and permanent basis: *Provided*, That the person is customarily  
104 performing the duties at least 20 hours per week for at least six months during the taxable year.

105 (15) *New job*. -- The term "new job" means a job which did not exist in the business of the  
106 taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled  
107 by a new employee.

108 (16) *New property*. -- The term "new property" means:

109 (A) Property, the construction, reconstruction or erection of which is completed on or after  
110 January 1, 2003, and placed in service or use after that date; and

111 (B) Property leased or acquired by the taxpayer that is placed in service or use in this state  
112 on or after January 1, 2003, if the original use of the property commences with the taxpayer and  
113 commences after that date.

114 (17) *Original use*. -- The term "original use" means the first use to which the property is  
115 put, whether or not the use corresponds to the use of the property by the taxpayer.

116 (18) *Partnership and partner*. -- The term "partnership" includes a syndicate, group, pool,  
117 joint venture or other unincorporated organization through or by means of which any business,  
118 financial operation or venture is carried on, and which is not a trust or estate, a corporation or a  
119 sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint  
120 venture or other organization.

121 (19) *Person*. -- The term "person" includes any natural person, corporation or partnership.

122 (20) *Property purchased or leased for business expansion*.

123 (A) *Included property*. -- Except as provided in §11-13Q-3(b)(20)(B) of this code, the term

124 “property purchased or leased for business expansion” means real property and improvements  
125 thereto, and tangible personal property, but only if the real or personal property was constructed,  
126 purchased, or leased and placed in service or use by the taxpayer, for use as a component part  
127 of a new or expanded business facility as defined in this section, which is located within the State  
128 of West Virginia. This term includes only:

129 (1) Real property and improvements thereto having a useful life of four or more years,  
130 placed in service or use on or after January 1, 2003, by the taxpayer.

131 (2) Real property and improvements thereto, acquired by written lease having a primary  
132 term of 10 or more years and placed in service or use by the taxpayer on or after January 1, 2003.

133 (3) Tangible personal property placed in service or use by the taxpayer on or after January  
134 1, 2003, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in  
135 determining the personal or corporation net income tax liability of the business taxpayer under  
136 §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which has a useful life, at the time the  
137 property is placed in service or use in the state, of four or more years.

138 (4) Tangible personal property acquired by written lease having a primary term of four  
139 years or longer, that commenced and was executed by the parties thereto on or after January 1,  
140 2003, if used as a component part of a new or expanded business facility, shall be included within  
141 this definition.

142 (5) Tangible personal property owned or leased, and used by the taxpayer at a business  
143 location outside the state which is moved into the State of West Virginia on or after January 1,  
144 2003, for use as a component part of a new or expanded business facility located in the state:  
145 *Provided*, That if the property is owned, it must be depreciable or amortizable personal property  
146 for income tax purposes, and have a useful life of four or more years remaining at the time it is  
147 placed in service or use in the state, and if the property is leased, the primary term of the lease  
148 remaining at the time the leased property is placed in service or use in the state, must be four or  
149 more years.

150 (B) *Excluded property.* — The term “property purchased or leased for business expansion”  
151 does not include:

152 (i) Property owned or leased by the taxpayer and for which the taxpayer was previously  
153 allowed tax credit under §11-13C-1 *et seq.*, §11-13D-1 *et seq.* or §11-13E-1 *et seq.* of this code,  
154 or the tax credits allowed by this article.

155 (ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other  
156 transferor, was previously allowed tax credit under §11-13C-1 *et seq.*, §11-13D-1 *et seq.* or §11-  
157 13E-1 *et seq.* of this code, or the tax credits allowed by this article.

158 (iii) Repair costs, including materials used in the repair, unless for federal income tax  
159 purposes the cost of the repair must be capitalized and not expensed.

160 (iv) Airplanes.

161 (v) Property which is primarily used outside the state, with use being determined based  
162 upon the amount of time the property is actually used both within and outside the state.

163 (vi) Property which is acquired incident to the purchase of the stock or assets of the seller,  
164 unless for good cause shown, the commissioner consents to waiving this requirement.

165 (vii) Natural resources in place.

166 (viii) Purchased or leased property, the cost or consideration for which cannot be  
167 quantified with any reasonable degree of accuracy at the time the property is placed in service or  
168 use: *Provided*, That when the contract of purchase or lease specifies a minimum purchase price  
169 or minimum annual rent the amount thereof shall be used to determine the qualified investment  
170 in the property under ~~§11-13Q-5-8~~ §11-13Q-8 of this code if the property otherwise qualifies as  
171 property purchased or leased for business expansion.

172 (21) *Purchase.* — The term “purchase” means any acquisition of property, but only if:

173 (A) The property is not acquired from a person whose relationship to the person acquiring  
174 it would result in the disallowance of deductions under section 267 or 707 (b) of the United States  
175 Internal Revenue Code of 1986, as amended, and in effect on January 1, 2003.



176 (B) The property is not acquired by one component member of a controlled group from  
177 another component member of the same controlled group. The commissioner can waive this  
178 requirement if the property was acquired from a related party for its then fair market value; and

179 (C) The basis of the property for federal income tax purposes, in the hands of the person  
180 acquiring it, is not determined:

181 (i) In whole or in part by reference to the federal adjusted basis of the property in the hands  
182 of the person from whom it was acquired; or

183 (ii) Under Section 1014 (e) of the United States Internal Revenue Code of 1986, as  
184 amended, and in effect on January 1, 2002.

185 (22) *Qualified activity.* -- The term "qualified activity" means any business or other activity  
186 subject to any of the taxes imposed by §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*,  
187 §11-23-1 *et seq.*, or §11-24-1 *et seq.* of this code (or any combination of those articles of this  
188 chapter). ~~but does not include the activity of severance or production of natural resources~~

189 (23) *Related person.* -- The term "related person" means:

190 (A) A corporation, partnership, association or trust controlled by the taxpayer;

191 (B) An individual, corporation, partnership, association, or trust that is in control of the  
192 taxpayer;

193 (C) A corporation, partnership, association, or trust controlled by an individual, corporation,  
194 partnership, association, or trust that is in control of the taxpayer; or

195 (D) A member of the same controlled group as the taxpayer.

196 For purposes of this section, "control," with respect to a corporation, means ownership,  
197 directly or indirectly, of stock possessing fifty percent or more of the total combined voting power  
198 of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust,  
199 means ownership, directly or indirectly, of 50 percent or more of the beneficial interest in the  
200 principal or income of the trust. The ownership of stock in a corporation, of a capital or profits  
201 interest in a partnership or association or of a beneficial interest in a trust is determined in

202 accordance with the rules for constructive ownership of stock provided in section 267 (c) of the  
203 United States Internal Revenue Code of 1986, as amended, other than paragraph (3) of that  
204 section.

205 (24) *Replacement facility.* -- The term "replacement facility" means any property (other  
206 than an expanded facility) that replaces or supersedes any other property located within this state  
207 that:

208 (A) The taxpayer or a related person used in or in connection with any activity for more  
209 than two years during the period of five consecutive years ending on the date the replacement or  
210 superseding property is placed in service by the taxpayer; or

211 (B) Is not used by the taxpayer or a related person in or in connection with any qualified  
212 activity for a continuous period of one year or more commencing with the date the replacement  
213 or superseding property is placed in service by the taxpayer.

214 (25) *Research and development.* -- The term "research and development" means  
215 systematic scientific, engineering or technological study and investigation in a field of knowledge  
216 in the physical, computer or software sciences, often involving the formulation of hypotheses and  
217 experimentation, for the purpose of revealing new facts, theories or principles, or increasing  
218 scientific knowledge, which may reveal the basis for new or enhanced products, equipment or  
219 manufacturing processes.

220 (A) Research and development includes, but is not limited to, design, refinement and  
221 testing of prototypes of new or improved products, or design, refinement and testing of  
222 manufacturing processes before commercial sales relating thereto have begun. For purposes of  
223 this section, commercial sales includes, but is not limited to, sales of prototypes or sales for market  
224 testing.

225 (B) Research and development does not include:

226 (i) Market research;

227 (ii) Sales research;

- 228 (iii) Efficiency surveys;
- 229 (iv) Consumer surveys;
- 230 (v) Product market testing;
- 231 (vi) Product testing by product consumers or through consumer surveys for evaluation of
- 232 consumer product performance or consumer product usability;
- 233 (vii) The ordinary testing or inspection of materials or products for quality control (quality
- 234 control testing);
- 235 (viii) Management studies;
- 236 (ix) Advertising;
- 237 (x) Promotions;
- 238 (xi) The acquisition of another's patent, model, production or process or investigation or
- 239 evaluation of the value or investment potential related thereto;
- 240 (xii) Research in connection with literary, historical, or similar activities;
- 241 (xiii) Research in the social sciences, economics, humanities or psychology and other
- 242 nontechnical activities; and
- 243 (xiv) The providing of sales services or any other service, whether technical service or
- 244 nontechnical service.
- 245 (26) *Taxpayer*. -- The term "taxpayer" means any person subject to any of the taxes
- 246 imposed by §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*, §11-23-1 *et seq.*, or §11-24-1
- 247 *et seq.* of this code (or any combination of those articles of this chapter).
- 248 (27) *This code*. -- The term "this code" means the Code of West Virginia, 1931, as
- 249 amended.
- 250 (28) *This state*. -- The term "this state" means the State of West Virginia.
- 251 (29) *Used property*. -- The term "used property" means property acquired after December
- 252 31, 2002, that is not "new property."

**§11-13Q-7. Application of annual credit allowance.**

1           (a) *In general.* -- The aggregate annual credit allowance for the current taxable year is an  
2 amount equal to the sum of the following:

3           (1) The one-tenth part allowed under §11-13Q-4 of this code for qualified investment  
4 placed into service or use during a prior taxable year; plus

5           (2) The one-tenth part allowed under §11-13Q-4 of this code for qualified investment  
6 placed into service or use during the current taxable year; plus

7           (3) The one-tenth part allowed under §11-13Q-5 of this code for locating corporate  
8 headquarters in this state; or the amount allowed under §11-13Q-10 of this code of the taxable  
9 year.

10           (b) *Application of current year annual credit allowance.* -- The amount determined under  
11 §11-13Q-7(a) of this code is allowed as a credit against 80 percent of that portion of the taxpayer's  
12 state tax liability which is attributable to and the direct result of the taxpayer's qualified investment,  
13 and applied as provided in ~~subsections (e) through (f), both inclusive, of this section §11-13Q-7(a)~~  
14 though §11-13Q-7(g), both inclusive, of this code, and in that order: *Provided,* That if the median  
15 salary of the new jobs is higher than the statewide average nonfarm payroll wage, as determined  
16 annually by the West Virginia Bureau of Employment Programs, the amount determined under  
17 §11-13Q-7(a) of this code is allowed as a credit against one hundred percent of that portion of  
18 the taxpayers state tax liability which is attributable to and the direct result of the taxpayer's  
19 qualified investment, and shall be applied, as provided in ~~subsections (e) through (f), both~~  
20 inclusive, of this section §11-13Q-7(a) though §11-13Q-7(g), both inclusive, of this code, and in  
21 that order.

22           (c) *Business and occupation taxes.* -- That portion of the allowable credit attributable to  
23 qualified investment in a business or other activity subject to the taxes imposed under §11-13-2o  
24 of this code must first be applied to reduce the taxes imposed or payable under §11-13-2o of this  
25 code, for the taxable year (determined before application of allowable credits against tax and the  
26 annual exemption). In no case may the credit allowed under this article be applied to reduce any

27 tax imposed or payable under §11-13-2f of this code, or under any other section of §11-13-1 *et*  
28 *seq.* of this code except §11-13-2o of this code.

29 (1) If the taxes due under §11-13-2o of this code are not solely attributable to and the  
30 direct result of the taxpayer's qualified investment in a business or other activity taxable under  
31 that section, the amount of those taxes that are attributable is determined by multiplying the  
32 amount of taxes due under that section, for the taxable year (determined before application of any  
33 allowable credits against tax and the annual exemption), by a fraction, the numerator of which is  
34 all wages, salaries and other compensation paid during the taxable year to all employees of the  
35 taxpayer employed in this state, whose positions are directly attributable to the qualified  
36 investment in a business or other activity taxable under that section. The denominator of the  
37 fraction shall be the wages, salaries and other compensation paid during the taxable year to all  
38 employees of the taxpayer employed in this state, whose positions are directly attributable to the  
39 business or other activity of the taxpayer that is taxable under §11-13-1 *et seq.* of this code.

40 (2) The annual exemption allowed by §11-13-3 of this code, plus any credits allowable  
41 under §11-13D-1 *et seq.*, §11-13E-1 *et seq.*, §11-13R-1 *et seq.*, and §11-13S-1 *et seq.* of this  
42 code shall be applied against and reduce only the portion of §11-13-1 *et seq.* of this code taxes  
43 not apportioned to the qualified investment under this article: *Provided*, That any excess  
44 exemption or credits may be applied against the amount of §11-13-1 *et seq.* of this code taxes  
45 apportioned to the qualified investment under this article, that is not offset by the amount of annual  
46 credit against the taxes allowed under this article for the taxable year, unless their application is  
47 otherwise prohibited by this chapter.

48 (d) Severance taxes. –

49 (1) That portion of the allowable credit attributable to qualified investment in a business or  
50 other activity subject to the tax imposed by §11-13A-1 *et seq.* of this code must first be applied to  
51 reduce up to eighty percent of the taxes imposed by that article for the taxable year (determined  
52 before application of any allowable credits against tax).

53 (2) If the taxes due under §11-13A-1 et seq. of this code are not solely attributable to and  
54 the direct result of the taxpayer's qualified investment in a business or other activity taxable under  
55 that article, the amount of such taxes which are so attributable, shall be determined by multiplying  
56 the amount of taxes due under that article for the taxable year (determined before application of  
57 any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and  
58 other compensation paid during the taxable year to all employees of the taxpayer employed in  
59 this state, whose positions are directly attributable to the qualified investment in a business or  
60 other activity taxable under that article. The denominator of the fraction shall be the wages,  
61 salaries and other compensation paid during the taxable year to all employees of the taxpayer  
62 employed in this state, whose positions are directly attributable to the business or other activity of  
63 the taxpayer that is taxable under that article.

64 (3) Any credits allowable under §11-13D-1 et seq. and §11-13E-1 et seq. of this code shall  
65 be applied against and reduce only the portion of §11-13D-1 et seq. of this code taxes not  
66 apportioned to the qualified investment under this article: *Provided*, That any excess credits may  
67 be applied against the amount of §11-13A-1 et seq. of this code taxes apportioned to the qualified  
68 investment under this article, that is not offset by the amount of annual credit against such taxes  
69 allowed under this article for the taxable year, unless their application is otherwise prohibited by  
70 this chapter.

71 ~~(d)~~ (e) Business franchise tax. --

72 (1) After application of §11-13Q-7(c) of this code, any unused allowable credit is next  
73 applied to reduce the taxes imposed by §11-23-1 et seq. of this code for the taxable year  
74 (determined after application of the credits against tax provided in §11-23-17 of this code but  
75 before application of any other allowable credits against tax).

76 (2) If the taxes due under §11-23-1 et seq. of this code are not solely attributable to and  
77 the direct result of the taxpayer's qualified investment in a business or other activity taxable under  
78 that article for the taxable year, the amount of the taxes which are so attributable are determined

79 by multiplying the amount of taxes due (determined after application of the credits against tax as  
80 provided in §11-23-17 of this code, but before application of any other allowable credits), by a  
81 fraction, the numerator of which is all wages, salaries and other compensation paid during the  
82 taxable year to all employees of the taxpayer employed in this state, whose positions are directly  
83 attributable to the qualified investment in a business or other activity taxable under §11-23-1 *et*  
84 *seq.* of this code. The denominator of the fraction is wages, salaries and other compensation paid  
85 during the taxable year to all employees of the taxpayer employed in this state, whose positions  
86 are directly attributable to the business or other activity of the taxpayer that is taxable under §11-  
87 23-1 *et seq.* of this code.

88 (3) Any credits allowable under §11-13D-1 *et seq.*, §11-13E-1 *et seq.*, §11-13R-1 *et seq.*,  
89 and §11-13S-1 *et seq.* of this code are applied against and reduce only the portion of §11-23-1 *et*  
90 *seq.* of this code taxes not apportioned to the qualified investment under this article: *Provided,*  
91 That any excess exemption or credits may be applied against the amount of §11-23-1 *et seq.* of  
92 this code taxes apportioned to the qualified investment under this article that is not offset by the  
93 amount of annual credit against those taxes allowed under this article for the taxable year, unless  
94 their application is otherwise prohibited by this chapter.

95 ~~(e)~~ (f) *Corporation net income taxes.* --

96 (1) After application of §11-13Q-7(c) and §11-13Q-7(d) of this code, any unused credit is  
97 next applied to reduce the taxes imposed by §11-24-1 *et seq.* of this code for the taxable year  
98 (determined before application of allowable credits against tax).

99 (2) If the taxes due under §11-24-1 *et seq.* of this code (determined before application of  
100 allowable credits against tax) are not solely attributable to and the direct result of the taxpayer's  
101 qualified investment, the amount of the taxes that is attributable are determined by multiplying the  
102 amount of taxes due under that article for the taxable year (determined before application of  
103 allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and  
104 other compensation paid during the taxable year to all employees of the taxpayer employed in

105 this state whose positions are directly attributable to the qualified investment. The denominator of  
106 the fraction is the wages, salaries and other compensation paid during the taxable year to all  
107 employees of the taxpayer employed in this state.

108 (3) Any credits allowable under §11-24-1 *et seq.* of this code are applied against and  
109 reduce only the amount of §11-24-1 *et seq.* of this code taxes not apportioned to the qualified  
110 investment under this article: *Provided*, That any excess credits may be applied against the  
111 amount of §11-24-1 *et seq.* of this code taxes apportioned to the qualified investment under this  
112 article that is not offset by the amount of annual credit against such taxes allowed under this  
113 article for the taxable year, unless their application is otherwise prohibited by this chapter.

114 ~~(f)~~ (g) *Personal income taxes.* --

115 (1) If the person making the qualified investment is an electing small business corporation  
116 (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), a  
117 partnership, a limited liability company that is treated as a partnership for federal income tax  
118 purposes or a sole proprietorship, then any unused credit (after application of §11-13Q-7(c), §11-  
119 13Q-7(d), and §11-13Q-7(e) of this code is allowed as a credit against the taxes imposed by §11-  
120 21-1 *et seq.* of this code on the income from business or other activity subject to tax under §11-  
121 13-1 *et seq.* or §11-23-1 *et seq.* of this code or on income of a sole proprietor attributable to the  
122 business.

123 (2) Electing small business corporations, limited liability companies, partnerships and  
124 other unincorporated organizations shall allocate the credit allowed by this article among its  
125 members in the same manner as profits and losses are allocated for the taxable year.

126 (3) If the amount of taxes due under §11-21-1 *et seq.* of this code (determined before  
127 application of allowable credits against tax) that is attributable to business, is not solely  
128 attributable to and the direct result of the qualified investment of the electing small business  
129 corporation, limited liability company, partnership, other unincorporated organization or sole  
130 proprietorship, the amount of the taxes that are so attributable are determined by multiplying the



131 amount of taxes due under §11-21-1 *et seq.* of this code (determined before application of  
132 allowable credits against tax), that is attributable to business by a fraction, the numerator of which  
133 is all wages, salaries and other compensation paid during the taxable year to all employees of the  
134 electing small business corporation, limited liability company, partnership, other unincorporated  
135 organization or sole proprietorship employed in this state, whose positions are directly attributable  
136 to the qualified investment. The denominator of the fraction is the wages, salaries and other  
137 compensation paid during the taxable year to all employees of the taxpayer.

138 (4) No credit is allowed under this section against any employer withholding taxes imposed  
139 by §11-21-1 *et seq.* of this code.

140 ~~(g)~~ (h) If the wages, salaries and other compensation fraction formula provisions of  
141 ~~subsections (c) through (f), both inclusive, of this section §11-13Q-7(a) through §11-13Q-7(g) of~~  
142 this code, inclusive, do not fairly represent the taxes solely attributable to and the direct result of  
143 qualified investment of the taxpayer the commissioner may require, in respect to all or any part of  
144 the taxpayer's businesses or activities, if reasonable:

145 (1) Separate accounting or identification;

146 (2) Adjustment to the wages, salaries and other compensation fraction formula to reflect  
147 all components of the tax liability;

148 (3) The inclusion of one or more additional factors that will fairly represent the taxes solely  
149 attributable to and the direct result of the qualified investment of the taxpayer and all other project  
150 participants in the businesses or other activities subject to tax; or

151 (4) The employment of any other method to effectuate an equitable attribution of the taxes.

152 In order to effectuate the purposes of this subsection, the commissioner may propose for  
153 promulgation rules, including emergency rules, in accordance with §29A-3-1 *et seq.* of this code.

154 ~~(h)~~ (i) *Unused credit.* -- If any credit remains after application of §11-13Q-7(b) of this code,  
155 the amount thereof is carried forward to each ensuing tax year until used or until the expiration of  
156 the third taxable year subsequent to the end of the initial ten-year credit application period. If any

157 unused credit remains after the 13th year, the amount thereof is forfeited. No carryback to a prior  
158 taxable year is allowed for the amount of any unused portion of any annual credit allowance.

**§11-13Q-19. Business eligible for credit entitlements.**

1 (a) Notwithstanding any other provision of this article to the contrary, except as provided  
2 in §11-13Q-5 of this code, no entitlement to the economic opportunity tax credit may result from,  
3 and no credit is available to any taxpayer for, investment placed in service or use except for  
4 taxpayers engaged in the following industries or business activities:

5 (1) Manufacturing, including, but not limited to, chemical processing and chemical  
6 manufacturing, manufacture of wood products and forestry products, manufacture of aluminum,  
7 manufacture of paper, paper processing, recyclable paper processing, food processing,  
8 commercial hydroponic growing of food crops, manufacture of aircraft or aircraft parts,  
9 manufacture of automobiles or automobile parts, and all other manufacturing activities, but not  
10 timbering or timber severance or timber hauling, or mineral severance, hauling, processing or  
11 preparation, or coal severance, hauling, processing or preparation or synthetic fuel manufacturing  
12 taxable under §11-13-2f of this code;

13 (2) Information processing, including, but not limited to, telemarketing, information  
14 processing, systems engineering, back office operations and software development;

15 (3) The activity of warehousing, including, but not limited to, commercial warehousing and  
16 the operation of regional distribution centers by manufacturers, wholesalers or retailers;

17 (4) The activity of goods distribution (exclusive of retail trade);

18 (5) Destination-oriented recreation and tourism; ~~and~~

19 (6) Research and development, as defined in §11-13Q-3 of this code; and

20 (7) Production of natural resources.

21 (b) Notwithstanding the fact that a company, entity or taxpayer is engaged in an industry  
22 or business activity enumerated in §11-13Q-19(a) of this code, the company, entity or taxpayer  
23 must qualify for the economic opportunity tax credit by fulfilling the qualified investment, jobs

- 24 creation and other credit entitlement requirements of this article in order to obtain entitlement to  
25 any credit under this article. Failure to fulfill the statutory requirements of this article results in a  
26 partial or complete loss of the tax credit.

NOTE: The purpose of this bill is to entitle natural resource producers to the economic opportunity tax credit. The bill allows the credit to be used to offset the severance tax. The bill establishes conditions. The bill modifies definitions.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.