ENVIRONMENTAL LAW, ALTERNATIVE ENERGY AND SITING GUIDELINES

MICHIGAN ASSOCIATION OF PLANNING SPRING INSTITUTE

HANDOUTS

March 13, 2008
Radisson Hotel
Lansing, Michigan

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OTSEGO COUNTY WIND TURBINE ORDINANCE

OTSEGO COUNTY
WIND TURBINE GENERATOR ORDINANCE

Ordinance Number: 06-01

AN ORDINANCE TO AMEND ARTICLE II "DEFINITIONS" BY ADDING NEW TERMS APPLICABLE TO WIND POWER GENERATION AND TO AMEND ARTICLE XVIII OF THE OTSEGO COUNTY ZONING ORDINANCE BY ADDING SECTION 18.47 "WIND GENERATION" TO PROVIDE REGULATIONS FOR WIND GENERATION AND ANEMOMETER TOWERS AS USES BY SPECIAL USE PERMIT IN THE COUNTY AND TO PROVIDE REVIEW PROCEDURES AND STANDARDS FOR WIND GENERATION AND ANEMOMETER APPROVAL FOR THE HEALTH, SAFETY AND WELFARE OF COUNTY CITIZENS.

THE COUNTY OF OTSEGO, STATE OF MICHIGAN ORDAINS:

Section 1. Amendment of Article II by adding new terms applicable to Wind Power Generation.

Article II of the Otsego County Zoning Ordinance is hereby amended to add the following definitions in their appropriate alphabetic locations, which definitions shall read in their entirety as follows:

ANEMOMETER: An instrument for measuring and recording the speed of the wind.

ESSENTIAL SERVICES: The erection, construction, alteration or maintenance of underground, surface, or overhead gas, electrical, steam or water transmission or distribution systems; collection, communication, supply or disposal systems, including mains, drains, sewers, pipes, conduits, wires, cables, fire alarm boxes, traffic signals, hydrants, towers, poles, electrical substations, gas regulator stations, and other similar equipment, and applicable accessories reasonably necessary for the furnishing of adequate service by such public utilities or municipal departments or commissions or for the public health, safety, and general welfare. Provided, however, that wireless telecommunication towers and facilities, alternative tower structures, antennas, Wind Tower Generators and anemometer towers shall not be considered essential services.

TEMPORARY ANEMOMETER TOWER: A structure, including all accessory facilities, temporarily erected, on which an anemometer is mounted for the purposes of documenting whether a site has wind resources sufficient for the operation of a wind turbine generator.

PRIVATE WIND TURBINE GENERATOR: A Wind Turbine Generator (WTG) used primarily to generate electricity or produce mechanical energy for use on the property where located with a wind generation tower height of 100 feet or less, and generation of 25kw or less of electricity. Sale of electric power via Net Metering is allowed.

WIND TURBINE GENERATOR (WTG) OR UTILITY WTG: A tower, pylon, or other structure, including all accessory facilities, upon which any, all, or some combination of the following are mounted:

1. A wind vane, blade, or series of wind vanes or blades, or other devices mounted on a rotor for the purpose of converting wind into electrical or mechanical energy.

2. A shaft, gear, belt, or coupling device used to connect the rotor to a generator, alternator, or other electrical or mechanical energy producing device.

3. A generator, alternator, or other device used to convert the energy created by the rotation of the rotor into electrical or mechanical energy.

WIND TURBINE GENERATOR TOWER HEIGHT:

1. Horizontal Axis Wind Turbine Rotors: The distance between the ground and the highest point on the arc of the rotor wind blades mounted on a horizontal axis wind turbine generator.

2. Vertical Axis Wind Turbine: The distance between the ground and the highest point of the wind turbine generator.

Section 2. Amendment of Article XVIII by adding Section 18.47 "Wind Generation"

Article XVIII of the Otsego County Zoning Ordinance is hereby amended by adding Section 18.47, which shall read in its entirety as follows:

SECTION 18. 47. WIND GENERATION

The purpose of this section is to establish requirements for the location of Wind Turbine Generators (WTG), commonly known as wind turbines or windmills, and anemometer towers. The county recognizes that it is in the public interest to permit the location of wind turbine generators within the county. The county also recognizes the need to protect the scenic beauty of Otsego County from unnecessary and unreasonable visual interference. As such, this ordinance seeks to:

a. Regulate the development of renewable energy resources in a prudent manner.

b. Protect all areas of the County from any potential adverse impacts of WTG and anemometer towers;

c. Regulate the location of WTG and anemometer towers in the County;

d. Protect the public health, safety and welfare;

e. Avoid potential damage to adjacent property from the failure of WTG and anemometer towers.

18.47.1 Exceptions

Wind Turbine Generator (WTG) regulations provided in this Section 18.47 shall not apply to Private WTGs 35 feet high or less with a rotor blade clearance above ground level a minimum of 15' and with a rotor blade not to exceed 20 feet in diameter. If the afore mentioned WTG is not attached to the principal dwelling or use, the WTG shall be regulated as an accessory structure in accordance with Section 18.1 of the Zoning Ordinance.

18.47.2 Application Requirements.

In addition to the application requirements of Article 16 of this ordinance, an application for a special use permit for a commercial or a private WTG or an anemometer tower shall include all of the following information, unless expressly indicated otherwise:

a. A site plan meeting all of the requirements of Article 20 of this Ordinance.

b. A detailed analysis by a professional engineer, licensed in the State of Michigan, describing the specific WTG structure(s) or anemometer tower proposed and all phases for implementing the development in compliance with the standards set forth in Section 18.47.5.

c. A study prepared by a professional engineer, licensed in the State of Michigan, documenting that the site of the WTG has sufficient wind resources for the proposed WTG equipment. Provided, however, this application requirement shall not apply an anemometer tower.

d. A resume' or other written summary of the education, experience, and other qualifications of all experts providing information concerning the WTG or anemometer tower project.

e. An avian study based on U.S. Fish and Wildlife Service, "Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines", Federal Register: July 10, 2003 (Volume 68, Number 132). Provided, however, this application requirement shall not apply to an anemometer tower.

f. Analysis, measurements and projections of WTG noise propogation shall conform to International Electromechanical Commission (IEC) Standard 61400-11 Part 11, as that standard may be amended or updated from time to time. Acoustic Noise Measurement Techniques shall include: optional noise directivity requirements (see below), infrasound (low frequency) projections, low frequency noise (between 20 and 100 Hz) measurement and analysis and impulsivity measurement (noise pressure of potential "thumping" sounds). Analysis shall include but is not limited to:

1. A survey of the existing ambient background noise levels. Analysis shall include day time measurements and also at least two ambient noise measurements between 9:00 PM and 11:59PM and two between 1:00 AM and 5:00AM.
2. A prediction of the WTG noise levels at the property border. This can be made with manufacturer's data or data from a private testing agency for proposed WTGs or by direct measurement for WTGs in place, so long as measurements are conducted according to IEC and 61400-11 part 11 as that standard may be amended or updated from time to time. Including infrasound and low frequency noise between 20 and 100 Hz, modeling must identify likely pure tone sources.
3. Identification and support for a model for sound propagation. The model may be hemispherical or spherical but particular attention must be paid to the noise propagation downwind of the proposed installation site and the propagation of sound at differing atmospheric densities.
4. A comparison of calculated wind sound pressure levels with and without the WTG or proposed WTGs. This confirms the baseline for permitted sound levels once the WTGs are operating.

This application requirement shall not apply to an anemometer tower.

g. A detailed written statement, with supporting evidence, demonstrating how the proposed WTG or anemometer tower will comply with all of the standards for approval.

h. Written documentation projecting the shadow flicker on any existing structures located off the property on which the WTG will be constructed, and the extent and duration of the shadow flicker on these existing structures. Provided, however, this application requirement shall not apply to an anemometer tower.

i. Written documentation that the applicant has notified the FAA, Gaylord Regional Airport and any other applicable state and federal regulatory agencies of the proposed WTG or anemometer tower.

j. Elevation drawings, computer generated sound models or simulations and other aids or documentation projecting the sound reaching off the property on which the WTG will be constructed, and the extent and duration of the sound. Provided, however, this application requirement shall not apply to an anemometer tower.

k. Elevation drawings, computer generated photographic simulations and other images, or other visual aids that depict how the WTG tower and all accessory structures will appear as constructed on the proposed site from vantage points north, south, east, and west of the WTG tower. Provided, however, this application requirement shall not apply to an anemometer tower.

18.47.3 Standards for WTG and Anemometer Tower Approval.

The Planning Commission shall approve, or approve with conditions, an application for WTG or an anemometer tower only upon a finding that the proposed WTG or anemometer tower complies with all of the following applicable standards, and the approval standards as found in Article 16 of the Zoning Ordinance.

a. The proposed site shall have documented annual wind resources sufficient for the operation of the proposed WTG. The wind resource documentation shall detail, at a minimum, ambient wind at the maximum height permitted by this ordinance. Lower elevations (consistent with anemometer tower approval) shall also be provided by the applicant. This standard shall not apply to an anemometer tower.

b. The minimum site area for WTG or an anemometer tower shall be as necessary to meet required setbacks and any other standards of this section.

c. Noise permitted from WTGs is governed by the original ambient baseline noise study performed in accordance with Section 18.47.2(f) for the first WTG on the subject property and original fixed noise pressure limits above baseline for both day and night operations.

d. Broadband noise from any WTG shall be limited to no more than 10 decibels above the original ambient baseline sound level (or that level which is exceeded 90% of the time) beyond the property line, considering both daytime and night measurements as reported in the engineer's sound propagation model required in section 18.2(f). The day and night requirements will be different. The harmonic mean of the night measurements will set the baseline for night noise limits and the harmonic mean of the daytime measurements will set the baseline for daytime limits. Pure tones, defined as an octave band (at any frequency), are limited to no more than 3 decibels above the adjacent higher and lower octave bands.

e. The potential ice throw or ice shedding for the proposed WTG shall not cross the property lines of the site in question nor impinge on any public Right-of-Way or overhead utility line. Compliance shall be demonstrated in the permit application by the specific analysis method but such model shall not alleviate the applicant of the need to comply with this subsection under all atmospheric conditions, for the life of the structure. This standard shall not apply to an anemometer tower.

f. A WTG shall meet a setback from any adjoining lot line and any adjoining public or private road a distance equal to 1.5x (D+H), but setbacks shall not be reduced to less than 1250 feet for a Public WTG and shall not be reduced to less than 180 feet for a Private WTG, where the proposed WTG meets standards c, d, and e above and where D= the diameter of the rotor and H = the height of the rotor axis above the ground at the base of the tower. This standard shall not apply to an anemometer tower.

g. An anemometer tower shall meet a setback from any adjoining lot line and any adjoining public or private road or overhead utility line a distance equal to the 1.5 times the height of the anemometer tower as measured to the highest point. The setback shall be measured from the outermost point on the base of the anemometer tower, not the guide wire or support wires.

h. The maximum wind generation tower height shall be 300 feet for a WTG. The maximum height of an anemometer tower shall be 300 feet. The Planning Commission may approve an increased height for a WTG, not to exceed 400 feet, if the following specific conditions are met along with the general conditions set forth in Section 16.7 of the Zoning Ordinance. The increased height, however, shall be the smallest increase necessary to meet the following conditions:

   1. The increased height is necessary for the preservation of a substantial stand of trees, existing land forms or structures that would otherwise be removed to increase wind velocity.

   2. To improve the sound model and/or improve compliance with paragraphs 18.47.3(c), (d) or (e).

   This standard shall not apply to an anemometer tower.

i. For both horizontal and vertical axis WTG turbines, the rotor shall be located on the tower such that the minimum blade clearance above the ground level is 25 feet for Private WTG in excess of 35 feet in height and 50 feet for WTG.

j. All WTG turbines shall be equipped with controls to limit the rotational speed of the blades within design limits for the specific WTG. This standard shall not apply to an anemometer tower.

k. The on-site electrical transmission lines connecting the WTG to a public utility electricity distribution system shall be located underground. In addition all other utility lines shall be located underground. Provided, however, this standard shall not apply to an anemometer tower.

l. The WTG or anemometer tower shall, subject to any applicable standards of the FAA, be painted a neutral color so as to reduce visual obtrusiveness. Excessively bright or neon colors are not acceptable. The Planning Commission, however, may approve an alternate color if the WTG or anemometer tower is located within an avian migratory route or if an alternate color would otherwise benefit the neighborhood.

m. The WTG or anemometer tower shall not be artificially lighted unless required, in writing, by the FAA. Where the FAA requires lighting, the lighting shall be the lowest intensity allowable under FAA regulations, the fixtures shall be shielded and directed to the greatest extent possible to minimize glare and visibility from the ground, and no strobe lighting shall be permitted, unless expressly required by the FAA

n. The WTG or anemometer tower shall be designed and constructed in such a manner that access is limited, to the extent possible, to authorize personnel only.

o. The WTG or anemometer tower shall be constructed and operated so that it does not interfere with television, radio, cellular telephone or microwave reception in neighboring areas. If degradation of television, radio, cellular telephone or microwave reception occurs as the result of the WTG or anemometer tower, the developer shall pay to correct the television, radio, cellular telephone or microwave reception.

p. A WTG shall be a monopole or monotube style construction (as distinguished from a lattice-style tower) and shall not utilize guy wires. A Private WTG or anemometer tower may be a lattice-style tower and may utilize guy wires, providing access limitations are maintained to prevent climbing by unauthorized persons.

q. The WTG or anemometer tower shall have posted on the site in a visible, easily accessible location two signs no more than four (4) square feet in area displaying an address and telephone number for emergency calls. The emergency telephone number shall allow a caller to contact a responsible individual to address emergencies at any time during or after regular business hours and on weekends or holidays. Provided, however, this standard shall not apply to private wind generation. One sign shall be located at the service drive entrance to the WTG at the minimum setback distance.

r. The WTG or anemometer tower shall have no advertising painted on or attached to the tower or any other structure of the WTG.

s. The WTG shall be designed and sited in such a manner to minimize shadow flicker on a roadway. In addition the WTG shall be designed and sited in a manner to prevent shadow flicker on any existing structures located off the property on which the WTG is constructed. It shall be the responsibility of the WTG operator to modify operations to also prevent shadow flicker on dwellings constructed and/or occupied after installation of the WTG. If necessary to prevent shadow flicker from crossing occupied structures the WTG may be programmed to stop rotating during times the WTG shadow crosses these structures. The WTG operator may obtain a written easement or other written agreement which specifically allows shadow flicker to cross an occupied structure.

t. Structural integrity of all components not under the jurisdiction of the Michigan Building Code shall be certified by a professional engineer licensed in the State of Michigan. Certification shall include; verification that ultimate strength exceeds that needed to withstand all factored loads and load combinations specified in SIE/ASCE 7-02 "Minimum Design Loads For Buildings And Other Structures". First Order Reliability Analysis shall demonstrate a reliability coefficient (Beta) of not less than 3.54 for any failure mode that could result in any portion of the WTG falling to the ground. In lieu of First Order Reliability Analysis, adequate structural reliability may be demonstrated via analysis methods specified in the Michigan Building Code.

18.47.4 Conditions.

The Planning Commission may attach reasonable conditions to the approval of a WTG or anemometer tower. These conditions may include those necessary to insure that public services and facilities affected by the WTG or anemometer tower will be capable of accommodating increased service and facility loads caused by the WTG or anemometer tower, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Any conditions imposed, however, shall meet all of the following requirements:

a. Be designed to protect natural resources, the health, safety, and welfare and the social and economic well being of those who will use the WTG or anemometer tower under consideration, residents and landowners immediately adjacent to the proposed WTG or anemometer tower, and the community as a whole.

b. Be related to the valid exercise of the police power, and purposes which are affected by the proposed WTG or anemometer tower.

c. Be necessary to meet the intent and purpose of the zoning ordinance, be related to the standards established in the ordinance for the WTG or anemometer tower under consideration, and be necessary to insure compliance with those standards.

18.47.5 Ongoing Compliance.

a. The noise propagation, blade flicker and ice hazard standards developed in permitting of WTGs are absolute. Once WTGs are permitted, the owners have the option of compliance or discontinuation of operations.

b. The owner of a WTG shall conduct physical inspections of the WTG structure(s) and associated equipment annually to ensure continuing compliance with this section and any conditions imposed with the approval of the WTG. Copies of all inspection reports shall be submitted to the zoning administrator within thirty (30) days of the inspection. In the event a WTG owner fails to comply with this Section the County shall have the authority to have the WTG inspected and shall utilize funds from the performance bond to cover the costs of such inspection.

c. Noise exceeding permitted levels. The ordinance recognizes that certain wind and weather conditions and altitude densities can enhance temporary noise pressure that exceeds permitted levels. If non-compliance with the noise standards is brought to the attention of Otsego County enforcement officials the complaint will be investigated and if confirmed, written notice will be sent to the WTG owner requiring post permit documentation of corrective measures taken to address the sound. Documentation could include statements from those adjusting or modifying the WTG and may, at the option of Otsego County, include additional noise propagation certification, conducted in a manner similar to that presented in section 18.47.2(f) tailored to the specific problem being addressed.

18.47.6 Performance Guarantee.

In connection with the approval of a WTG or anemometer tower, the Planning Commission shall require the owner of the WTG to furnish the county with a performance guarantee in the form of a cash deposit, certified check, irrevocable bank letter of credit, or surety bond acceptable to the county in an amount equal to the estimated costs associated with removal of the WTG or anemometer tower and all associated equipment and accessory structures and restoration of the site to a reusable condition which shall include the removal of all underground structures to a depth of ten feet (10') below the natural ground level at that location.

A detailed cost estimate for the removal of the tower shall be provided with the application and shall be based on Means Construction Estimating Guide or similar accepted pricing schedule and shall not include credit for the salvageable value of any materials.

The amount of the performance guarantee shall be reviewed every five years at the time of the Planning Commission review of the WTG as noted in Section 18.47.8. The amount of the performance guarantee shall be increased based on an inflation rate equal to the average of the previous 10 years Consumer Price Index, but not less than 3.5% per year.

If the performance bond is used to cover costs associated with inspections as noted in Section 18.47.5(b) the owner of the WTG shall immediately insure that the full bond amount is available. Failure by the owner of the WTG to insure that the full bond amount is available shall be a violation of this ordinance.

18.47.7 Removal of WTG and Anemometer Towers

WTG and anemometer towers that are not operated for a continuous period of twelve (12) months shall be removed by the owner of the WTG or anemometer tower within 90 days of receipt of a notice from the county requiring such removal. For purposes of this section, non-operation shall be deemed to include, but shall not be limited to, the anemometer instrument(s) being removed from the anemometer tower or disconnected so that wind resources are no longer being measured, the blades of the WTG remaining stationary so that wind resources are not being converted into electric or mechanical energy, or the WTG is no longer connected to the public utility electricity distribution system. In the event a WTG owner fails to remove the WTG tower or the anemometer tower as required by this section the County shall have the authority to remove the tower and shall utilize the performance bond to cover the costs of such removal. If the performance bond is not sufficient to cover the cost of the removal or if the performance bond has expired or is not available the County shall institute an action in a court of competent jurisdiction for the collection of the cost for removal.

18.47.8 Duration of Permit

A permit to operate a temporary anemometer tower shall be valid for one year and may be extended for a maximum of one additional year. A permit to operate a WTG shall be valid for 20 years with review of the operation by the County Planning Commission at a public hearing every five (5) years.

18.47.9 Use of Current Technology

WTGs shall be designed to the current state of the technology. Used, outdated or obsolete WTG equipment shall not be permitted to be constructed or installed. With respect to performance standards set forth in this ordinance, repairs and parts replacement shall not be of lesser quality than that of the original permitted equipment and shall be upgraded to the performance standards current at the time of the repair. In no case shall repairs or alterations be allowed which will decrease the degree to which the WTG complies with this ordinance.

18.47.10 Major Equipment Replacement During Life of the Permit

Should the WTG operator wish to replace major components such as turbine blades, generator, main gear box, nacelle, or the entire WTG, the operator shall demonstrate that the WTG will substantially meet the then current criteria for new WTG permits, except that setback distances will not be increased. In no case shall replacement or alterations be allowed which will decrease the degree to which the WTG complies with this ordinance.

18.47.11 WTG Permit Renewal

At any time the operator of a WTG may elect to seek a new permit for a given site. A new WTG permit shall not allow aspects of the previous permit to be "grandfathered". To qualify for a new permit the WTG installation shall meet all criteria of the then current standards.

Section 3. Severability.

If any section, clause, or provision of this Ordinance is declared unconstitutional or otherwise invalid by a court of competent jurisdiction, said declaration shall not affect the validity of the remainder of the Ordinance as a whole or any part thereof, other than the part so declared to be unconstitutional or invalid.

Section 4. Effective Date.

This Ordinance shall become effective eight (8) days after being published in a newspaper of general circulation within the County.

OTSEGO COUNTY

By:_____
Paul M. Beachnau, County Board Chairman

By:_____
Susan I. DeFeyter, County Clerk

LAW SUMMARIES

ENERGY FACILITIES AND SITING
2006 Annual Report[1]

I. LEGISLATIVE UPDATE - IMPLEMENTATION OF THE ENERGY POLICY ACT OF 2005

The Energy Policy Act of 2005[2] (EPAct 2005) granted federal agencies new authority related to siting of energy facilities. In 2006, several of the new requirements under the Act were implemented.

A. Transmission Facilities Siting

Section 1221(a) of the EPAct 2005 updated section 216 of the Federal Power Act (FPA),[3] creating new federal authority over siting of transmission lines that have an interstate, regional, or national benefit.

1. National Interest Electric Transmission Corridors

Amended FPA section 216 required the Department of Energy (DOE) to issue a national transmission congestion study for comment by August 2006 and every three years thereafter. Based on the study and public comments, the DOE may designate selected geographic areas as "National Interest Electric Transmission Corridors." Applicants for projects proposed within designated corridors that are not acted upon by state siting authorities within one year may request the FERC to exercise federal "backstop" siting authority.

Although some transmission line proponents sought early designation of their projects, the DOE announced on June 6, 2006, that any designations would occur after the congestion study was completed. On August 8, 2006, the DOE issued its congestion study for comment.[4] Following a public comment period, on November 9, 2006, the DOE announced that it would issue corridor designations in draft form in order to allow another round of comments.

The congestion study identified two "Critical Congestion Areas" where remedies are critically needed: Southern California and the Atlantic coastal area from metropolitan New York to Northern Virginia. Four "Congestion Areas of Concern" were identified, where the DOE found that more information and analysis was needed: New England; the Phoenix-Tucson area; the Seattle-Portland area; and the San Francisco Bay area. Finally, the DOE identified five "Conditional Congestion Areas" where congestion could become acute without associated transmission capacity based on potential new generation to serve distant load: Montana-Wyoming (coal and wind); Dakotas-Minnesota (wind); Kansas-Oklahoma (wind); Illinois, Indiana, and Upper Appalachia (coal); and the Southeast (nuclear).

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[1] Compiled by Michael B. Wigmore and Sandra P. Franco of Bingham McCutchen LLP in Washington, D.C. Christopher W. Zibart of Foley & Lardner, Chicago, IL, contributed to the update on transmission facility siting. The update on nuclear reactor siting was contributed by Tamar Jergensen Cerafici of CH2M Hill in Boston, MA. Any questions or comments may be addressed to michael.wigmore@bingham.com.

[2] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[3] Federal Power Act, 16 U.S.C. §§ 791-828 (2000).

[4] National Electric Transmission Congestion Study, 71 Fed. Reg. 45,047 (Aug. 8, 2006). The report is available at http://www.oe.energy.gov.

2. FERC Permitting Procedure

The new FPA section 216 also required the FERC to develop a federal permitting procedure applicable to electric transmission lines. The FERC issued a final order on November 16, 2006, which clarified some of the specifics of the federal backstop siting process.[5]

Under the final rule, the one-year time limit applicable to state proceedings will start when the applicant files its state application.[6] Following this one-year period, an applicant could commence pre-application federal activities, which may include public scoping meetings under the National Environmental Policy Act (NEPA). The FERC also ruled that outright denial by a state commission, not just failure to act, would give rise to FERC jurisdiction.[7] The FERC adopted a uniform distance of one-quarter mile on either side of the proposed right-of-way for notice to nearby landowners, regardless of state requirements.[8] The FERC declined to adopt an exclusive list of factors or to construct a bright-line test to determine whether a project meets all the statutory criteria to assert jurisdiction, but instead will consider all relevant factors presented on a case-by-case basis. The FERC anticipates conducting paper hearings, not evidentiary hearings, based on the extensive information it will collect.[9] Federally permitted transmission lines on new routes will require an Environmental Impact Statement (EIS).[10]

3. Memorandum of Understanding

On August 8, 2006, the DOE, Department of Defense (DOD), Department of Agriculture, Department of Interior (DOI), Department of Commerce, FERC, Environmental Protection Agency, Council on Environmental Quality, and Advisory Council on Historic Preservation (ACHP) entered into a Memorandum of Understanding on Early Coordination of Federal Authorization and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities on Federal Lands (MOU). The MOU "establish[es] a framework for early cooperation and participation that will enhance coordination of all applicable land use authorizations, related environmental, cultural, and historic preservation reviews, and any other approvals that may be required under Federal law in order to site an electric transmission facility."[11] Under the MOU, one week after receiving a project proposal, a participating agency is required to initiate contact with the DOE if the proposed project is (1) equal to or greater than 230 kV, (2) reasonably likely to require an EIS, or (3) reasonably likely to require more than one

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[5] Order No. 689, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, F.E.R.C. Stats. & Regs. ¶ 31,234, 71 Fed. Reg. 69,440 (2006) (to be codified at 18 C.F.R. pts. 50 (transmission line permits), 380 (NEPA implementation)) [hereinafter Order No. 689]. Petitions for rehearing were subsequently filed, but have not yet been resolved.

[6] The FERC noted, however, that it may reconsider this issue.

[7] Order No. 689, *supra* note 5, ¶¶ 30-31.

[8] *Id.* ¶ 53.

[9] *Id.* ¶ 199.

[10] *Id.* ¶ 135. The FERC clarified that, in the case of a line that spans multiple states where its authority only attaches to a portion of the facility under section 216(b)(1), it would have to analyze the impact of the entire project for purposes of the NEPA.

[11] U.S. DEP'T OF ENERGY ET AL., MEMORANDUM OF UNDERSTANDING ON EARLY COORDINATION OF FEDERAL AUTHORIZATION AND RELATED ENVIRONMENTAL REVIEWS REQUIRED TO SITE TRANSMISSION FACILITIES ON FEDERAL LANDS 1 (2006), http://www.oe.energy.gov/DocumentsandMedia/Final_MOU_w_Sigs.pdf.

federal authorization. The agencies also agree to cooperate with the DOE to coordinate reviews and consultation, and adhere to deadlines established by the DOE or as required by law. Within sixty days of a request by the applicant, the agencies agree to coordinate with the DOE to provide information regarding key issues of concern and the likelihood of approval.

4. Energy Corridors on Federal Lands

Section 368 of the EPAct 2005 directs the Secretaries of Agriculture, Commerce, Defense, Energy, and the Interior to designate corridors on federal land in eleven Western states for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities (energy corridors) within two years after enactment, or August 8, 2007.[12] As part of a programmatic environmental impact statement (PEIS) being prepared by the Bureau of Land Management (BLM),[13] in June of 2006, the agencies identified preliminary energy corridors, the majority of which utilize existing corridors and/or rights-of-way. In December of 2006, the BLM announced that more than 200 comments and suggestions on the preliminary maps were received, and additional time was needed to consider these comments. Revised corridor maps are expected to be included in the draft PEIS, which is planned for Spring of 2007. The BLM is also participating in section 106 Consultation under the National Historic Preservation Act (NHPA) with the ACHP, National Conference of State Historic Preservation Officers, and Native American Tribes.

B. Siting of Natural Gas Facilities

Under sections 3 and 7 of the Natural Gas Act, the FERC authorizes the construction and operation of proposed natural gas projects, including liquefied natural gas (LNG) terminals. Because additional federal agencies also may have jurisdiction over other aspects of a natural gas project, section 313 of the EPAct 2005 directed the FERC to coordinate the processing of federal authorizations for such projects, including (a) establishing a schedule for agencies to review requests for authorizations and (b) compiling a record of each decision to serve as a consolidated record for the purpose of appeal, including judicial review. On October 27, 2006, the FERC promulgated regulations implementing section 313 of the EPAct 2005.[14] Federal authorizations covered by the rule include those issued by states under federal delegated authority and recommendations and opinions necessary to reach a decision on a request for a federal authorization, such as biological opinions under the Endangered Species Act.

Under the final rule, applicants for FERC authorizations are required to provide a statement identifying each federal authorization required, the date of submission or expected submission of requests for such authorization, and the date final action on the federal authorization is expected. Within thirty days of receiving the requests, an agency

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[12] In February of 2006, the agencies entered into a memorandum of understanding regarding energy right-of-way corridors on federal lands to delineate certain of the agencies' duties under sections 368 and 372 of the Energy Policy Act.

[13] Notice of Intent to Prepare a Programmatic Environmental Impact Statement, Amend Relevant Agency Land Use Plans, Conduct Public Scoping Meetings, and Notice of Floodplain and Wetlands Involvement, 70 Fed. Reg. 56,647 (Sept. 28, 2005).

[14] Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record, 71 Fed. Reg. 62,912 (Oct. 27, 2006) (to be codified at 18 C.F.R. pts. 153, 157, 375, 385).

must inform the FERC whether the application is deemed complete, what additional time will be provided to allow the applicant to provide additional information, if any studies will be necessary to evaluate the request, the anticipated effective date of the agency's decision, and whether a schedule is set forth by federal law for the agency to act. Subject to any schedule established by federal law, the agencies must act on the requests within ninety days of the issuance of the FERC's final environmental document in a proceeding, or if an environmental document is not prepared, then within ninety days of the issuance of a final FERC order. The FERC has committed to issuing, within ninety days of the notice of an application, a schedule that will apply to the FERC's environmental review process, including the anticipated date for completion of the environmental assessment or EIS. Agencies issuing data requests to applicants must also submit a copy to the FERC within ten business days. Agencies have thirty days to submit a final decision, or summary thereof, and an index of the record to the FERC.[15]

C. *Offshore Alternative Energy Projects*

Section 388 of the EPAct 2005 gave the DOI authority to grant leases, easements, or rights-of-way on the U.S. Outer Continental Shelf (OCS) for the development of renewable energy and to allow for alternate uses of existing facilities. Under this new authority, the DOI's Minerals Management Service (MMS) regulates projects on the OCS related to renewable energy, including wind, wave, solar, and underwater current. The MMS announced that it will be establishing a new program to implement this authority, and is preparing a PEIS to analyze the potential impacts associated with activities under the new program, which is expected in early 2007.[16]

II. ADMINISTRATIVE UPDATE

A. *Department of Defense and Wind Farms*

The National Defense Authorization Act for Fiscal Year 2006 contains an amendment requiring the DOD to study and report by May 8, 2006, the effects of wind projects on military readiness, including the effects of wind turbines on radar installations.[17] On March 21, 2006, the DOD and the Department of Homeland Security (DHS) issued the DOD/DHS Long Range Radar Joint Program Office Interim Policy, stating a policy "to contest any establishment of windmill farms within radar line of site

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[15] The Energy Policy Act sought to resolve an ongoing jurisdictional conflict between the FERC and the states over onshore LNG terminals. The California Public Utilities Commission dismissed its case asserting jurisdiction over a facility in Long Beach, but Californians for Renewable Energy, Inc. (CARE) continued to pursue its case before the U.S. Court of Appeals for the Ninth Circuit. On June 29, 2006, the Ninth Circuit dismissed CARE's petition as moot, and, on August 25, denied requests for panel rehearing and rehearing en banc. Californians for Renewable Energy, Inc. v. FERC, No. 04-73650 (9th Cir. Aug. 25, 2006).

[16] In the FERC's comments on the MMS's Advanced Notice of Proposed Rulemaking, it claimed jurisdiction over Ocean Wave Hydroelectric Projects pursuant to section 23(b)(1) of the FPA, 16 U.S.C. § 817(1), and outlined various opportunities for the MMS to participate in its proceedings.

[17] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 358, 119 Stat. 3136, 3208 (2006).

of the National Air Defense and Homeland Security Radars."[18] This policy remained in effect until the completion of the study and the report, and in the interim the Federal Aviation Authority (FAA) delayed construction of several proposed wind projects through issuance of a notice of presumed hazard, citing to the DOD/DHS policy.

The DOD report was submitted to Congress on September 28, 2006. Based largely on military tests conducted between 2002 and 2005, the report found that wind turbines located within the line of sight of military radar have the potential to downgrade the ability of the radar to detect and track objects of interest. The report also found there are a number of mitigation measures that currently exist to avoid interference, and the DOD indicated it is working on developing additional mitigation approaches. The report also concluded that wind turbines in close proximity to military training, testing, and development sites and ranges can adversely affect the DOD's "train and equip" activities, and wind turbines located in close proximity to Comprehensive Test Ban Treaty monitoring sites can adversely impact its ability to perform this mission by increasing ambient seismic noise levels.

B. New Nuclear Reactor Siting and Design

Part 52 of the Nuclear Regulatory Commission (NRC) rules provides for streamlined application and review of nuclear reactor siting, construction, and operation. In 2006, the NRC proposed a major reorganization of this regulation and related rules.[19] Generally, the proposed changes would clarify the applicability of various requirements to each of the licensing processes (i.e. early site permit, standard design approval, standard design certification, combined license, and manufacturing license). Environmental practitioners will be most interested in the expansion of the NRC's NEPA obligations in 10 C.F.R. § 51. For example, the NRC proposes to eliminate the need for environmental assessments each time a design is certified under 10 C.F.R. § 52, subpart B. Additionally, the NRC will require proposed new reactor designs to address severe accident mitigation alternatives during the certification process. Other proposed regulatory changes include requirements for environmental impact reviews of limited work authority and new definitions to refine the scope of pre-construction activities. The NRC also proposed several changes in hearing requirements, most notably dispensing with mandatory uncontested hearings for licenses.

III. CASE LAW UPDATE

Provided below are summaries of a few of the more notable cases in 2006 regarding challenges to the siting of various types of energy facilities.

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[18] Memorandum from The Dep't of Defense/Dep't of Homeland Sec. Joint Program Office to Joint Program Participants (Mar. 21, 2006), http://www.af.mil/shared/media/document/AFD-060801-032.pdf.

[19] Licenses, Certifications, and Approvals for Nuclear Power Plants, 71 Fed. Reg. 12,782 (proposed Mar. 13, 2006) (to be codified at 10 C.F.R. pts. 1, 2, 10, 19, 20, 21, 25, 26, 50, 51, 52, 54, 55, 72, 73, 75, 95, 140, 170, 171). The NRC supplemented its proposed rule on October 17, 2006. Licenses, Certifications, and Approvals for Nuclear Power Plants; Supplemental Proposed Rule, 71 Fed. Reg. 61,330 (proposed Oct. 17, 2006) (to be codified at 10 C.F.R. pts. 2, 50, 51, 52).

A. *Cape Wind Project in Nantucket Sound*[20]

In *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*,[21] the Massachusetts Supreme Court upheld the May 2005 decision of the Massachusetts Energy Facilities Siting Board to permit construction of underground and undersea transmission lines for the Cape Wind power project, once all permits required for the wind farm are obtained. Rejecting a challenge by the Alliance to Protect Nantucket Sound, the Court found that the Board had the discretion to announce a new approach to determine the need for proposed transmission lines, and that the Alliance had sufficient notice of the issue. The Court also found nothing improper in the Board's decision to issue a conditional permit.

B. *Altamont Pass Wind Farm Challenges*

In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*,[22] the California Superior Court for Alameda County dismissed a case brought by the Center for Biological Diversity (CBD) under California's Unfair Competition Law (the Law), alleging the past killing of birds at the Altamont Pass Wind Farm violated state and federal wildlife protection laws. Interpreting a new standing requirement that was passed the day after the suit was filed, the court found that the CBD was required to show "lost money or property." Because the CBD did not have a financial stake in the birds, the court found the CBD could not claim loss under the Law and, therefore, did not have standing. The court also found that the CBD could not assert a cause of action under the public trust doctrine based on the destruction of wildlife, finding that courts have refused to expand the use of the public trust doctrine by private parties beyond the traditional public trust interest in navigable and tidal waters and tidelands. The CBD filed a notice of appeal on December 11, 2006.

C. *New Nuclear Reactor Siting and Design*

In *Environmental Law and Policy Center v. NRC*,[23] the Seventh Circuit Court of Appeals recently concluded that environmental groups could seek district court review of the Atomic Safety Licensing Board's (ASLB) summary dismissal of their petition for hearing. The groups sought to intervene in proceedings regarding an Early Site Permit in Clinton, Illinois. The ASLB permitted one contention regarding the applicant's analysis of "clean energy alternatives." In other proceedings, the ASLB determined that the applicant's revised environmental report satisfied the requirements of the NEPA. The NRC affirmed the Board's ruling and dismissed the environmental groups' petition, and the environmental groups appealed. On appeal, the Seventh Circuit ruled that (1) the NRC's dismissal of the environmental groups' petition was a final, appealable order; (2) the Board properly dismissed the contention that the applicant had failed to analyze energy efficiency alternatives; and (3) the Board properly granted summary disposition against the groups on the remaining contentions.

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[20] In 2006, Congress saw several efforts to stop the Cape Wind project, including proposed legislation that would have given the Massachusetts governor veto power over the facility. Due to opposition to the provision, a compromise was reached subjecting the project to review by the U.S. Coast Guard and to reasonable terms and conditions the U.S. Coast Guard determines to be necessary to provide for navigational safety.

[21] 858 N.E.2d 294 (Mass. 2006).

[22] No. RG04183113, 2006 WL 2987634 (Cal. Super. Ct. Oct. 12, 2006).

[23] 470 F.3d 676 (7th Cir. 2006).

D. Conformity Determinations

In *Border Power Plant Working Group v. DOE*,[24] the plaintiff challenged two applications under the NEPA and the Clean Air Act for permits and federal rights-of-way to build electricity transmission lines within the United States and across the United States-Mexico border. The transmission lines would connect new power plants in Mexicali, Mexico with the power grid in Southern California. On motions for summary judgment, the court upheld the DOE's environmental review and dismissed the plaintiff's Clean Air Act challenge to the agency's conformity analysis. The court found that the DOE did not have to consider emissions from the power plants in Mexico in its conformity determination and, without considering those emissions, the plaintiff could not show that emissions exceed the thresholds requiring a conformity determination.

E. NEPA Review

In *San Luis Obispo Mothers for Peace v. NRC*,[25] the U.S. Court of Appeals for the Ninth Circuit ruled the Nuclear Regulatory Commission (NRC) must consider potential terrorist attacks when conducting environmental reviews under the NEPA for NRC licenses. The Court rejected the NRC's arguments that the NEPA did not require consideration of potential terrorist attacks, finding that (1) the possibility of terrorist attacks is not so remote and highly speculative as to be beyond the NEPA's requirements; (2) precise quantification of a risk is not necessary to trigger the NEPA requirements and even if it were, the NRC had not established that the risk of a terrorist attack is unquantifiable; (3) the NRC mischaracterized review of a terrorist attack as a demand for a worst-case analysis; and (4) the NRC cannot rely on potential security risks to decline to comply with the NEPA. Various industry groups sought review of the decision by the U.S. Supreme Court, although the Department of Justice urged the Supreme Court to decline to hear the case. On January 16, 2007, the Supreme Court denied certiorari in the case.

[24] 467 F. Supp. 2d 1040 (S.D. Cal. 2006).
[25] 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007).

2006

PA 633 General Property Tax Act--provides that wind energy system is considered personal property for purposes of taxation for taxes levied after December 31, 2005 (SB 803; eff. 1/4/07)

PA 446 General Property Tax Act—revises definition of "transfer of ownership" to exclude a transfer of land, but not buildings or structures located on the land, if the land is subject to a conservation easement under the Natural Resources and Environmental Protection Act or if a transfer of ownership of the land or a transfer of interest in the land is eligible for a deduction as a qualified conservation contribution under the Internal Revenue Code (SB 1004; eff. 12/08/06)\

From the act:

(7) Transfer of ownership does not include the following:

(p) Beginning on the effective date of the amendatory act that added this subdivision, a transfer of land, but not buildings or structures located on the land, which meets 1 or more of the following requirements:

(i) The land is subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140 to 324.2144. As used in this subparagraph, "conservation easement" means that term as defined in section 2140 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140.

(ii) A transfer of ownership of the land or a transfer of an interest in the land is eligible for a deduction as a qualified conservation contribution under section 170(h) of the internal revenue code, 26 USC 170.

324.2140 Definitions.

(a) "Conservation easement" means an interest in land that provides limitation on the use of land or a body of water or requires or prohibits certain acts on or with respect to the land or body of water, whether or not the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the owner of the land or body of water or in an order of taking, which interest is appropriate to retaining or maintaining the land or body of water, including improvements on the land or body of water, predominantly in its natural, scenic, or open condition, or in an agricultural, farming, open space, or forest use, or similar use or condition.

PA 381 Natural Resources and Environmental Protection Act--adds Part 512 (Sustainable Forestry Conservation Easement Tax Incentives) to establish an annual specific tax for commercial forestland subject to a sustainable forest conservation easement, which would be 15 cents per acre less than the specific tax under Part 511 (Commercial Forests); requires an applicant for the reduced tax rate to pay a nonrefundable application fee of $2 per acre, subject to a minimum of $200 and a maximum of $1,000; requires owner to pay a penalty if forestland

subject to an easement were used in violation of Part 512 or the easement; provides that specific tax and penalty are payable to township treasurer; allows owner of commercial forestland subject to an easement to remove forest products in compliance with Part 511 and the easement (SB 917; eff. 9/27/06)

PA 382, 383 Natural Resources and Environmental Protection Act--modify Commercial Forest Act to, among other things, set penalty rate for owners of commercial forestland who withdraw their property; require that the public have access to the forestland for hunting and fishing; and modify eligibility criteria to designate commercial forestland (HB 5454, 5455; eff. 9/27/06)

- PA 379 Qualified Forest Property Recapture Tax Act--enacted effective January 1, 2007, to provide for the recapture of taxes owed on qualified forest property that was converted by a change in use after December 31, 2006, and no longer qualifies for a tax exemption; recapture tax is doubled if no harvests of forest products have been conducted on the land consistent with the approved forest management plan; State Treasurer must collect the tax and deposit the proceeds in the General Fund (SB 913; eff. 9/27/06)
- PA 378 General Property Tax Act--exempts qualified forest property from taxes levied by local school districts, with some exceptions; requires amount exempted each year under these amendments to be paid to the School Aid Fund from the General Fund; exempts transfer of qualified forest property, under certain conditions, from a provision requiring taxable value of property to be adjusted on transfer; and repeals Part 513 (Private Forestry) of the Natural Resources and Environmental Protection Act, which provides a tax exemption for private forest reservations, on September 1, 2007 (SB 912; eff. 9/27/06)

- PA 37 Safe Drinking Water Act—requires Department of Environmental Quality (DEQ) to evaluate impact of proposed waterworks system for community supply that would either: (1) provide new total designed withdrawal capacity of more than 2 million gallons of water per day from source of water other than Great Lakes and connecting waterways, or more than 5 million gallons per day from Great Lakes and connecting waterways, or (2) provide an increased total designed withdrawal capacity of more than 2 million gallons per day from source other than Great Lakes and connecting waterways, or more than 5 million gallons per day from Great Lakes and their connecting waterways, beyond the system's total designed withdrawal capacity; DEQ must reject plans and specifications for proposed system if it determines that system would not meet certain standards under Natural Resources and Environmental Protection Act unless both of the following conditions are met: (1) DEQ determines that there was no feasible and prudent alternative location for the withdrawal, and (2) DEQ includes in approval conditions related to depth, pumping capacity, rate of flow, and ultimate use that ensure that environmental impact of withdrawal would be balanced by its public benefit related to public health, safety, and welfare (SB 857; eff. 2/28/06)
- PA 36 Natural Resources Protection Act--encourage all persons within watershed to establish committee to evaluate status of water resources and uses, and to assist in long-term planning of water resources within the watershed; if Department of Environmental Quality determines that adverse resource impact is occurring, or is likely to occur, DOQ would notify committee or convene meeting with registrants and permit holders within watershed to prevent future adverse resource impacts from occurring; DEQ could issue order restricting water withdrawal if it determines by clear and convincing scientific evidence that there is a substantial and imminent

threat causing adverse resource impact; person subject to the order could request a contested case hearing under Administrative Procedures Act (SB 854; eff. 2/28/06)

- PA 35 Natural Resources Protection Act--requires all owners of real property with capacity to make large quantity withdrawal from state waters to register with Department of Environmental Quality prior to making a withdrawal; registration would not be required for: (1) a person who previously registered, unless the person develops new or increased withdrawal capacity of an additional 100,000 gallons per day; (2) a community supply that holds permit under Safe Water Drinking Act; (3) a person holding a permit under Section 32723; and (4) an owner of noncommercial well on residential property (SB 852; eff. 2/28/06)
- PA 33 Natural Resources and Environmental Protection Act (NREPA)--amends Part 327 (Great Lakes Preservation) to regulate withdrawal of large quantities of water from state waters and further provides that such withdrawals are not regulated under Part 301 (Inland Lakes and Streams) of the NREPA (SB 850; eff. 2/28/06)

PA 648 Revised School Code--permits school board that has levied additional mills beyond maximum number of mills otherwise permitted under Code for school operating purposes to exempt residential property and qualified agricultural and forest property from all or a portion of those additional mills (HB 4125; eff. 1/5/07)

2004 Public Acts

PA 576 Real property--amends General Property Tax Act to exempt from taxes under real property owned by qualified conservation organization that is held for conservation purposes and that is open to all residents of the State for educational and recreational use (HB 6036; eff. 1/4/05)

From senate analysis:
This use would include such low-impact, nondestructive activities as hiking, bird watching, cross-country skiing, and snowshoeing.

Under the bill, "qualified conservation organization" would mean a nonprofit charitable institution or a charitable trust that met all of the following conditions:

-- It was organized or established, as reflected in its articles of incorporation or trust documents, for the purpose of acquiring, maintaining, and protecting nature sanctuaries, nature preserves, and natural areas that predominantly contained natural habitat for fish, wildlife, and plants.
-- It was required under its articles of incorporation, bylaws, or trust documents to hold in perpetuity property acquired for the purpose of maintaining and protecting nature sanctuaries, nature preserves, and natural areas in the State, unless the property was no longer suitable for that purpose or the sale of the property was approved by a majority vote of the members or trustees.
-- Its articles of incorporation, bylaws, or trust documents prohibited any officer, shareholder, board member, employee, or trustee or one of their family members from benefiting from the sale of property acquired for maintaining and protecting nature sanctuaries, nature preserves, and natural areas.

Summary of Original 2002 Legislation

2002 PA Ref #	2002 Public Act	Bill Amended	Comments
1	2002 Public Act 588	1975 PA 228	SBT Related. Offering various Single Business Tax (SBT) exemptions for qualifying alternative energy technologies
2	2002 Public Act 549	1893 PA 206	Personal Property Related. Exempting from the Personal Property Tax any company whose primary service or product is alternative energy technologies research, development or manufacturing until 2012.
3	2002 Public Act 587	1996 PA 376	RenZone Related. Allowing the Michigan Strategic Fund to designate one of the five floating Renaissance Zones as an Alternative Energy Zone. This zone will be called the NextEnergy Zone and have Renaissance Zone status for 20 years.
4	2002 Public Act 593	N/A	Creating a state authority (NextEnergy Authority) to promote the research and development of alternative energy technologies and related economic development in Michigan and to govern the NextEnergy Zone. Note: 2002 PA 593 contains all of the functional definitions related to qualifying technologies

Summary of 2005 Public Act 584 (Olshove) - Amends 2002 Public Act 587 (Alternative Energy Zone)

Olshove Ref #	Technology Focus	Comments
1	AE - Vehicles	Adds Alternative Energy Vehicles to eligible AE-Zone technologies
2	AE - Systems	Alternative Energy Systems to eligible AE-Zone technologies
3	Testing	Adds "Testing" as an AE-Zone qualified business activity

Summary of 2005 Public Act 583 (Allen) - Amends 2002 Public Act 593 (NextEnergy Authority)

Allen Ref #	Technology Focus	Comments
1	Marine Propulsion System	Makes any alternative energy system eligible to power a Marine Propulsion System.
2	BioMass/Thermoelectric	Makes Biomass Energy System and Thermoelectrics eligible Alternative Energy Systems
3	Alternative Energy Technology	Strikes "Solely" and replaces with "Integrally" regarding eligible component parts, etc.
4	Clean Fuels	Replaces "Hydrogen" with "Clean Fuels" regarding the eligibility of storage, generation, reformation, or distribution of "Clean Fuels" for use in an alternative energy system. Note: Clean Fuels include Methanol, Ethanol, Natural Gas, Hydrogen and Renewable Fuels
5	Clean Fuels/Alternative Energy Vehicles	Adds Alternative Energy Vehicles to the list of technologies that Clean Fuels can be generated, stored, formed or distributed for.
6	Alternative Energy Systems	Specifically declares all Alternative Energy Systems as eligible Alternative Energy Technologies
7	MicroGrids	Adds Fuel Lines and Fuel Reformers to eligible sub technologies
8	Alternative Energy Vehicles	Adds Alternative Energy Vehicles as eligible Alternative Energy Technologies
9	Anaerobic Digester	Adds Anaerobic Digesters as eligible Alternative Energy Technologies (R&D and Manufacturing Only)
10	Hybrid Vehicles	Reduces number of alternative energy systems from two to one (in combination with traditional engine) to qualify. This definition is separate from the Hybrid-Electric Vehicle
11	Hydraulic Hybrid Vehicle	Adds Hydraulic Hybrid Vehicle as eligible Alternative Energy Vehicles
12	Renewable Fuels	Adds Renewable Fuels to eligible Clean Fuels. Renewable Fuels include Bio-Diesel, Bio-Diesel Blends, and BioMass
13	MegaWatt Limitations	Removes all MegaWatt Limitations for Wind Energy Systems, Photovoltaic and Fuel Cells
14	Solar Thermal Systems	Strikes "Water" and replaces with "Fluid" for eligible heat transfer fluids

Summaryof 2005 Public Act 803 (Allen) - Section 8 of the General Property Tax Act

Sect 8 Ref #	Technology Focus	Comments
1	Wind, Photovoltaic, Fuel Cells	Specifically declares Wind, Fuel Cells, and Photovoltaic Energy Systems as personal property.

(Future - Pending)

Sect 9i Ref #	Technology Focus	Comments
1	Local Match	Declares the local units of Government can opt out of no more than 50% of the local match
2	Sunset Date	Adjusts the abatement period ot a 10 year rolling abatement from the year approved. 2012 is the last date the abatement can be offere

Synopsis of Michigan Renewable Energy Legislation Introduced in 2007 Session (as of October 25)

Energy Policy

- HB 4331 – MPSC shall develop an energy policy for the state, which shall include, among other things and not limited to: renewable energy, alternative energy, decentralized energy. Sponsor: Clemente (9 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4331

- HB 5218 - A bill to require certain providers of electric service to purchase electricity from eligible electric generators; to prescribe the powers and duties of certain state agencies and officials; and to provide for penalties. Sponsor: Law http://legislature.mi.gov/doc.aspx?2007-HB-5218

Net Metering

- HB 5121 – Establishment of a Michigan net metering system for all instate retail customers. Sponsor: Opsommer (8 co-sponsors) http://legislature.mi.gov/doc.aspx?2007-HB-5121

Renewable Portfolio Standard

- SB 0385 – Require 13% by end of 2015, 20% by end of 2020. 5% of portfolio amount set aside for solar, including eligibility for solar thermal that displaces electricity. Sponsor: Barcia (16 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-SB-0385
- HB 4539 – Same as SB 0385. Sponsor: Jones (25 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4539

- SB 0213 – Require 10% after 2015. $2,000/kW rebate from local distribution company for solar electric installations, up to 25,000 kW by 2016. Sponsor: Birkholz (5 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-SB-0213
- HB 4562 – Same as SB 0213. Sponsor: Accavitti (17 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4562

- SB 0219 – Require 7% by and after 2015. 1% of portfolio amount set aside for solar, including eligibility for solar thermal that displaces electricity. Sponsor: Kahn (3 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-SB-0219
- HB 4319 – Same as SB 0219. Sponsor: Walker (3 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4319

Tax Incentive: Biomass

- HB 4203 – Non-refundable Single Business Tax credit for manufacturing for residential use corn-burning stoves or boilers. Sponsor: Sheen. (13 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4203

- HB 4219 – Refundable income tax credit for residential biomass burning stove; not a conventional wood burning stove. Sponsor: Nitz. (12 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4219

Tax Incentive: Residential Green Rate Programs

- HB 4528 – Income tax credit up to $100 equal to price premium paid by residential customer participating in a qualified, MPSC approved, independently certified, electric utility green rate program. Sponsor: Moolenaar (9 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4528

Tax Incentive: Solar

- HB 4584 – Refundable Single Business Tax credit for 50% of the total amount paid to purchase and install a residential photovoltaic system. Sponsor: Accavitti (2 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4584

- HB 4585 – Refundable income tax credit for 50% of the total amount paid to purchase and install a residential photovoltaic system. Sponsor: Condino (3 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4585

Tax Incentive: Wind

- HB 4247 – Establishes as personal property and exempts from the collection of taxes, "wind energy system [which] includes any foundation, easement, or right of way associated with a tower. Sponsor: Meadows (10 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4247

Wind Siting

- HB 4254 – Establishes statewide guidelines for wind energy system siting and zoning. Sponsor: Walker (15 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4254

Renewable Vehicle Fuel: Biodiesel

- HB 4608 – Set standards for purity and quality of biodiesel and require diesel fuel sold in Michigan to include at least 5% biodiesel. Sponsor: Sheltrown (26 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4608

Renewable Vehicle Fuel: Ethanol

- SB 0033 –Require gasoline sold in Michigan to contain at least 2% ethanol. Sponsor: Switalski. http://legislature.mi.gov/doc.aspx?2007-SB-0033

- HB 4198 –Require gasoline sold in Michigan to contain at least 10% ethanol. Sponsor: Law (20 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4198

Renewable Vehicle Fuel: Other

- SB 0092 – Liquid vegetable or animal fat oil used directly to produce biofuels would be exempted from classification as liquid industrial waste. Sponsor: Basham (5 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-SB-0092

- HB 4011 – Allow franchise filling stations to purchase and provide biofuels for sale, even if their franchiser, refiner, or distributor does not supply biofuels to them. Sponsor: Caswell. http://legislature.mi.gov/doc.aspx?2007-HB-4011

- HB 4277 – State leased or purchased vehicles would have to be capable of using alternative fuels. Sponsor: Pearce (10 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-HB-4277

Tax Incentive: Alternative Fueled Vehicles

- SB 0147 – Provide $1,000 state income tax credit for purchase of "Alternative Energy Vehicle" as defined in the Michigan Next Energy Authority Act (MCL 207.822; http://legislature.mi.gov/doc.aspx?mcl-207-822). Sponsor: C. Brown (3 co-sponsors). http://legislature.mi.gov/doc.aspx?2007-SB-0148

QUALIFIED FOREST PROPERTY EXEMPTIONS

AND

CHICAGO CLIMATE CHANGE

What is the Chicago Climate Exchange?

The Chicago Climate Exchange (CCX) is North America's only, and the world's first, greenhouse gas emission registry, reduction and trading system for all six greenhouse gases.[1] CCX is a self-regulatory, rule-based exchange designed and governed by CCX Members. Members make a voluntary but legally binding commitment to reduce greenhouse gas emissions.

What are forest carbon offset credits?

Exchange forestry offset credits (XFOs) are carbon credits issued to forestry projects registered with the Exchange. The CCX issues XFOs based on increases in carbon stocks or avoided deforestation - quantified in metric tons of carbon dioxide equivalent (CO_2e) - realized during the project period.

How does the sale of forestry carbon offset credit on the CCX reduce emissions of greenhouse gases?

Members of the CCX are legally bound to reduce emissions of greenhouse gases in accordance with the CCX rules. The Chicago Climate Exchange bases its rules on "cap and trade" emissions reduction strategies similar to the U.S. sulfur dioxide trading program. All Exchange members must show a 6% reduction by 2010, with at least 3% of the reductions from changes to facility operations. Members have the option of purchasing carbon credits remaining 3% required reductions may include purchases of carbon offsets. The fact that members are required to obtain reductions through changes to their operations guarantees that real emissions reductions will occur.

What forestry practices are eligible for the program?

Eligible forestry practices include:

Forestation: Forestation projects includes afforestation or reforestation initiated on or after January 1, 1990, on land not forested, or on forest land that had been degraded or unforested on December 31, 1989. The quantity of carbon credits (XFOs) to be issued to a CCX-registered forestry project shall be based on the annual increase in stored carbon (expressed in metric tons of carbon dioxide equivalence) on eligible sites included in the project during years 2003 through 2010.

Non-Industrial Working Forests: Projects in the U.S. involving working forests - forested land harvested in accordance with a sustainable forest management plan that is part of a CCX-approved forest stewardship program - may earn XFOs. The quantity of XFOs issued to a CCX-registered forestry project is based on the net annual increase in stored carbon (expressed in metric tons of carbon dioxide equivalence) above the baseline level. The baseline level, as well as annual carbon sequestration, is calculated by inputting data from the carbon inventory (conducted in accordance with the guidelines outlined in Attachment E) into the US Forest Service Forest Vegetation Simulator (FVS) or other CCX approved method.

Conservation Lands: Projects in the U.S. involving conservation lands - forested lands that have permanent legal protection via conservation easements – may earn XFOs. The quantity of XFOs issued to a CCX-registered forestry project is based on the net annual increase in stored carbon (expressed in metric tons of carbon dioxide equivalence) above the baseline level. The baseline level, as well as annual carbon sequestration, is calculated by inputting data from the carbon inventory (conducted in accordance with the guidelines outlined in Attachment E) into the US Forest Service Forest Vegetation Simulator or other CCX approved method.

What is the enrollment process?

The first step to enrolling eligible lands in the Managed Forest Carbon Offset and Trading Program is to complete an enrollment application and sign the forestry offset (XFO) contract. The XFO contract gives the Delta P2/E2 Center, LLC the right to trade carbon credits on your behalf through 2012. Second, obtain sustainable certification for your forestlands. For most landowners, this is accomplished by joining an American Tree Farm Certified Group, sponsored by a local forester. Then, gather a copy of your approved Forest Stewardship Plan, a signed letter of intent to manage your forestland according to your sustainable forest management plan, the signed letter of intent to maintain the enrolled project lands in an approved sustainable certification program, and aerial photos or maps of the property. Once you have compiled all the required documents, send them to the Delta P2/E2 Center. Finally, contact a "qualified" forester about conducting the carbon inventory on your property. You are responsible for hiring a qualified professional forester to conduct the property level carbon inventory. Since you are paying for the inventory, either directly to the forester or indirectly through the Technical Assistance Fund, it is worthwhile to get several quotes, as rates among qualified foresters will vary.

Once the inventory is complete, the Delta P2/E2 Center enters the information into a proprietary database and runs the Forest Vegetation Simulator to determine the carbon baseline and the annual carbon sequestration rate for the property. Delta multiples the carbon sequestration rate by the number of enrolled acres to quantify the tons of carbon available for trading on the CCX. For properties with multiple forest stands, Delta calculates the tradable tons of carbon by using the weighted average sequestration rate for each stand on the property. Because you can only trade the net annual increase in carbon sequestration for the stand, as predicted by the model, Delta sells your carbon credits 12 to 14 months after the inventory has been completed. In other words, you cannot sell carbon

credits until the forest has a year's worth of growth. Prior to trading, an independent, third-party verifier reviews the inventory, database, and Forest Vegetation Simulator to ensure that the project owner has met all requirements and that the Delta P2/E2 Center has accurately applied the model. After approving the verification results, the Exchange releases the carbon credits to the Delta P2/E2 Center. Delta combines your credits with others, creating tradable quantities for CCX members to purchase. Once Delta sells the credits, the revenue - minus fees, verification cost and technical assistance debt - is returned to each landowner. Delta reports revenue from carbon credit sales to the Internal Revenue Service, so expect to receive a 1099-form each year.

As the project owner, you will be required to provide the Delta P2/E2 Center with yearly updates to the stand, such as new tree planting, harvesting, or catastrophic loss (see Attachment F). The Delta P2/E2 Center uses this information to update its database and re-run the Forest Vegetation Simulator.

What are long-lived wood product protocols?

When a landowner harvests timber according to a sustainable forest management plan, they reduce the short-term, carbon sequestration potential of the forestlands. A timber harvest could be thought of as a "carbon emission" since the land's ability to sequester carbon is reduced. However, when trees are milled into wood products, such as dimensional lumber or plywood, much of the carbon dioxide remains sequestered in the product. To quantify this long-term carbon benefit, the Chicago Climate Exchange created long-lived wood product protocols. These protocols allow Delta to quantify the amount of carbon dioxide that remains sequestered indefinitely from wood products. The long-lived wood product protocols should make it easier for smaller landowners to harvest timber without fear of creating an annual carbon deficit.

Who conducts the property level inventory?

A landowner hires a "qualified", professional forester to perform the carbon inventory. For purposes of this agreement, a "qualified" forester is any forester that is: 1) a Certified Forester through the Society of American Foresters; 3) a State Registered Forester; or 4) a member of the Association of Consulting Foresters. In Michigan, certified Forest Stewardship Plan Writers are also considered "qualified" foresters for this program. The forester must provide proof of their credentials at the time they submit the carbon inventory data to the Delta P2/E2 Center. For this program, Delta will manage the inventory data. Property owners will have access to the inventory data. To establish the carbon baseline accurately, the forester must perform the carbon inventory during the dormant season.

What are the participation fees?

All landowners pay the aggregation and CCX Offset Registration and Trading Fee. In addition, some landowners will pay fees for sustainable forest plan development or carbon inventories. Technical assistance funds may be available for carbon inventories. Government cost-share funds may be available for forest plan development. Please consult with a qualified forester for funding options. All fees are collected upon the sale of credits.

1. **Inventory Development:** If you do not have an adequate inventory, you must obtain one. If you are having a sustainable forest management plan written, your forester may be able to incorporate the carbon inventory into the plan at a reduced cost. Although you are responsible for the inventory and forest plan development costs, you can request technical assistance funds to pay for the carbon inventory. However, you cannot request technical assistance funds to cover the costs of developing a sustainable forest management plan.

2. **Aggregation Fee:** The Delta P2/E2 Center collects a 10% aggregation fee or service fee to cover the program operating costs, data management, and forest modeling. The aggregation fee is applied to the gross revenues from the sale of carbon-offset credits. The landowner pays this fee every year their credits are sold.

3. **CCX Transaction Fee:** The CCX charges a fee of $0.20 per metric ton of carbon trades. The landowner pays this fee every year their credits are sold.

4. **Verification Costs:** The landowner pays all verification costs, proportional to the amount of credits the landowner contributes to the enrollment pool. If a landowner contributes 10% of the credits in the enrollment pool, they are responsible for 10% of the verification costs. The Delta Institute will hire the CCX-approved verifier and negotiate the total verification costs. The landowner pays their share of verification costs in the first and last years in which their credits are sold, and then in any subsequent years as determined by the CCX.

5. **Technical Assistance Funds:** If a landowner used technical assistance funds, they must repay the technical assistance loan before they receive any revenue.

What is the Technical Assistance Fund?

The Michigan Department of Natural Resources has established a limited, revolving Technical Assistance Fund to assist forest landowners with the costs of developing the initial carbon inventory. A landowner can only request technical assistance funds for working forest projects. Afforestation or reforestation projects are not eligible for technical assistance funds.

The Delta P2/E2 Center manages the Technical Assistance Fund and pays the initial carbon inventory costs for landowners who request technical assistance funds. Landowners should inform their forester that they have requested technical assistance funds, allowing the forester to invoice Delta for the carbon inventory work. After receiving and approving all contracts, documentation, and inventory data, Delta pays the forester with technical assistance funds. The landowner repays their technical assistance 'debt' through the annual sale of carbon credits. Thus, the Technical Assistance Fund is self-perpetuating, providing funds each year for carbon inventories. Because technical assistance funding is limited, Delta disburses funds on a first-come first-served basis. As a way of minimizing technical assistance debt, Delta encourages landowners to pay a portion of the carbon inventory costs. Depending on the market price of a carbon credit and the cost of the carbon inventory, landowners with smaller acreages may not realize any profits over the contract period. Please contact the Delta P2/E2 Center prior to enrollment for an estimate of the revenue potential of your forestlands. Finally, a Michigan Forest Stewardship Plan and a signed Exchange Forest Offset Contract are required to receive technical assistance funds.

What is the Michigan Forest Stewardship Program?

The Forest Stewardship Program is a voluntary program that encourages non-industrial, private forest landowners to manage their property. Through the Forest Stewardship Program, landowners will increase the benefits they derive from their property while conserving it for the future. To enroll, a landowner must meet the eligibility requirements outlined in the Forest Stewardship Act of 1990; be a non-industrial, private forest landowner; and must own at least 12 acres, with at least 5 acres in forests or 5 acres to be planted with trees. If eligible, a landowner completes the Forest Stewardship Assessment Form, which leads to Forest Stewardship Management Plan. A certified plan writer must complete the Forest Stewardship Management Plans.

A Forest Stewardship Management Plan is a comprehensive plan that contains the following elements:

§ Clearly stated long-range goals and objectives that reflect forest stewardship ethics;
§ Michigan's Stewardship Ethic;
§ Maps showing current conditions, soil types (including soil descriptions), and locations of proposed activities;
§ A short overview of the property, discussing items such as major forest cover types, landforms, topography, wildlife use, threatened & endangered species, etc;
§ Description of each management unit, including goals and objectives, vegetative cover types, soils, forest density, age and condition, an evaluation of resource elements present, detailed descriptions of planned management activities, and precautionary steps to protect value resource elements;
§ Schedule of recommended management activities for all stands over the next 10 to 20 years;
§ Appendix of technical information to help landowner implement management recommendations

Once the plan is complete, a landowner can use the plan recommendations as a guide to implementing best forest management practices. However, plan implementation is voluntary. The landowner decides which, if any, recommendations to implement. The Michigan Department of Natural Resources encourages plan implementation, but does not monitor or enforce the extent to which landowner do or do not implement their Forest Stewardship Plans.

What are the yearly reporting requirements?

Participating landowners are required to submit yearly update reports, documenting any changes in the carbon stocks of the property (See Attachment F). Landowners should report events such as timber harvesting, afforestation/reforestation, natural disasters (wind-throw, forest fires, insect & disease outbreaks), property development (home construction, land divisions, pond construction) and changes in ownership. Delta uses this information to recalibrate the Forest Vegetation Simulator. In some cases, another carbon inventory may be required to re-establish the carbon baseline. Again, the landowner is responsible for this cost. Technical assistance funds are not available for recalibration inventories. Delta shares this information with the Michigan Department of Natural Resources.

Who will verify my practices and when? How frequently?

An independent, third party verification firm - with expertise in forestry practices and approved by the CCX - conducts desk and field verification for all forestry projects. Verification is intended to confirm the reported species mix and characteristics, verify enrolled acreage, confirm that forest management practices on enrolled land are in conformance with the program criteria, and identify any acres not in compliance with eligibility criteria.

When will I be paid and how frequently?

Because your lands are aggregated with other lands, Delta does not know when the credits generated by your land are actually sold. We sell the aggregated pool of credits, returning to each landowner in the pool, a percentage - proportional to the amount of credits each landowner contributes to the pool - of sale revenue. Thus, if your land contributes 1% of the credits in the overall pool, you will receive 1% of the revenue from each sale. This method allows each landowner to receive greater revenue from increases in market prices. Because, carbon credits are a commodity, the price may fluctuate over time. Delta reserves the right to hold credits, while waiting for a higher market price. The credits are always sold at the market rate - you are never locked into a certain sale price. You can expect to be paid 30 days after Delta sells all the credits in your enrollment pool. Each enrollment pool is eligible for sale 12 to 14 months after you enroll, to allow for forest growth and timber harvesting.

What are the consequences if I do not continue sustainable forestry management practices until the end of the contract period?

The contract contains stipulations for non-compliance with the forestry management plan. Non-compliance with the contract would require the project owner to return a quantity of the carbon credits for the project years or pay an amount equal to the cost of the credits. Additionally, the CCX may ban the project owner from future participation on the Exchange.

What is the Reserve Pool?

The Chicago Climate Exchange requires every landowner to place 20% of annual credits into the reserve pool. The reserve pool is your insurance policy against carbon losses on your property. At the end of the contract period, the CCX releases the unused reserve pool credits to Delta for sale on your behalf. Reserve pool provisions are detail in the XFO contract.

What happens if there is a net loss in carbon stocks due to harvesting?

Landowners earn offset credits for managed forest projects on the basis of net changes in carbon stocks on eligible sites included in the project during each of the years 2003 through 2012. The net change in carbon stocks is defined as the increases in carbon stocks due to growth (as determined by a CCX-approved model) minus the quantity by which carbon stocks decreased due to harvest, pest, fire and adverse weather events. If a timber harvest removes more carbon from the enrolled project lands than is sequestered through annual growth on the enrolled project lands, i.e. the net change in carbon stocks is negative, then the Project Owner has a carbon deficit for that year.

If a carbon deficit occurs prior to the sale of offset credits and only impacts the initial baseline of the enrolled project lands, then those lands are excluded from future projections of annual changes in carbon stocks until the quantity of carbon stocks in these stands reaches the reported quantities of the initial baseline.

If a carbon deficit occurs after the first year of enrollment for landowners that are part of an aggregated pool of projects and the landowner has sold credits then the landowner's carbon deficit will be shared equally among the other landowners in the enrollment pool. The Delta P2/E2 Center, LLC, will automatically deduct the carbon deficit from each landowner's XFOs. Additionally, the stands showing the carbon deficit are excluded from future projections of annual changes in carbon stocks until the quantity of carbon stocks in these stands reaches the reported quantities of the initial baseline.

Therefore, when planning a timber sale, please consider the impact on the carbon stocks. You do not want to remove more carbon through a harvest than you are annually sequestering!

What happens if there is a net loss in carbon stocks due to uncontrolled, catastrophic events?

Each CCX managed forest project must place 20% of the offsets it earns into a CCX Forest Carbon Reserve Pool. Such offsets remain the property of the landowners (pool participants in the case of aggregated projects) until released to the project owners by the CCX near the end of the market period. Accumulated offsets in the Forest Carbon Reserve Pool are used to compensate for any catastrophic losses. In cases of adverse weather events or outbreaks of fire and pest damage which reduce the quantity of carbon stocks on the enrolled project land (but do not impact the baseline level), the landowner shall document the quantity of timber destroyed by fire, pest or adverse weather event and surrender an equivalent amount of Carbon Financial Instrument (CFI) from the Forest Carbon Reserve Pool.

In cases of adverse weather events or outbreaks of fire and pest damage which reduce the quantity of carbon stocks on the enrolled project land below the documented baseline level, the landowner shall document the quantity of timber destroyed by fire, pest or adverse weather event and surrender an amount of CFIs in the Forest Carbon Reserve Pool equal to the amount destroyed by the catastrophic event. However, the CFIs in the Forest Carbon Reserve Pool represent the maximum amount that the landowner can lose in a catastrophic event. These stands are excluded from future projections of annual changes in carbon stocks until the quantity of carbon stocks in these stands reaches the reported quantities of the initial baseline.

All reports of significant damage caused by pest, fire and adverse weather events are subject to audit by a CCX-approved verifier.

What is a Carbon Financial Instrument?

A Carbon Financial Instrument or CFI is term given to carbon offset credits when the credits are traded on the Chicago Climate Exchange. One (1) CFI is one hundred (100) metric tons of carbon offset credits. For purposes of this agreement, CFIs also include carbon offset credits recognized by any established and recognized entity that validates carbon offset credits. Those institutions include, but are not limited to, the California Climate Action Registry, and the Voluntary Carbon Standard. Should the Project Owner and the Delta P2/E2 Center, LLC, decide to pursue registration of CFIs through a standard setting organization other than CCX, the registration and qualification requirements for that entity shall be substituted for the references herein to CCX.

Can I cancel my contract?

You can cancel your contract through a mutual agreement with the Delta P2/E2 Center.

TAX CREDITS FOR BROWNFIELD DEVELOPMENT
ACT 381 AMENDMENTS

OVERVIEW OF NEW ACT 381 AMENDMENTS

Presented by
John Byl, Warner Norcross & Judd

1. Introduction. On December 27, 2007, the Governor signed a package of four bi-partisan bills that amended Act 381 of 1996 (Public Acts 201-204 of 2007). The bills included various changes to Act 381, many of which are significant.

2. Extends sunset date. There was a sunset date of December 31, 2007 for MDEQ OR MEGA approval of Act 381 work plans. The legislation extended the sunset date to December 31, 2012.

3. New eligible activities. Act 381 authorizes an authority to reimburse a developer for certain "eligible activities." The legislation added the following "eligible activities":

   a. Reasonable costs of developing and preparing brownfield plans and work plans.

   b. Demolition and lead or asbestos abatement on brownfield property that is not located in a qualified local governmental unit (core community), whether or not it is a "facility".

   c. Reasonable costs of environmental liability insurance that is not otherwise required by state or federal law.

   d. Costs incurred by a land bank to acquire property for economic development purposes.

4. Adds basis for "blighted" determination. Under Act 381, a property is eligible if it is a "facility", "functionally obsolete", or "blighted." The act contains criteria for determining when a property is considered "blighted." The legislation adds one criterion to this list. A property can now be considered "blighted" if it has substantial subsurface demolition debris buried on site so that the property is unfit for its intended use.

5. Increases and clarifies maximum duration of brownfield plan and TIF capture. Act 381 limited the duration of a brownfield plan to 30 years. The legislation increases this maximum duration to 35 years and clarifies that the duration applies separately to each eligible property. The duration begins for a particular eligible property when the plan is amended to add that property. In addition, the legislation added a maximum duration of 30 years for capturing tax increment revenues for each eligible property. The brownfield plan must identify the beginning date for this capture, which can be any date within 5 years after the plan amendment adding the property. The legislation also authorizes an authority to amend the beginning date at any time before the authority has begun to reimburse the costs of eligible activities on the eligible property.

6. Changes notice and hearing requirements. Act 381 requires a BRA to give certain notices and requires the municipal governing body to hold a public hearing before adopting a brownfield plan. The legislation changes these requirements and adds additional requirements as follows:

   a. Requires two public notices of a hearing to approve a brownfield plan, both of which must occur between 10 and 40 days before the hearing.

   b. The municipal governing body may delegate the public hearing process to the authority or to a subcommittee of the governing body.

   c. Requires an authority to give the MEDC or MDEQ at least 10-days notice of a brownfield-plan hearing if the plan involves activities requiring each agency's respective approval.

   d. Requires an authority to give the MDEQ and MEDC notice within 30 days after the authority amends the beginning date for TIF capture.

7. Allows an authority to use school taxes to reimburse interest. The legislation clarifies the law by allowing an authority to approve the use of taxes levied for school operating purposes, with the MDEQ's approval, to reimburse interest associated with environmental eligible activities and, with MEGA's approval, to reimburse interest associated with non-environmental eligible activities, such as demolition, public infrastructure and site preparation, remains subject to the MEDC's approval.

8. Allows reimbursement for pre-brownfield-plan environmental activities. The legislation authorizes an authority to use tax increment revenues attributable to local taxes to reimburse the reasonable costs of site investigation activities, BEAs, and due care activities that occur before the municipality adopts a brownfield plan if the costs are included in the brownfield plan.

9. Eliminates the work-plan-approval requirement for some activities. Under the previous version of Act 381, the MDEQ must approve a work plan for environmental eligible activities before an authority can use school TIF to reimburse the costs of those activities. The legislation eliminated this work-plan-approval requirement (which means that an authority can now approve the use of taxes levied for school operating purposes without MDEQ approval) for the following activities:

   a. Site investigation activities required to conduct a BEA and to evaluate due care activities required under Part 201.

   b. Conducting a BEA.

   c. Preparing a due care plan to comply with Part 201.

10. Streamlines work-plan-approval process. The legislation attempted to streamline the MDEQ approval process with the following changes:

a. Work-plan approval. Authorizes the MDEQ to approve a work plan if:

i. the activities in the plan are "eligible activities" under Act 381;

ii. the activities in the plan are protective of the public, health, safety and the environment; and

iii. the costs of the activities as a whole are reasonable.

b. Work-plan denial. Addresses the ability of the MDEQ to deny an activity in a work plan, including the following changes:

i. The MDEQ may deny a work plan if the property is not an "eligible property" and may deny any specific activity in the work plan if:

(1) the activity will benefit a liable party;

(2) the activity was conducted before the brownfield plan was approved—other than the reasonable costs of preparing and reviewing the work plan; and

(3) the activity does not satisfy the work-plan-approval criteria, but only if the MDEQ cannot conditionally approve the activity by delineating modifications needed to satisfy the criteria or if the MDEQ needs additional information to analyze whether the activity satisfies the criteria.

ii. The MDEQ must send a letter that explains with specificity the reason for the denial.

iii. For any activity in a work plan that the MDEQ cannot deny, the MDEQ must either unconditionally approve, conditionally approve, or request additional information.

iv. Activities that the MDEQ denies can be resubmitted in another work plan.

c. MDEQ request for additional information. Act 381 allows the MDEQ to request additions or changes to a work plan if the plan lacks sufficient information for the MDEQ to unconditionally approve the plan. The legislation requires the MDEQ to review the additional information and provide one of the authorized responses to the activity within 45 days after receiving the additional information. If the MDEQ does not provide a response within this time frame, the activity is considered approved.

d. Activities more protective than required by Part 201. Authorizes the MDEQ to approve activities in a work plan that are more protective of the public health, safety, and welfare and the environment than required by Part 201 if those

activities provide public health or environmental benefit, for which the MDEQ may consider:

i. Proposed new land use and reliability of restrictions to prevent exposure to contamination;

ii. Cost of the activities required to comply with Part 201, cost of the additional activities, and the cost of all activities; and

iii. Long-term obligations associated with leaving contamination in place and the value of reducing or eliminating these obligations.

e. MDEQ's denial is a final decision only in regard to school TIF. The legislation clarifies that the MDEQ's denial of a work plan constitutes a final decision in regard to school TIF, which an aggrieved person may appeal in circuit court. But the MDEQ's decision does not restrict an authority's use of local TIF under Act 381.

f. Extension by mutual agreement. The legislation clarifies that the MDEQ and an applicant may mutually agree in writing to extend any work-plan-review period.

11. Increases annual cap on an authority's reimburseable costs. Act 381 previously allowed an authority to use up to $75,000 annually of local taxes to pay for the authority's reasonable and actual administrative and operating expenses; BEAs, due care activities, and additional response activities conducted by or on behalf of the authority; and the reasonable costs of preparing a work plan. The legislation increases this annual $75,000 cap depending on the number of active projects. If an authority has fewer than 6 active projects, the cap is now $100,000. This cap increases by $25,000 for every five active projects thereafter until an authority has 25 active projects. When an authority has more than 25 active projects, the cap increases to and is frozen at $300,000. An active project is a project for which the authority is currently capturing tax increment revenues under a brownfield plan.

12. Modifies the definition of "specific taxes." This change allows taxes captured under the commercial rehabilitation act to be captured under a brownfield plan, similar to the treatment of various other tax incentive programs.

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