

Wind Energy



Raymond W. Faricy III

Lindquist & Vennum PLLP
4200 IDS Center
80 South Eighth St.
Minneapolis, MN 55402

LINDQUIST & VENNUM

Today's Presentation

- Legal Issues in Wind Projects
- New Stimulus Items
- Lease/Easement Issues
- Community Organization

Legal Issues

- Real Estate
- Permitting
- Transmission
- Financing

Wind Energy Provisions of 2009 Stimulus Bill

1. Three-Year Extension of Production Tax Credit ("PTC")

- Income tax credit of 2.1 cents per kilowatt-hour allowed for electricity produced at certain qualified wind energy facilities
- Credit claimed during the 10-year period commencing with the date the qualified facility is placed in service
- Electricity must be sold to an unrelated person
- The Stimulus Bill extends the PTC to include projects placed in service on or before December 31, 2012

Wind Energy Provisions of 2009 Stimulus Bill (cont.)

2. Temporary Election to Claim Investment Tax Credit ("ITC") Instead of the Production Tax Credit ("PTC")

- The ITC is allowed for the cost of certain qualified facilities used to generate energy. The ITC is allowed for the year in which the qualified facilities are placed in service, as opposed to the PTC which is claimed over a 10-year period
- Because of current market conditions, it is difficult for many renewable projects to find financing due to the uncertain future tax positions of potential investors in these projects

Wind Energy Provisions of 2009 Stimulus Bill (cont.)

2. Temporary Election to Claim Investment Tax Credit ("ITC") Instead of the Production Tax Credit ("PTC") (cont.)

- The Stimulus Bill allows taxpayers that would otherwise be eligible to claim the PTC to elect to claim the ITC instead of the PTC. For qualifying wind energy facilities, the ITC is equal to 30% of the cost of facility.
- The ITC election applies to qualifying wind energy facilities placed in service in 2009-2012

Wind Energy Provisions of 2009 Stimulus Bill (cont.)

3. Direct Grant from Treasury In Lieu of the Investment Tax Credit ("ITC")

- The Stimulus Bill allows taxpayers who are eligible to claim the ITC to receive a grant from the U.S. Treasury Department in lieu of the ITC
- To qualify for the grant, the wind energy property must be (i) placed in service in 2009 or 2010 or (ii) placed in service before January 1, 2013 as long as construction commenced in 2009 or 2010
- The U.S. Treasury Department is required to pay the grant within 60 days of receipt of an application from the taxpayer

Wind Energy Provisions of 2009 Stimulus Bill (cont.)

3. Direct Grant from Treasury In Lieu of the Investment Tax Credit ("ITC") (cont.)

- The grant amount is not included in income but the tax basis of the property must be reduced by 50% of the amount of the grant
- Allows taxpayers who may not be paying taxes due to losses to monetize and thereby receive the benefit of the ITC
- Grant not available to consumers. Grant only available to entities (i.e., businesses) for purposes of Sections 45 and 48 of the IRC

Preliminary Concerns For any Landowner

- Know your developer
- Understand the lease terms
- Can a landowner be an investor?
- Obtain professional advice

Types of Contracts

1. Lease

- Contract for possession and profits of land for a certain period of time

2. Easement

- A right of use over the property of another
- No obstruction to the free flow of wind

3. Option

- A right, which acts as a continuing offer, given for consideration, to purchase or lease property at an agreed-upon price and terms, within a specified time

Critical Lease Terms

1. Grants

- Wind easement
- Access/Access Roads
- Transmission

2. Term

- Development period
 - 7 year maximum in Minnesota
- Operating period
- Re-Powering

3. Termination

- Developer—on 30 days' notice
- Landowner—more restrictive and subject to cure periods
- Decommissioning

Critical Lease Terms (cont.)

4. Payment structure

- Development
 - Signing bonuses
 - Pay for legal review
- Meteorological tower
- Turbine installation
- Operating fees/royalties
 - Turbine
 - Transmission line
- Escalation clause

Critical Lease Terms (cont.)

5. Restrictions on landowner

- No interference: Limitation on new structures/vegetation

6. Pooling concept

7. Assignment

- Developer will have open-ended rights
- Lease runs with land
- General Rule - If contract is silent, it is assignable

Critical Lease Terms (cont.)

8. Taxes

- Developer pays increase in taxes over farming/grazing

9. Tax credits

- Developer can restructure lease in case of lost tax credits

Critical Lease Terms (cont.)

9. Crop damage
10. Governmental requirements
11. Insurance
12. Indemnity

Wind Project Early-Stage Activities of a Developer

1. Evaluation of wind resources for proposed site
2. Preliminary analysis of interconnection and transmission issues
3. Evaluation of site-control requirements
4. Initial analysis of environmental permitting and other governmental approvals

Next Steps

1. Preliminary discussions with possible purchasers (typically electric utilities)
2. Analysis of project design and evaluation of turbines
3. Identification of development team participants, (engineering contractors, permitting experts, professional advisors)

Potential Development Roadblocks

1. Poor wind resources
2. Project site incomplete
3. No transmission
4. No turbines (or no warranty)
5. Permitting studies
6. Lawsuits
7. No financing (construction or permanent)

How Landowners Can Benefit

1. T.E.A.M. (together everyone achieves more)
2. Landowners band together to form project development groups
3. Groups then develop project themselves or hire developer
4. Retain more of economic benefit

Difficulties for Landowners

1. Development is time-consuming
2. Hiring developer is expensive
3. Prospective buyers like to work with known quantities

C-BED Projects

1. C-BED rules enacted in 2005
2. Intended to benefit local owners
3. "Qualified owners" must receive significant portion of project's financial benefit

Where to Get More Information

1. "Farmers' Guide to Wind Energy"
2. AWEA website (www.awea.com)
3. CBED groups