

2009 SENATE NATURAL RESOURCES

SB 2411

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2411


Senate Natural Resources Committee

Check here for Conference Committee

Hearing Date: February 12, 2009

Recorder Job Number: 9396

Committee Clerk Signature



Minutes:

Senator Hogue opens the hearing on SB 2411, relating to the siting of energy conversion facilities.

Senator Christmann, district 34, it was felt at the time if we didn't allow for these to be put up in a hurry or if we required for PSC approval of the siting process they would set up on the South Dakota side of the border and this industry would never get a chance to develop. At that time there was a bit of dissent even among the public service commissioners. The legislature made a decision that for 100 kilowatts or less the wind farm did not need PSC siting approval. Since then we have had a lot of turbines put up and farms also. I feel that we no longer face the threat, if they need to go through an approval process that they will build elsewhere. They are pretty wise on what it takes to make one work and they are savvy on where to set them up. The reason I see it as a problem is that as they set them up they are coming in at 99 megawatts to avoid an approval process if they went to 100 megawatt. Recently constituents of mine brought this to my attention. There is someone who is just leasing up the rights to it and then selling them someone who will then set it up. There is not a time when the PSC comes to town and everyone gets a chance to visit about issues. It is kept relatively quiet and they are asked to sign disclosure agreements so there is not too much

discussion on the amounts the others are getting. There are a lot of things the landowners should know and questions they should be asking. I think for good wind farm developers it is probably a benefit to them because of the experience the PSC brings to this process. From the perspective of landowners I think it is important that there should be some sort of advisory process, because there is no other way to gain knowledge except through experience and if you make a bad deal it is too late then. I think this bill should be passed where ½ megawatt is enough; I just want to catch the commercial generation processes.

Senator Triplett the intention is specifically to leave individual people out of it for wind generation on their own property for their own use?

Senator Chrismann yes that is correct.

John Olson, Ottertail Power Company, spoke in opposition to the bill. We are not significantly opposed to revisiting the size of these energy conversion facilities for sighting purposes. I have been told that the law had previously read 50 megawatts in North Dakota. We are at 100 megawatts right now. This would take it down to ½ megawatt. It is a tiny fraction of where we are now. I thought the PSC would probably adding FTEs if you are going to be sighting every ½ megawatt wind turbine tower in North Dakota. I suspect their work load would increase. These things can be expensive. I think that there are some ramifications here and I don't think we want to go down that low.

Senator Triplett if Ottertail was to build a 99 megawatt instead of a 100 megawatt facility what kind of costs would they save by not having to go through the sighting process?

John Olson I don't know the answer to that. I have never been through the process, but I know there are hearings on the application.

Senator Schneider can you give us any advice on a number that would be more appropriate?

John Olson I don't know what number would be appropriate. I don't think Ottertail is all that concerned with this because they have participated in 100+ megawatt projects. I represent Florida Power and light and I don't think you will find them doing project of 10-20 megawatts. If we are talking 50 megawatts I am sure I could get Ottertail to agree to that if you want to go in that direction. I think going down to ½ megawatt is truly unreasonable.

Senator Triplett if your clients aren't planning on building anything below 50 megawatt what difference does it make to you if we say ½ megawatt or 50 megawatts?

John Olson I think it will compromise the PSC to do the job they need to do on these larger wind projects.

Senator Hogue could you speak to how active the county commissions are in terms of exercising any type of zoning authority over the sighting process?

John Olson I know there have been some localities that have exercised some regulations that have probably discouraged wind farmers from developing and gone elsewhere. There is zoning authority available to those localities.

Senator Triplett can you respond generally to John's concerns that the PSC would be overwhelmed and compromise your ability to manage your process if we asked you to do this?

Ilona Jeffcoat-Sacco, Public Service Commission, I can't say that we would be compromised because if we felt that way we would have been down here testifying to that effect. We have no condition on this bill and we are willing and able to do what you ask us to do. We have been out of the business of dealing with small wind farms since it went from 50 to 100 megawatts. I can say we will do our best. There are costs on the company such as the application fee and the environmental impact statement.

Senator Triplett can you give us an idea of what the costs of the companies are for the application fee and the environmental impact statement.

Illona Jeffcoat-Sacco our fees are capped at \$100,000 and I have a feeling everything reaches the cap. For the last four years we have been refunding what is not spent on the case.

Senator Triplett do you have an opinion on what a cut off would be if we wanted to honor the sponsor's request to make the cut off such that below the cut off would be obviously personal use wind farms and above the cut off would be obvious commercial use wind farms?

Illona Jeffcoat- Sacco replied not to me. I do not have enough technical knowledge.

Senator Hogue does this bill conflict any counting zoning regulations?

Illona Jeffcoat- Sacco if you look at section 49-22-16 it states how the county stands.

Senator Hogue closed the hearing on SB 2411.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2411

Senate Natural Resources Committee

Check here for Conference Committee

Hearing Date: February 13, 2009

Recorder Job Number: 9468

Committee Clerk Signature



Minutes:

Senator Lyson opens up the discussion on SB 2411.

Senator Triplett this bill is the one that moves the conversion facility from 100,000 kilwats down to 500killowats which is really just half of a megawatt. The intention is to try to describe the cut off between the personal use of wind on farms and commercial use. I would like to double that from 500 kilowatts to 1,000 kilowatts so it would be one megawatt. That is a motion to strike 500 and replace it with 1,000 in line 8.

Senator Erbele what does this come to in terms of megawatts?

Senator Triplett one megawatt

Senator Erbele this relates to the point when the PSC needs to come in and do their siting?

Senator Triplett right, and the testimony stated that hardly anyone is doing commercial wind farms for less than 100 megawatts.

Senator Erbele that was a really hard battle several sessions ago. Even the PSC was divided on the decision.

Senator Triplett the PSC was here yesterday and they didn't seem to have a problem with it.

This would prevent a producer from putting up four or five small towers in the wrong place.

Senator Schneider seconds the motion.

A voice vote was taken and the motion passed.

Senator Triplett moved a Do Pass as amended.

Senator Pomeroy seconds the motion.

The bill received a Do Pass on a vote of 6 to 1.

FISCAL NOTE
Requested by Legislative Council
03/11/2009

REVISION

Amendment to: Engrossed
SB 2411

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$7,500	\$0	\$7,500
Expenditures	\$0	\$0	\$0	\$7,500	\$0	\$7,500
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Bill lowers the threshold for Public Service Commission siting jurisdiction over energy conversion facilities. Engrossed bill lowers the threshold from 100 MW to 25 MW.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

We assume two additional siting applications per biennium if the threshold is lowered. Fees for siting applications vary with the size of the investment, up to a maximum of \$100,000. Fees are used to pay expenses and any remaining amount is refunded to the applicant. We estimate expenses of \$3000 to \$4000 per application, if processed by Commission staff. This is the basis for the revenue and expenditure estimates of \$7,500 per beinnium. The Commission has a continuing appropriation to use the siting application fee to pay expenses of processing that application, so no appropriation authority is necessary.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Fees for siting applications vary with the size of the investment, up to a maximum of \$100,000. Fees are used to pay expenses and any remaining amount is refunded to the applicant. We estimate expenses of \$3000 to \$4000 per application, if processed by Commission staff. This is the basis for the revenue estimate of \$7,500 per beinnium.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Fees are used to pay expenses and any remaining amount is refunded to the applicant. We estimate expenses of \$3000 to \$4000 per application, if processed by Commission staff. This is the basis for the expenditure estimate of \$7,500 per beinnium.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

None

The Commission has a continuing appropriation to use the siting application fee to pay expenses of processing that application, so no appropriation authority is necessary.

Name:	Ilona A. Jeffcoat-Sacco	Agency:	PSC
Phone Number:	328-2407	Date Prepared:	03/11/2009

FISCAL NOTE
Requested by Legislative Council
03/06/2009

Amendment to: Engrossed
SB 2411

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Bill lowers the threshold for Public Service Commission siting jurisdiction over energy conversion facilities. Engrossed bill lowers the threshold from 100 MW to 25 MW

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

none

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

none

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

none

We cannot predict the number of siting cases we will have under any particular jurisdictional threshold. If necessary, we can use the siting application fee to pay out of pocket expenses for assistance in processing the case for which the fee is paid. Consequently, we do not expect any fiscal impact from this bill.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

none

Name:	Illona A. Jeffcoat-Sacco	Agency:	PSC
Phone Number:	328-2407	Date Prepared:	03/10/2009

Date: Feb 13, 2009

Roll Call Vote #: 2411 #1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate _____ Natural Resources _____ Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Amendment

Motion Made By Sen. Triplett Seconded By Sen. Schneider

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman	/		Senator Jim Pomeroy	/	
Senator David Hogue, Vice Chairman	/		Senator Mac Schneider	/	
Senator Robert S. Erbele	/		Senator Constance Triplett	/	
Senator Layton W. Freborg	/				

Total (Yes) 7 No 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Voice vote on Amendment only.

Date: Feb 13, 2009

Roll Call Vote #: 2411 #2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate _____ Natural Resources _____ Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Amendment

Motion Made By Sen. Triplett Seconded By Sen. Pomeroy

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman	/		Senator Jim Pomeroy	/	
Senator David Hogue, Vice Chairman	/		Senator Mac Schneider	/	
Senator Robert S. Erbele		/	Senator Constance Triplett	/	
Senator Layton W. Freborg	/				

Total (Yes) 6 No 1

Absent _____

Floor Assignment Sen. Triplett

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2411: Natural Resources Committee (Sen. Lyson, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2411 was placed on the Sixth order on the calendar.

Page 1, line 8, remove the overstrike over "~~one~~", remove "five", overstrike "hundred", and remove the overstrike over "~~thousand~~"

Renumber accordingly

2009 HOUSE NATURAL RESOURCES

SB 2411

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2411

House Natural Resources Committee

Check here for Conference Committee

Hearing Date: 3-6-09

Recorder Job Number: 10381

Committee Clerk Signature

Nancy L. Gerhardt

Minutes:

Vice Chairman Damschen – Open the hearing on SB 2411.

Senator Randel Christmann – See **Attachment # 1**. The handout I passed around is an example of what 1 state has done in preparing some guidelines for landowners in regards to turbines for wind farms. They aren't requirements; it just gives landowners ideas about what they can do in negotiating a deal. A little background. What is 25 MW – its 1,000 KW, and 1 KW is 1,000 W. The big coal fired power plants might range from 300 MW to 600 MW. Old ones might be 50 to 100 MW. The wind turbines that are up, some of the first ones might have been 1 MW per turban, I think now they're making them about 1 ½ to 2 ½ MW. A wind farm of 25 MW should go through a PSC sitting is maybe 10 to 15 or larger. The PSC sitting process involves them just getting involved. The basics is to be involved, have a process and require a public meeting in the area where this is going to happen so people can get a little information. You sign a deal to have 1, 2, 3 or 4 turbines on your property as part of a wind farm. Is there going to be an assignment clause? Is this the people you are going to be dealing with for decades, or are they just leasing this and then assigning it off. Is there a confidentiality clause? Are there automatic extensions? Are there going to be fixed payments, where you know you are going to be getting a certain amount for ever and forever or is it based on

production? Is there pooling? If there is a wind farm and your turban produces a lot and some of the others produce very little and it's on a production formula, do your neighbors get some of the rewards for your successful turban? Are there inflation adjustments to these payments? When they come in and build the farm or later on if repairs are needed, who's going to be responsible for repairing the land that's damaged and the road building and that sort of thing. This is an improvement, which's responsible for the taxes, and it can be a lot. To me some of the biggest things regard liability. You put this wind turban on your property, say a chunk of ice flies off this turban and damage someone else's property or someone else personally. Is that your responsibility since you are the land owner, or is it the responsibility of the wind farm operator? If you put this up and your neighbor decides to sue you because you've ruined their view of the rest of the world, is the wind farm going to help you on that? If you allow someone to go in hunting, or if you are hunting yourself and a stray bullet damages that wind turban. Is that their problem or are you responsible for that? If the company defaults. What happens then? Will you grant them a lease to put up a wind farm, does that address the mineral rights under there? If there is oil under there later, does that revenue still stay with the mineral owners or are you signing away your mineral rights as well? Who is responsible for enforcing trespassing rules? If a kid gets out there and sprays graffiti on it is it your responsibility or theirs or who's? If a future law change impacts your contract, does that throw out the whole contract or just that part or what? I think a lot of people are signing leases and are completely unaware. If we have a sitting process there will be a public meeting where we can adopt something on this order and have some information available to these people so they can at least ask the right questions. We wouldn't open a coal mine big enough to run a 99 MW power plant in ND without reclamation laws covering it and also a sitting process for that coal mine. I don't think we should be doing it for these wind farms either. A few years ago, I believe at the

time we had two turbans in this state, we were really hoping the wind energy was going to get established here and we could explore this possibility. SD was offering no sitting process. We established this law that at 99 MW or less they didn't have sitting and I think it was important to do at the time. It was an industry in its infancy. It is important we allow them this flexibility in order to get started. We have a number of farms around the state. This industry isn't really in its infancy any more. I'm very rarely the one arguing for more regulations. For the protection of the landowners, the neighborhoods, and for just the wise development of the energy industry. I think it should be more organized. If it is a major industrial producer they should be under the sitting laws and make sure everybody is protected. Questions?

Rep. DeKrey – I don't see a fiscal note here. I would think the PSC would have to have a fiscal note on it.

Senator Christmann – I will let the PSC address that if they choose. I don't think it's going to be very often a wind farm will be going up anymore at less than 100 MW anyway.

Chairman Porter – In your area were there any wind farms developed under 100 MW?

Senator Christmann – I don't know the answer to that, but I'm sure the Oliver Co. one is over 100 mw.

Chairman Porter – The under 100 MW wind farms, or any kind of energy production falls back onto the local political subdivision then for their zoning, whether it be a township level or the county commission level. Were any of those sited using the township or county commission level zoning ordinances?

Senator Christmann – I'm most familiar with the Oliver County one, and I'm certain their zoning looked over it. But, there to, I don't know that the counties have a lot of information and experience at negotiation this type of thing.

Rep. Keiser – Have you had the chance to see bill 1509?

Senator Christmann – No, we haven't had it on the floor yet.

Mary Mitchell – Dakota Resource Council – We support the bill as engrossed.

Chairman Porter – Further testimony in support? Opposition?

Ryan Rauschenberger – Energy Development – See **Attachment # 2**. Questions

Clark Carlson – Next Era Resources – There's really no reason for changing the system that can't be addressed in 1509. Every change in regulation changes the competitive relationship that ND has compared to other states. Every time you put an additional regulatory factor into it that increases that regulatory risk.

John Olson – Otter Tail Power Co. – See **Attachment # 3**. This bill started in the Senate to downsize the sitting requirement from 100 MW to ½ MW for 500 KW. The Senate committee amended the bill to 1 MW and then there was a floor amendment adopted to raise it to its current engrossed bill at 25 MW. As of June of 2007 Connecticut is at 1 MW; Colorado is at 2 MW; Iowa is at 25 MW; and Minnesota is at 50 MW and SD is at 100 MW. I think wind is exempt, so I don't know if they have to site wind farms there. Otter Tail isn't opposed to revisiting the 100 MW requirements, but it certainly thinks 50 MW is as low as we think you should go. I prepared an amendment at 50 MW for you, but maybe I should just have put scratch & sniff on there.

Illona Jeffcoat-Sacco – We were not asked for a fiscal note, but the question did come up in the other house. We don't think it will have a fiscal impact, it could, but we can't tell you what that is and we think we can handle whatever happens. When a company sites they pay a sitting fee.

Chairman Porter – What is the ball park cost of a sitting?

Ms. Jeffcoat-Sacco – There is a maximum in the law. The maximum is usually \$ 100,000, but much of that is often refunded.

Chairman Porter – So in the end, what is the cost?

Ms. Jeffcoat-Sacco - \$ 2,000 maybe. We have a rule on the refund. We do retain a bit of the fee, this applies whether it is wind farm, transmission lines whatever, we retain some for the inspection process, which is later after the revegetation, trees replanted, we retain some for that. Then we would give that back later, but it is a very small amount.

Rep. Keiser – This should have a fiscal note that says exactly what you just said. I think a fiscal note should be drafted and sent to the chairman.

Chairman Porter – We will run it the other way. We'll take it back to council and tell them to ask for it. With that we will close the hearing on SB 2411.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2411

House Natural Resources Committee

Check here for Conference Committee

Hearing Date: 3-11-09

Recorder Job Number: 10837

Committee Clerk Signature

Nancy L. Gerhardt

Minutes:

Chairman Porter – Pull up SB 2411. What this bill will do is mandate sitting for virtually any wind farm construction out there. Currently we are at anything less than 100 KW does not require sitting and that is pretty much in line with what SD is. We did that so we would not be more onerous state than SD. Apparently that has worked over the years to bring wind projects to ND. Discussion?

Rep. Hanson – What about the wind farms on both side of the state boundary.

Chairman Porter – Those are sited by the township or county commission if they are under the current 100 MW. If they do 99 on each side, even if they touch, the sitting responsibility falls back to local zoning ordinances. Either to the township or through the county commission.

Chairman Porter – It was amended in the Senate to 25; Mr. Olson suggested replacing 25 with 50.

Rep. Keiser – I move a Do Not Pass on SB 2411.

Chairman Porter – We have a motion from Rep. Keiser for a Do Not Pass on SB 2411.

Rep. Kelsh – 2nd.

Chairman Porter – 2nd from Rep. Kelsh. Discussion? Seeing none the clerk will call the roll on a Do Not Pass for SB 2411.

Yes 10 No 2 Absent 1 Carrier Rep. Kelsh

Date: 3-12-09
Roll Call Vote #: _____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2411

House Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass As Amended

Motion Made By Keiser Seconded By Kelsh

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hanson	✓	
Vice Chairman Damschen	✓		Rep Hunsakor		
Rep Clark	✓		Rep Kelsh	✓	
Rep DeKrey		✓	Rep Myxter	✓	
Rep Drovdal		✓	Rep Pinkerton	✓	
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Nottestad	✓				

Total (Yes) 10 No 2

Absent 1

Floor Assignment Kelsh

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 12, 2009 4:17 p.m.

Module No: HR-45-4752
Carrier: S. Kelsh
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2411, as reengrossed: Natural Resources Committee (Rep. Porter, Chairman)
recommends **DO NOT PASS** (10 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING).
Reengrossed SB 2411 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

SB 2411

Revised February 2008

LANDOWNER GUIDELINES FOR EVALUATING WIND ENERGY PRODUCTION LEASES

Stephen B. Harsh
David Schweikhardt
Lynn Hamilton

Department of Agricultural, Food and Resource Economics
Michigan State University
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The process of evaluating a wind lease can be complex, and the signing of such a lease involves a long-term commitment by the landowner. Leases can be as short as a few pages or as long as a hundred pages. As a general rule, longer lease documents provide more detailed responsibilities for the leasing parties and are more likely to provide specific answers for disputes that arise in the future. It is also important to note that nearly all leases are option agreements and do not guarantee that wind energy will be developed on the property. A modest fee (\$5 to 10 per acre) is paid for the option of developing the property for wind energy generation. Whether this option is exercised will depend upon a number of factors (e.g., adequacy of the wind resource, electricity prices, proximity to the electrical grid, local regulations, etc.)

This worksheet is designed to help landowners consider some important issues that should be addressed in a lease and some of the alternatives to address those issues. This worksheet is divided into sections related to key issues in wind energy contracts. Where appropriate there are comments to help you understand some alternatives to consider for each issue. It is strongly advised that you obtain legal assistance to better understand the provisions presented in the lease. *This worksheet is not a substitute for obtaining legal counsel regarding the lease – it is intended to help focus your discussions with qualified legal counsel.*

I. Basic Details of the Lease

Name of leasing agent/company _____

Description of land parcel(s) and portions of parcels to be leased _____

Contract person/company _____

II. Introductory Issues

A. What are your long-term (25 to 35 years) plans for the land parcel(s) covered by the lease?

- | | |
|---|--|
| <input type="checkbox"/> Retain in farming | <input type="checkbox"/> Commercial development |
| <input type="checkbox"/> Recreational use (e.g., hunting) | <input type="checkbox"/> Keep as "natural" as possible |
| <input type="checkbox"/> Sell to others | <input type="checkbox"/> Other _____ |

Wind energy leases are long-term agreements, with the shortest in length being 20 to 25 years and the longest as much as 99 years. If you or your heirs have plans to use these parcels for another purpose during the life of the lease, you may be prevented from doing so by the lease or because the parcel is less desirable for the purpose you envision in the future.

B. To what degree will the lease payments help or hinder your plans or goals?

- | | |
|--|---|
| <input type="checkbox"/> Very important for plans or goals | <input type="checkbox"/> Somewhat hinders plans or goals |
| <input type="checkbox"/> Somewhat important for plans or goals | <input type="checkbox"/> Significantly hinders plans or goals |
| <input type="checkbox"/> Limited importance for plans or goals | <input type="checkbox"/> Neither helps nor hinders plans or goals |

The lease payment might help achieve your plans or goals and will likely affect your financial options in the

future. If the lease payments help achieve your financial objectives, then the lease might be useful in meeting your future goals. On the other hand, if the lease prevents your use of the property for other purposes, then the lease may hinder your longer term goals or plans.

C. Who is offering the lease?

- | | |
|--|---|
| <input type="checkbox"/> A leasing agent | <input type="checkbox"/> A community wind project |
| <input type="checkbox"/> A Michigan wind energy developer | <input type="checkbox"/> An out-of-state wind energy firm |
| <input type="checkbox"/> An international wind energy firm | <input type="checkbox"/> Other _____ |

There are many firms offering wind energy leases. Some firms assemble leases for a block of land that could be developed into a wind farm and then sell the leases to a wind developer for a fee. Another firm may offer leases and intends to develop the wind project itself. Other issues to consider are: Does the firm have prior experience in developing wind projects and, if not, is there a good chance they will succeed with the project? Would you prefer to have a lease with a community-based project, a local firm, or a firm located in a foreign country? Regardless of who originally offers the lease, there may be an assignment clause in the lease. Be sure to see section IV below for details about assignment clauses. In addition, if you are dealing with a firm from outside Michigan, see section IX below for details about the legal ramifications of dealing with an out-of-state firm.

D. Does the lease have a confidentiality clause?

- Yes No

Many legal analysts advise against signing a lease containing a confidentiality clause. This clause may prevent discussion of the lease with other landowners involved in the project and may inhibit family communications.

III. Length of the Lease

A lease can have two or three time periods: 1) an evaluation phase, 2) a production phase, and 3) an option for extension of the production phase. The sum of these phases can be quite long. Be aware of the length of each phase and the total time commitment for your property under the lease.

A. Evaluation or discovery phase

1. What is the time permitted for the evaluation phase? _____ Years
2. If the developer is permitted to extend the evaluation phase, how long is the extension? _____ Years

In the evaluation phase, the developer will collect information about wind quality and conduct an economic analysis to determine the viability of the project. In some cases, the contract will permit the evaluation phase to be extended by the developer. It is usually desirable for the landowner to keep this phase as short as possible. With a long evaluation phase, a developer can control the property for several years while waiting for the project's viability to improve (e.g., easier access to the electricity grid, finding financial resources, higher electricity prices). During this time, you would not be permitted to sign a contract with another developer who has more immediate plans to develop the property. Note: This issue is of such critical importance that some states (e.g., South Dakota) have limited the phase to 5 or 7 years by law. Michigan has no such law and the parties must resolve this issue in the lease.

B. Production phase.

1. What is the length of the production phase? _____ Years

The length of the production phase in the lease is usually 20 to 30 years. A long production phase is necessary because the investment has a long payback period. Usually, a shorter phase is desired because this provides an earlier opportunity for the landowner renegotiate the terms of the lease or use the land for other purposes.

C. Renewal or extension of the production phase

1. What is the length of time the production phase may be extended by the developer? _____ Years

Some developers claim that an extension clause is necessary to obtain financing for the project. Most wind projects, however, have financing terms of 12 to 15 years, well within the range of the initial production phase. Consider the following issues if faced with this decision: What land use decisions might you, your heirs, or a buyer want to make? Will the lease payments be sufficient 30 years from now? It is generally in the landowner's best interest to be able to renegotiate the terms of the lease before it is renewed, or to be able to terminate the

agreement at the end of the lease. By avoiding an automatic extension clause, you might be able to protect your future land use options. If the developer seeks an extension clause, then additional financial compensation should be negotiated.

D. Total lease period

To determine the maximum time the parcel will be committed to the lease, add the following:

Evaluation Phase (A.1) _____ + Evaluation Phase Extension (A.2) _____ + Production Phase (B.1) _____ + Production Phase Extension (C.1) = _____ Total Years Committed

IV. Compensation Clauses

Because there are many payment options, the determination of the compensation clause is a difficult issue in any lease for wind energy development. Careful attention must be paid to the payment method's impact on the landowner's returns for the entire length of the lease.

A. What is the payment being offered during the evaluation phase of the lease? _____\$/Acre
This payment is offered for the option of developing the parcel for production of electricity from wind. Be aware that a firm offering a higher payment does not imply that the firm is more committed to actually developing the property for wind energy. Thus, do not become too concerned with this payment – instead, focus on the payments during the production phase for the lease. Production payments are much more critical in determining the landowner's long-run returns from the project.

B. What method is used to determine payments for the electricity generated during the production phase of the lease?

A lump-sum payment at the beginning of the lease (\$ _____)

An annual fixed payment per turbine (\$ _____)

A payment based on a percentage of the electricity sales (____%)

A payment based on an annual fixed payment and a percentage of the electricity sales (\$ _____ annually and ____%)

Other _____

If the lease offers a lump-sum payment at the beginning of the lease, then this payment will be the only payment you will receive during the life of the lease. There might be situations in which having access to an immediate payment is desirable, but care must be taken with this option. What are the tax consequences of a lump-sum payment? How does it compare to a lease with payments over time? To compare the options, use a standard financial annuity formula to convert the lump-sum payment into annual payments. It is important to make this calculation so you are fully informed about your decision.

The option of a fixed payment per turbine guarantees the landowner's payment regardless of how much electricity is generated. Thus, the developer will bear the risk related to variations in the electricity generated. At the same time, you will receive this payment only if the project is actually developed. With this option, it is important to know the size of the turbine because the payment offered should be higher for larger turbines.

Another option is for the lease to share a percentage of the electricity sales with the landowner. Thus, returns can vary based on variations in wind speed and the landowner will share in the risk associated with the quantity of electricity produced. To obtain an estimate of the payment received under this lease, obtain the following information about the Power Purchase Agreement (PPA) that the developer has negotiated with the electricity buyer (the electricity generated is usually measured at the connection to the grid or at the turbine site):

- The electricity sale rate (Dollars per kilowatt-hour);
- An estimate of the annual kilowatt-hours of electricity generated per turbine at the point where the power is measured (this will be affected by the quality of the wind resource and the size and type of turbine installed);
- Your percentage share of the electricity sales specified by the lease.

By multiplying these three estimates, you can calculate your estimated annual returns per turbine. With this payment option, there could be many unknowns because the PPA, the wind resource strength, and the type of turbine to be installed might not be known at the time of the signing of the lease.

- C. How many turbines will be installed on your property? _____
For leases offering a fixed payment per turbine or a percentage of electricity sales, it is necessary to estimate the number of turbines to be installed on your property. This payment will vary by the size of turbine installed. With larger turbines, the payment per turbine should probably be larger. The number of turbines multiplied by the expected annual payment per turbine will equal the total annual payment.
- D. Will "pooling" be used to calculate the value of electricity sales?
 Yes No
This procedure might be used if the lease payment is based on a percentage of the electricity sales. If pooling is used, then your returns will be based on your share of the acreage in the project. If you own 10% of the total acreage in the project, then your share would be 10% of the electricity sales from all the turbines in the project, even if you had more or less than 10% of the turbines on your property.
- E. Does the compensation clause include the sale of the Renewable Energy Credits (RECs)?
 Yes No
Electricity from renewable energy projects (including wind) has two sources of value: 1) the value of the electricity generated (Dollars per kilowatt hour) and 2) the value of the Renewable Energy Credits (RECs). When negotiating the PPA, the developer might sell both the electricity and the RECs, or the developer might sell only the electricity, with the RECs being sold to another buyer. In either case, does the lease share the value of the RECs with the landowner? How will the value of the RECs be determined? The value of the RECs is expected to increase in the future as the states or the federal government enact Renewable Portfolio Standards or new regulations on climate change issues.
- F. Does the compensation clause have an inflation adjustment provision?
 Yes No
Because of inflation, a dollar ten years from now will have less value than a dollar today. It is desirable, therefore, to have a compensation agreement that increases your payment to adjust for inflation at specific intervals (e.g., annually or every five years). The developer is likely to have an inflation adjustment included in the PPA with the utility. Therefore, the landowner should request an inflation adjustment clause to protect the value of future payments. Otherwise, the inflation-adjusted value of your payment will diminish significantly over the 20 to 30 year life of the lease.
- G. Does the compensation clause include payment for the land removed from existing uses by the developer (such as permanent roadways or structures) during the production phase?
 Yes No
During the production phase, the developer must have access to the turbines and may need to construct other structures on the land. The lease should specify the landowner's payment per acre for the use of this land.
- H. Does the compensation clause include payment for the land used by the developer during the construction phase, such as temporary roadways, temporary structures, space for large equipment such as cranes, etc.?
 Yes No
During the construction phase, the developer might need access to land on a temporary basis. If such use interferes existing with uses of the land (e.g., prevents the planting of a crop or destroys an existing crop), the lease should specify the landowner's payment per acre for the use of this land during this phase. In addition, the lease should specify that land used on a temporary basis will be returned to its original state by the developer before the construction is concluded.
- I. Does the lease contain a Force Majeure clause?
 Yes No

A Force Majure clause permits the developer to extend the time of the lease if a delay is caused by any law, legal action, or requirement of a government agency, court, or utility. The clause might also apply to natural causes that prevent the development or use of the project. During the time this clause is in effect, any payment due to you could be delayed or avoided by the developer. These clauses are common in oil and gas leases.

IV. Assignment Clauses

A. Does the lease have an assignment clause?

- Yes No

An assignment clause permits the wind developer to sell/transfer the lease rights to another party. Thus, a lease with this clause might mean that a different company will own the rights to the lease in the future. If the lease has an assignment clause, you may want to consider at least two options. First, you may want to negotiate a higher payment rate as compensation for the risk you face in dealing with another party in the future. Second, you may want to negotiate a provision in which the developer is liable if the lease is assigned to a third party and the third party fails to satisfy the terms of the lease (especially the payment terms). In a similar matter, does the lease permit the developer to mortgage the leased property to a third party without the landowner's permission? If the developer mortgages the property under lease to a third party, and the developer then defaults to the third party, the landowner's rights relative to the developer and the third party might be affected. A lease should specify the conditions under which a mortgage may be exercised by the developer and the landowner's right of approval in such a case. In addition, the lease should limit the landowner's obligations to the third party.

VI. Property Taxes

A. Does the lease specify who will pay the property taxes associated with turbine(s), other equipment, or any other improvements on the property?

- Developer Landowner

The turbine(s) and any other associated improvements are likely to be considered improvements in the property and therefore subject to property tax. In some cases, contracts specify that the developer is liable for the property taxes associated with the wind project. If the landowner is to be liable for such tax increases, the compensation received by the landowner should reflect such an expense.

VII. Liability Issues

A. Who will be responsible for liability coverage?

- Developer Landowner

At least four potential liability issues should be considered in the negotiation of a lease. First, the liability of the landowner for damage he/she commits on the turbine and other facilities on the property is a major issue that should be specified in the lease. Be aware that the landowner also might be liable for damages caused by a third party whom the landowner grants permission to use the property. For example, assume the landowner gives permission for a third party to hunt on the land. If the hunter damages a turbine, is the landowner liable for those damages? Second, is the developer liable for damages to the landowner's property at each phase (evaluation, construction, production) of the lease? Third, is the developer liable for damages that occur to a third party? For example, assume a third party is injured by ice that falls from the blades of a wind turbine. Is the developer or the landowner liable for the third party's injuries? Fourth, does the lease require the developer to carry insurance on the turbine and associated facilities? In addition to consultation with an attorney, the landowner should have the contract reviewed by his/her insurance agent.

B. Who will pay the cost of any litigation with a third party?

- Developer Landowner

Litigation with a third party can arise in many situations. For example, assume a neighbor, claiming to be affected by the noise of the turbine, sues to halt the operation of the turbine. Will the cost of responding to that

lawsuit be borne by the developer or the landowner? The lease should specify which party will pay the cost of such events.

VIII. Other Restrictions on Land Use

A. Does the lease contain other restrictions (e.g., a prohibition of hunting) that prevent the landowner from using the property for other desirable purposes?

Yes No

The lease may contain provisions that limit the landowner's use of the land. At the very least, the lease is likely to limit the height or location of building construction near the turbine(s), the height of trees or other obstructions near the turbine(s), and other activities that could interfere with the operation of the turbine(s). While some provisions are necessary to permit the efficient operation of the turbine(s), landowners should be sure that such clauses are narrowly written to prevent interference with other activities on the property.

B. Who will pay the cost (e.g., fines, etc.) for violations of land use regulations caused by the project?

Developer Landowner

Wind projects can be subject to many local land use and zoning regulations (e.g., setback regulations). If the project violates a regulation, and a fine or other penalty must be paid, which party will be liable for such a violation? The lease should specify (a) each party's responsibility in complying with such regulations during the life of the lease and (b) each party's responsibility in the case of violations of such regulations.

C. Is the turbine or an associated structure located on land enrolled in the Conservation Reserve Program (CRP)?

Yes No

Wind turbines may be placed on land enrolled in the CRP, but such projects must be approved by USDA as "consistent with the conservation of soil, water quality, and wildlife habitat." Landowners should consult with the Farm Service Agency and/or the Natural Resources Conservation Service regarding the placement of turbines or other structures on CRP acreage. The lease should also specify which party is liable for any penalties or fines imposed for violations of CRP regulations.

D. Is the turbine or an associated structure located on land enrolled in USDA commodity programs (i.e., on Crop Acreage Base)?

Yes No

If the turbine or other facilities are located on land that is enrolled in USDA commodity programs, how will the developer's use of that land affect the landowner's farm program payments? Does the lease payment received by the landowner justify the loss of commodity program payments? Landowners should consult with the Farm Service Agency to determine the impact of the developer's use of the land on commodity program payments.

IX. Choice of Law/Choice of Venue Clauses

A. Does the lease contain a choice of law clause or choice of venue clause?

Yes No

If you are considering a lease with a developer from outside Michigan, you should examine the lease for both a choice of law clause and a choice of venue clause. A choice of law clause might specify that any litigation that arises under the contract must apply the laws of the state in which the developer is located. While the dispute might be heard in a Michigan court, the court would be required to apply the laws of the developer's home state. If the lease contains a choice of venue clause, the case would be heard by a court in the developer's home state. It is usually in the landowner's best interest to have all legal disputes resolved under Michigan law by a Michigan court.

N. Dakota

N. Dakota

X. Termination of the Lease

A. Does the lease specify the events that permit the developer to terminate the contract?

- Yes No

A particularly important issue is whether the developer is permitted to terminate the contract "at any time without cause." If so, what are the landowner's rights to any remaining payments under the contract?

B. Does the lease specify the landowner's rights of termination?

- Yes No

Particular attention should be paid to how the landowner must exercise the right of termination (including the issue of whether arbitration – including binding arbitration – is required).

C. Is the process defined for the removal of the turbine and associated facilities (i.e., structures, roads) at the conclusion of the lease?

- Yes No

D. Who must pay the costs associated with the removal of the turbine and facilities at the conclusion of the lease?

- Developer Landowner

The cost of installing and removing a wind turbine can be substantial. The lease should specify which party will pay the costs of removing the turbine and associated facilities when the lease is terminated. Some leases require the developer to pay these costs and to retain funds in escrow that will be sufficient to pay these costs. The lease should also specify the condition of the land at the end of the removal/clean up process.

XI. Other issues related to the lease

There are many more issues that should be considered in negotiating a lease for electricity production from wind. Only the assistance of competent legal counsel can address the full list of issues that should be considered in such a lease. The following is a partial list of other issues that should be considered.

A. Does the lease grant broad access and use of the land parcel to the developer? In general, such provisions should be narrowly written to limit the use of the land to those portions necessary for the conduct of the project.

B. Is the landowner an LLC or other form of business organization other than a sole proprietorship? Michigan contract law might treat contracts between an LLC and a developer in a different manner than discussed here.

C. Does the lease grant a perpetual easement to the developer for the use of the land? Such provisions are usually considered unfavorable to a landowner.

D. Does the lease address the issue of default during the project? What are the landowner's rights if the developer defaults, leaving an unfinished project?

E. Does the lease require that disputes be submitted to mediation or arbitration before a lawsuit can be filed? If so, what is the mediation/arbitration process?

F. Does the lease include any other form of mineral rights or property rights? If the lease includes any other form of property rights, be sure that the lease includes compensation for the purchase of other rights.

G. Does the lease specify which party will be responsible for the enforcement of trespassing laws and the actions of trespassers?

- H. Does the lease require bonding by either party during the project?
- I. In the event of a change in a law or regulation that invalidates one portion of the lease, does the remainder of the lease apply as written?
- J. Does the lease require the developer to include the landowner on the developer's insurance policy?

XII. Conclusion

The development of electricity generated from wind has the potential to be a viable industry in Michigan. To participate in this industry, landowners should be aware of the economic benefits and the potential legal risks associated with negotiating a contract for the generation of electricity from wind. Above all, landowners should be aware that signing a wind contract should be a matter of negotiation. The landowner should be aware of the terms of the lease and should seek greater compensation for terms of the lease that are less favorable to the landowner. The lease provisions listed above, along with many other aspects of the lease, should be considered carefully given the long term of commitment required by many leases. Negotiation of an equitable lease requires the assistance of effective legal counsel. If satisfactory terms or compensation are not provided in the lease, new or additional terms should be negotiated or the lease should not be signed.

XII. Other Resources

Noling, Bernard. *Guidelines for Landowners in Negotiating Wind Energy Leases*. Speech, Southwest Kansas Royalty Owners Association, 2003. (Retired attorney reflects on experience of reviewing wind energy leases in Texas and Kansas and the problems that landowners can experience with a poorly negotiated lease – very readable and a must-read for any landowner). Available at <http://www.swkroa.com/formspublications.html>

McEowen, Roger A. *Wind Energy Production: Legal Issues and Related Concerns for Landowners*. Center for Agricultural Law and Taxation, Iowa State University. Available at <http://www.calt.iastate.edu/windenergy.htm>

Windustry. *Leasing Your Land to a Developer*. Available at <http://www.windustry.com/leases>

Windustry. *Leases and Easements*. (Includes “webinar” presentations from Iowa State University and Colorado State University). Available at <http://www.windustry.com/taxonomy/term/120>

Stoel Rives, LLP, Attorneys at Law. *The Law of Wind: A Guide to Business and Legal Issues*. 2006. (If your attorney is unfamiliar with wind energy leases, be sure to direct him/her to this publication.) Available at <http://www.swkroa.com/formspublications.html> (Also available at the windustry.com website above.)

**DEPARTMENT OF COMMERCE TESTIMONY ON SB 2411
MARCH 6, 2009, 10:00 A.M.
HOUSE NATURAL RESOURCES COMMITTEE
PIONEER ROOM
REPRESENTATIVE TODD PORTER, CHAIRMAN**

**RYAN RAUSCHENBERGER – MANAGER OF ENERGY DEVELOPMENT, ECONOMIC
DEVELOPMENT & FINANCE DIVISION, ND DEPARTMENT OF COMMERCE**

Good morning, Mr. Chairman and members of the committee, for the record my name is Ryan Rauschenberger, Manager of Energy Development in the Department of Commerce.

I am here today to speak in regards to SB 2411 on behalf of Shane Goettle, Commissioner for the Department of Commerce who serves as the chairman of the EmPower North Dakota Commission.

In the bill's current form, the Public Service Commission's threshold for siting electrical generation facilities would be lowered from 100 megawatts to 25 megawatts. We would urge the committee to keep the status quo and leave the siting threshold at 100 megawatts. Our viewpoint is based on remaining competitive with surrounding states that also have natural resources favorable for electrical generation.

We've worked hard to figure out how to remain competitive with other states through tax incentives for electrical generation and we feel it is important to remain competitive on the regulatory front as well. We would like to recognize that Minnesota's Public Utilities Commission has a siting threshold of 50 megawatts and both South Dakota's and Wisconsin's Public Utilities Commissions have siting thresholds of 100 megawatts. Although most of the new projects proposed in North Dakota are well over the current 100 megawatt limit and won't be impacted by this bill, lowering the threshold may subject future expansions of already existing wind farms to PSC siting that would have otherwise been exempt under current law.

For example, the Oliver II wind farm in Oliver County developed by Florida Power & Light and Minnesota Power uses 2.3MW Siemens turbines. With the proposed siting threshold, it would only take 11 new wind towers of the same size to require the full PSC siting process. There are plans for future wind farms in North Dakota to utilize 3 megawatt towers. These projects would only require 9 new towers for the project to be subject to the full PSC siting process.

Mr. Chairman, this concludes my testimony and I would be happy to try and answer any questions.

Attachment #3

Prepared by John M. Olson

Lobbyist #142

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PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2411

Page 1, line 8, replace "twenty-five" with "fifty"

Re-number Accordingly