

LETTER OPINION
96-L-33

March 5, 1996

Honorable Harvey D. Tallackson
State Senator
53 West Fifth Street
Grafton, ND 58237

Dear Senator Tallackson:

Thank you for your February 6, 1996, letter regarding the ethanol production incentive for Alchem, Ltd. in Grafton, North Dakota.

Your letter states that Alchem, Ltd. is an ethanol production plant which receives the ethanol production incentive administered by the Agricultural Products Utilization Commission (APUC) according to N.D.C.C. ch. 4-14.1. Alchem typically produces less than 15 million gallons of ethanol in a fiscal year, and accordingly receives up to \$1 million in production incentives in the following fiscal year. The production incentive paid to ethanol producers meeting these qualifications is at a rate of forty cents for each gallon of ethanol produced in the state that is marketed by the producing plant to a distributor or wholesaler for sale in North Dakota. Beginning in July of each year, Alchem certifies its production of ethanol marketed for sale in North Dakota on a monthly basis and requests the monthly incentive at the forty cents per gallon rate until the one million dollar cap is reached.

Alchem typically reaches the one million dollar cap within the first six months of the fiscal year, and has already received its maximum incentive for FY 1996. Your letter asks whether Alchem can begin receiving its production incentive for FY 1997 in July, 1997, based on certified production for March, April, May and June of 1996. Under this proposal, the APUC would be making payment to Alchem in FY 1997 based on certified production in FY 1996.

N.D.C.C. § 4-14.4-07 governs your question, and provides, in relevant part:

. . . .

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2. An ethanol plant that was in operation before July 1, 1995, and which produced fewer than fifteen million gallons [5678100 liters] of ethanol in the previous fiscal year may receive up to one million dollars in production incentives from the state for production in a fiscal year. . . .

(Emphasis added.)

According to this statute, an ethanol plant must first show that it has produced fewer than fifteen million gallons of ethanol in the previous fiscal year to qualify for the production incentive program. If the plant qualifies, the plant may then receive up to one million dollars "for production in a fiscal year." This indicates that the ethanol production incentive is tied to the production of a single fiscal year. That particular year is the year in which the incentive is paid. Accordingly, if a plant produces less than fifteen million gallons of ethanol in a fiscal year, then it is eligible to receive up to one million dollars in production incentives for production in the following fiscal year. APUC and Alchem have always applied the statute in this manner.

Alchem has already received the maximum ethanol production incentive for FY 1996 based on production during the first six months of FY 1996. Under your proposal, Alchem would use later production in FY 1996 to receive its FY 1997 incentive payments, beginning in July 1997. This is not allowed by the statute, which ties the incentives of each fiscal year to the production of that fiscal year.

Accordingly, it is my opinion that Alchem cannot certify production for March, April, May and June of 1996 to receive payments beginning in July 1997, and the APUC cannot make payment to Alchem in FY 1997 based on certified production in FY 1996.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cgm/dmm