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PROPOSAL: A UNIFORM ACT FOR WIND RIGHTS

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Introduction

According to the Congressional Research Service, wind energy is the "fastest growing source of new power generation in the United States." Between 1996 and 2009, installed wind energy capacity grew from 1416 megawatts (MWs) to 35,086 MWs (American Wind Energy Association, U.S. Wind Energy Annual Market Report—Year Ending 2009). In addition, the Department of Energy has estimated that the United States has nearly 10.5 million MWs of wind energy potential. Federal and state governments have adopted policies and spent millions to encourage the development and deployment of wind energy. Yet, the fundamental legal regime defining the nature of wind rights is largely unsettled.

The absence of a consistent legal framework ultimately hinders mass deployment of wind energy due to uncertainty, increased costs associated with differing rights regimes across states, and potential inefficiencies in wind use. The unsettled nature of wind rights, despite Americans using wind energy for centuries, may be attributable to a lack of sustained commercial demand. But the time when wind is not considered a valuable resource is now over. A pending case in the Kansas Supreme Court, *Zimmerman v. Board of County Commissioners*, No. 07-98487-AS, which deals with the legal nature of wind rights and whether a zoning ordinance prohibiting wind farm development constitutes a takings of property, exemplifies the situation.

Consequently, this article proposes the drafting and adoption of a Uniform Act for Wind Rights. A uniform act is beneficial for several reasons. First, as a practical matter, adopting a rights regime toward the beginning of an industry's growth is easier than imposing a regime mid-stream. Second, the adoption of a rights regime by state legislatures avoids the slow and varied assignment of rights through the courts. Finally, a uniform act serves the purpose of providing legal consistency between states, thereby lowering the costs of wind energy development.

What Are Wind Rights?

Wind rights can be conceptualized as having two parts. The first part is physical access: the acquisition of a real property interest to construct, maintain, and decommission the turbine and the transmission infrastructure used to transport the energy it produces. The right to occupy another's land and the right of ingress and egress are clearly defined within existing property law. The second component of wind rights is more problematic: the right to make use of the wind that flows across the land and convert it—through a wind turbine—into electricity. This right to the wind, or alternatively the right to use the wind, is unsettled in the law.

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In this issue:

Eight state legislatures (Kansas, Minnesota, Montana, Nebraska, North Dakota, Oregon, South Dakota, and Wisconsin) have touched upon wind rights but primarily in terms of prescribing an instrument of conveyance. For example, Minnesota law provides: "Any property owner may grant a . . . wind easement in the same manner and with the same effect as a conveyance of an interest in real property" (Minn. Stat. § 500.30). Similarly, Montana law provides: "An easement obtained for the purpose of insuring the undisturbed flow of wind across the real property of another must be created in writing and is subject to the same conveyancing and instrument recording requirements as other easements on real property" (Mont. Code Ann. § 70-17-303). Nebraska law provides: "Any property owner may grant a solar skyspace easement or wind energy easement in the same manner and with the same effect as a conveyance of any other interest in real property" (Neb. Rev. Stat. § 66-910). Likewise, Wisconsin state law provides: "Every renewable energy resource easement shall be in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements. Renewable energy resource easements shall run with the land benefited and burdened unless otherwise expressly stated therein" (Wis. Stat. § 700.35).

With the exception of Wyoming, which is considering a bill establishing wind rights, there appears to be an assumption that the right to wind is part of the constellation of rights comprising fee ownership. This assumption may be rooted in the common law doctrines of *ad coelum* and *ferae naturae*, or the right of capture. (*See generally* Terry E. Hogwood, *Against the Wind*, STATE BAR OF TEX.: OIL, GAS & ENERGY RESOURCES L. SEC. REP., v. 26, no. 2 (2001)). However, both doctrines have their limitations as a rationale for wind rights ownership.

The *ad coelum* doctrine states that a landowner's rights extend from the center of the earth to the limits of the sky. Notably, the application of *ad coelum* to an individual's right over the airspace was limited years ago when Congress passed the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, which declared navigable airspace as the public domain. The Supreme

Court recognized this limit of the *ad coelum* doctrine in *United States v. Causby*, 328 U.S. 256, 261 (1948):

> [T]hat doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

The rule of capture or *ferae naturae,* provides another possible theory for a property right in wind. In England, the rule of capture developed as a way to assign rights of ownership in wild animals. In essence, the first person to capture the animal owned it. In some states, the doctrine was extended to oil, gas, and groundwater. The rule of capture in the oil and gas arena led to wastage because it encouraged drilling of multiple wells to exploit the subsurface resources with consequent surface environmental impacts. Subsequently, states passed legislation to address resource use through adoption of pooling, prorationing, unitization, and various conservation laws.

In the absence of statutes defining wind rights, courts and scholars have relied on the legal regimes supporting minerals and appropriative water rights to ascertain the legal status of wind. The only two cases on the status of wind rights come to different conclusions. In *Contra Costa Water District v. Vaquero Farms*, Inc., 68 Cal. Rptr. 2d 272 (Cal. Ct. App. 1997), which focused on whether the state could condemn a fee with the exception of wind rights, the California Court of Appeals concluded that wind resource was analogous to oil and, therefore, severable. In *Romero v. Bernell*, 603 F. Supp. 2d 1333 (2009), a real property partition case, a federal district court held that wind was more akin to water or wild animals than oil because the interest does not become vested until it is reduced to possession and put to beneficial use. Finally, if the supplemental briefs on takings filed in the pending Kansas Supreme Court case *Zimmerman* are any indication, *Zimmerman* should deal more squarely than the aforementioned cases with the fundamental question of whether private property interests or rights in wind exist at all. Defining the interest or right in wind is challenging because of its fugitive and commons resource nature. By commons, we mean those resources that are common to all and not associated with a particular parcel of land. (For a discussion of the commons or *res communes*, *see* Gerald Torres, *Who Owns the Sky*, 18 PACE ENVTL. L. REV. 227 (2001)). In other words, no one person owns the wind, or, to take another renewable energy example where the legal regime is unsettled, the sun's rays. Similarly, water has been described as a "semi-commons" resource. However, without a thoughtful legal regime, common resources may be used haphazardly and in a manner that may not be in the public interest. Because of the nature of the commons, the state should define the rights regime and frame those rights in a manner that serves the public interest. Thus, given the unsettled nature of the law of wind and the benefits of developing a legal regime that facilitates the use of the resource in the public interest, the development and adoption of a uniform act should provide states with an effective tool to address these foundational legal issues.

Why a Uniform Act?

A uniform law is an unofficial law drafted by the Uniform Law Commission (ULC) of the National Conference of Commissioners on Uniform State Laws and intended to be adopted by all the states exactly as written. The ULC, which was formed in 1892 and is composed of lawyers appointed by the state and territorial governments of the United States, has produced over 250 uniform acts on private civil matters. According to the ULC, these uniform laws draw on the individual experiences of each state, and are created in order to simplify areas of law that grow more complex as "new technology wears away geographical borders and matters of law implicate more than one state." Wind law is one such area.

Wind is a borderless resource. Harnessing wind to make energy can implicate multiple states in terms of siting and transmission. Without a uniform legal approach, inefficient development of the resource both

within a state and between states may occur. For example, when wind siting decisions are left to localities, wind developers could, by constructing their own turbines as close to a downwind border as possible, limit the ability of other developers to construct wind turbines in downwind communities.

Additionally, a uniform law will both keep costs down for wind energy developers and reduce the strain on state courts. As the cases discussed above suggest, it is better to proactively develop wind through legislation than through case-by-case court decisions. For instance, because state legislatures have generally failed to address solar access rights, individuals seeking such rights have had to turn to the courts. Not only have courts not readily accepted solar energy claims, but "the costs of litigation, borne by each party, exceed the costs of both express agreements and governmental allocations, and can be disproportionate to any anticipated benefit" (Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1251 (2009)). State legislatures have long recognized the strain that case-by-case apportionment, classification, and validation of rights put on their courts, as most prior appropriation states now have statutory provisions governing water use (*see* Thaddeus Baria, Note, *Up the Creek with a Paddle: Water Doctrine as a Basis for Small Wind Energy Resource Rights*, 59 DEPAUL L. REV. 141, 162 (2009)).

In sum, a uniform law has the ability to encourage efficient development of America's wind resources in a manner that benefits the common good. The question then becomes what should this uniform wind law consider? In addition to appropriate considerations and analyses for environmental protection, the authors believe any uniform wind law should address at least the following seven questions:

1. What **rights regime** best secures the common good?

There are several possible wind rights regimes, each with differing implications for the public interest. For example, the surface owner could have a private property interest in the wind blowing above his property; this equates with a surface owner's interest in the minerals lying below his property. Second, the surface owner only has a private property interest in the wind when he actually harnesses the wind through a turbine; this theory draws upon the *ferae naturae* doctrine. Third, as a commons resource, wind cannot be owned by individuals but is held in trust by the government. Fourth, individuals may be granted a use right to the wind by the state similar to how water rights are allocated under appropriative regimes. The ULC should draw on experiences of other resource ownership in this country to best determine which ownership regime will secure the most benefit for Americans.

2. May a wind right be **severed** from the surface estate?

If the uniform law recognizes a private ownership right in the wind, then it will also need to address whether that right can be severed from the surface estate, thereby creating a separate wind estate. Severance of the wind estate could encourage growth by making it easier for developers (and speculators) to acquire wind rights. However, severance could lead to conflicts between the wind estate owner, the surface owner, and the mineral estate owner (if present). For a discussion of the negative implications of severance, *see* K.K. DuVivier, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, 49 WASHBURN L.J. 69 (2009).

3. How should **access rights** be secured?

If the ULC determines that both private ownership and severance are the best way to secure the common good, then another issue needing to be addressed is how access rights to develop the wind resource could be secured. Under the common law theory of mineral severance, an implied right of surface access accompanies the mineral estate. Should the uniform law recognize a similar implied right or should it require a wind energy developer to secure the necessary rights-of-way or easements in a separate instrument?

4. How is wind "**wastage**" best minimized?

Because wind turbines create a wake that can negatively impact the efficiencies of downwind turbines, any uniform law should include setback

requirements for wind turbines. These setback requirements would establish how close a turbine could be constructed to a property line. This will ensure that the downwind landowner has the ability to construct a wind turbine on his land without interference from upwind landowners. More generally, it will encourage efficient development of the wind resource. In the alternative, if setback requirements are not practicable because of relatively small parcel size, realty and compensation arrangements that adequately compensate original and subsequent adjacent landowners could be considered (see question 6 below).

In addition, the ULC should consider whether temporal limitations are needed to discourage resource wastage, such as requirements that wind development occur within a certain time period after rights acquisition or whether to place a cap on the duration of wind rights acquisition on third parties.

5. How should development first of the **highest energy, lowest impact** areas be encouraged?

Any uniform law should consider how to incentivize development of areas with the most wind energy potential while avoiding areas with important environmental, cultural resources, and open-space values.

6. How should **compensation** be addressed?

Any winds rights regime should consider whether compensation is appropriate for land where estates are burdened or benefited in order to generate (or forgo the generation of) wind energy.

7. How much **flexibility, if any,** should be built in to allow for state-by-state differences?

Any uniform act should consider the degree of flexibility that should be built into the act to allow for state-by-state differences and special circumstances. Although there may be an interest in accommodating state differences, this should be balanced with the importance of creating uniformity between states.

Conclusion

Wind has become a valuable resource, yet the nature of wind rights—who may own and access such rights—is largely unsettled. The orderly development of the wind resource demands that this right be carefully defined in a manner that protects the public interest, preferably with national consistency. Consequently, the authors propose a Uniform Act for Wind Rights and set forth some initial considerations that any uniform act should address.

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The views expressed in this article are the authors' own and do not necessarily reflect the position of the U.S. Department of Agriculture or the federal government.

MEETING WIND POWER VARIABILITY WITH DEMAND RESPONSE

Douglas M. Canter

Technological changes in electric transmission systems and electronic consumer products hold the promise of promoting greater use of wind power. According to the Energy Information Administration, in 2009, new wind-generating capacity rose to 39 percent of all newly installed generating capacity. But the variability (or intermittency) of electricity generated from the wind has hindered wind energy from becoming a significant source of U.S. electric supply (total 2009 wind-generating capacity was still only approximately 35,000 megawatts (MW) out of total summer-generating capacity of 1,026,000 MW, less than 4 percent).

Wind-generated electricity varies throughout the day as the wind blows heavy or blows light. That's the intermittency of wind. In the world of electricity, it creates operational problems for transmission providers, which operate relatively high voltage (69–765 kilovolts) transmission networks that deliver large quantities of power over long distances. Demand response, which permits transmission providers and/or local utilities to reduce or stop a customer's electric use under prescribed conditions, can alleviate these operational problems.

Electricity supplied into the grid (an interconnected group of transmission lines that deliver power over long distances) must match electricity used by customers continuously throughout the day or else brownouts, blackouts, and customer equipment explosions in homes and business can occur (these consequences flow from the change in frequency that results from mismatches between generated electricity and customer usage (load)).

Historically, transmission providers accepted variability of load, which is a demand-side variable, and the industry focused on ensuring that regulatory and operational rules enabled transmission providers to match generation with load fluctuations. But wind and certain other forms of intermittent renewable energy present new variability issues on the supply side.

National and regional reliability rules obligate transmission providers to balance electricity delivered to their systems with the electricity they deliver off their systems (for further transmission by other transmission providers or for distribution and sale to customers). Even with accurate power production forecasts, something the Federal Energy Regulatory Commission (FERC) has taken steps recently to address, variability can impede a transmission provider's ability to match wind-generated electricity with customer load on a reliable basis.

Wind power variability also creates costs related to the same set of operational system balancing issues. Balancing requires transmission providers to be able to call upon various types of backup generating capacity to meet system imbalances. Unless these resources are self-supplied by the transmission customer, the transmission provider generally sells them as what are called "ancillary services" to transmission customers, who effectively pay for these resources through these services.

Unlike most other types of generated electricity, the fuel source for wind power—the wind—cannot be stored and varies with wind speed, an uncontrollable natural force. Demand response has been used in the past by transmission providers and local utilities, along with other resources, to maintain system reliability. The prospect of increased production of wind power heightens the reliability and cost concerns associated with wind power variability. But policymakers and industry stakeholders view demand response together with new technologies as one means of addressing wind power variability, making greater reliance on wind energy feasible.

Definition of Demand Response

FERC staff's June 2010 *National Action Plan on Demand Response*, p. 3, a report required by the Energy Independence and Security Act of 2007 (cited and discussed below), available at http://www.ferc.gov/legal/staff-reports/06-17-10-demand-response.pdf, defines "demand response" as:

> the ability of customers to respond to either a reliability trigger or a price trigger from their utility

system operator, load-serving entity, regional transmission organization/independent system operator (RTO/ISO), or other demand response provider by lowering their power consumption.

To meet reliability, for example, in response to an emergency balancing need, the transmission provider and/or utility must be able to count on the reduction or cessation of electric use. Some demand response meets this criterion. To respond to a "price trigger," the wholesale price of electricity must be visible to the customer. This economic demand response, while not always controllable, can also be used to meet system imbalances as part of the transmission provider's continuous efforts to maintain system balance.

Wholesale demand response programs are regulated by FERC. Retail programs are generally subject to state regulation. Existing demand response programs generally allow end-use customers such as businesses, industrial plants, homes, and government facilities to save money by agreeing to permit the transmission provider and/or local utility to reduce or interrupt electric service to the customer under set conditions in return for a lower rate or billing credit.

FERC staff's June 2009 *National Assessment of Demand Response Potential*, pp. 21–23, also required by the Energy Independence and Security Act of 2007, discusses five types of demand response programs: (1) dynamic pricing without enabling technologies, (2) dynamic pricing with enabling technologies, (3) direct load control, (4) interruptible tariffs, and (5) other demand programs (for example, those offered under FERC tariffs). *See* 2009 *National Assessment*, available at http://www.ferc.gov/legal/staff-reports/06-09-demand-response.pdf. These categories provided staff with a structure to quantify demand response potential, but to some extent individual programs may exhibit characteristics of more than one type of demand response program.

"Dynamic pricing without enabling technologies" refers to retail price structures that transparently show wholesale electric prices either a day in advance or hour by hour during the electric day. Customers must not only see the real price of electricity but also have the ability to reduce consumption in response. Most retail pricing today does not have these dynamic rate structures. Dynamic pricing assumes the existence of both advanced metering infrastructure (sometimes called "AMI"), which permits local utilities to measure customer usage on a real-time basis, and real-time retail pricing.

"Dynamic pricing with enabling technologies" refers to dynamic pricing together with a number of new technologies (the smart grid) that will allow transmission providers and local utilities to reduce consumption of retail customers, including residential customers, who will be able to reduce their electric use in response to real-time (dynamic) electric prices using automatic advance settings (e.g., thermostats that respond automatically to high prices based on advance settings). Smart grid-ready electronic equipment will permit two-way communications between the transmission providers and/or local utilities and retail customers' equipment (e.g., thermostats, dishwashers, air conditioners, home electronic equipment). It will allow real-time demand response on a far broader level than exists today.

"Direct load control" programs generally refer to residential and small commercial demand response programs in which the utility has the right to reduce or stop service (e.g., air conditioner use) through a device located on the customer's equipment and directly controlled by the utility. The customer receives compensation, for example, a credit on its bill.

"Interruptible tariff" programs generally refer to industrial or large commercial demand response programs in which the utility has the right to reduce service to a prespecified level or amount agreed by the customer. (A customer who purchases under an interruptible tariff may or may not have direct controls on its equipment.) The customer receives compensation, for example, through payment of lower electric rates.

The "other demand response" category used in the 2009 *National Assessment* captures demand response programs for medium and large commercial and industrial customers operated by FERC-regulated

transmission providers. But the division of demand response programs into the five categories created by FERC staff is less important than staff's key finding that the biggest potential for increased demand response comes from residential customers reacting to dynamic pricing.

Federal Statutory Policies Promoting Demand Response and the Smart Grid

In the Energy Policy Act of 2005 (EPAct 2005), Congress set forth two related statutory policies: "to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public" and "[to encourage] time-based pricing and other forms of demand response . . . , [and to facilitate] deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems . . ." Pub. L. No. 109-58, § 1252 (e)–(f), 119 Stat. 594, 965–66 (2005).

Among other things, EPAct 2005 adds time-based retail rate design (e.g., time-of-use, critical peak, and real-time pricing) to the list of federal retail rate standards that state regulatory commissions and nonregulated retail utilities are directed to consider under state law. It also requires each state regulatory authority to investigate and decide whether it is appropriate for electric utilities in their jurisdictions to install time-based meters and communications devices for their customers "which enable such customers to participate in time-based pricing rate schedules and other demand response programs." EPAct 2005 § 1252 (a)–(b) (amending Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2621(d) and 2625).

In 2007, Congress expanded this statement of policy to modernize the electric grid and utilize demand response. The Energy Independence and Security Act of 2007 (EISA) sets forth the following policy:

> to maintain a reliable and secure electricity infrastructure that can meet future demand growth and to achieve each of the following, which together characterize a Smart Grid:
>
> . . .
>
> (3) Deployment and integration of distributed resources and generation, including renewable resources.
> (4) Development and incorporation of demand response, demand-side resources, and energy-efficient resources.
> (5) Deployment of "smart" technologies (real-time, automated, interactive technologies that optimize the physical operation of appliances and consumer devices) for metering, communications concerning grid operations and status, and distribution automation.
> (6) Integration of "smart" appliances and consumer devices.
> (7) Deployment and integration of advanced electricity storage and peak-shaving technologies, including plug-in electric and hybrid electric vehicles, and thermal-storage air conditioning.
> (8) Provision to consumers of timely information and control options.
> (9) Development of standards for communication and interoperability of appliances and equipment connected to the electric grid, including the infrastructure serving the grid.
> (10) Identification and lowering of unreasonable or unnecessary barriers to adoption of smart grid technologies, practices, and services.

Pub. L. No. 110-40, § 1301, 121 Stat. 1492, 1783–84 (2007), 42 U.S.C. § 17381.

The Energy Independence and Security Act, among other things, also requires FERC to (1) assess potential demand response (FERC met this obligation with its 2009 *National Assessment*); (2) develop a plan that identifies potential state technical assistance and educational outreach efforts (FERC met this obligation with its June 2010 *National Action Plan*); (3) submit, along with the Secretary of Energy, a demand response implementation plan to Congress (as of January 9, 2010, FERC and the Secretary had not yet submitted this implementation plan), and (4) initiate rulemaking proceedings *to adopt* smart grid standards and

protocols that permit interoperability by smart grid equipment. *See* EISA §§ 571, 1305(d), 42 U.S.C. §§ 8279, 17385 (d).

Regulatory Policies Promoting Demand Response and the Smart Grid

Demand response is not a new concept at either the wholesale or retail level. For years, FERC has approved a number of individual wholesale demand response programs. *See, e.g.*, *PJM Interconnection, LLC*, 99 FERC ¶ 61,227 (2002); *PJM Interconnection, LLC*, 99 FERC ¶ 61,139 (2002); and *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006). The 2009 *National Assessment*, Appendix A, discusses existing and potential retail demand response programs within each state. *See also* 2010 *National Action Plan*, Appendix B.

In 2007, FERC required transmission providers to establish "coordinated, open and transparent transmission planning . . . that allows for the incorporation of demand resources [by transmission providers] if they 'are capable of providing the functions assessed in a transmission planning process, and can be relied upon on a long-term basis.'" *Assessment of Demand Response & Advanced Metering*, Staff Report, pp. 5–6 (Sept. 2009 *Annual Report*), available at <http://www.ferc.gov/legal/staff-reports/sep-09-demand-response.pdf> (footnotes omitted), summarizing and quoting Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, FERC Stats. & Regs. ¶ 31,241, at 479 (2007), 72 Fed. Reg. 12,266 (Mar. 15, 2007) (subsequent history omitted).

In October 2008, as amended the following year, FERC reformed its policies governing organized markets (those operated by an ISO or RTO), in part, to address what it perceived as barriers to demand response, including barriers to the greater use of price to encourage demand response, in these market. FERC, among other things, required RTOs and ISOs to accept bids from demand response resources for "ancillary services" under certain conditions. It required RTOs and ISOs to accept bids from aggregators of retail demand response, subject to eligibility criteria that differ depending upon the load size of the utility whose retail customers are being aggregated (i.e., whether in excess of 4 million MWH in the prior fiscal year). It also required RTOs and ISOs to report their assessments of any further demand response barriers that exist in their respective markets. *See Wholesale Competition in Regions with Organized Electric Markets*, 128 FERC ¶ 61,059, at 2, 13, 51 (2009) (Order No. 719-A), *denying reh'g and granting clarification*, 129 FERC ¶ 61,252 (2009).

Then, in June 2009, FERC issued a smart grid policy that takes the first step toward the Energy Independence and Security Act goals relating to smart grid standards and protocols (interoperability standards). FERC adopted "key priorities" on which initial work to develop interoperability standards should concentrate. Essentially, these constitute recommendations to the National Institute of Standards and Technology, which is charged under the Energy Independence and Security Act with coordinating development of interoperability standards with various stakeholders. These priorities include developing interoperability standards for demand response and integration of variable renewable energy such as wind power. FERC's policy also adopts interim rate recovery standards and procedures relating to smart grid equipment and devices. *See Smart Grid Policy*, 128 FERC ¶ 61,060, at 5–6, 29, 63–77 (2009).

More recently, in 2010, FERC took steps to address issues relating to integration of renewable energy resources into the transmission grid. FERC first issued a notice of inquiry and then a notice of proposed rulemaking, seeking comments addressing scheduling, forecasting, and reliability issues associated with the variability of wind and other renewable energy. Generation imbalance cost issues are also being addressed. *See Integration of Variable Energy Resources*, 130 FERC ¶ 61,053 (2010) and 133 FERC ¶ 61,149, at 84–100 (2010).

Also in 2010, FERC amended its regulations governing standard business practices for electric utilities, which incorporate standards adopted by the Wholesale Electric Quadrant of the North American Energy Standards Board. The revised standards are intended,

in part, to "facilitate development of standardized business practices for measuring and verifying demand resource products and services . . ." *Standards for Business Practices and Communication Protocols for Public Utilities,* 131 FERC ¶ 61,022, at 9 (2010) (Order No. 676-F) (revising 18 C.F.R. § 38.2(a) (2010)).

Finally, according to the September 2009 *Annual Report* prepared by FERC staff under Energy Policy Act of 2005 requirements, "[a]t least ten states [have] issued comprehensive long-term energy plans or passed legislation or regulations that . . . enable increased deployment of advanced metering infrastructure or demand response . . ." (Sept. 2009 *Annual Report*, p. 9).

Barriers

Estimating demand response potential is difficult and subject to many variables. Moreover, the 2009 *National Assessment* identifies 24 barriers to achieving estimated demand response potential. Appendix C of that report places these barriers into four categories: (1) regulatory, (2) economic, (3) technological, and (4) other (primarily customer acceptance).

The principal barriers involve issues relating to (1) installation of advanced metering infrastructure equipment, (2) implementation of dynamic retail pricing (which requires smart grid implementation), (3) adoption of uniform interoperability standards, and (4) consumer acceptance. As Peter Fox-Penner explains in his book, *Smart Power*, pp. 51–65 (Island Press 2010), smart grid implementation involves a complete revamping of the electric power systems, including establishing uniform communication protocols. The investment in advanced metering infrastructure and the smart grid software and hardware are to some extent subject to the willingness of state regulators to allow utilities cost recovery, which presents a regulatory obstacle. *Id.* at 51–52. (Note that the Smart Grid Investment Matching Fund Program provides for grants of up to 50 percent of qualifying smart grid investments. *See* Energy Independence and Security Act, as amended by the American Recovery and Reinvestment Act of 2009, 42 U.S.C. 17386 (2010).) Moreover, consumer acceptance of new electric pricing and technologies is uncertain.

Conclusion

The 2009 *National Assessment*, pp. 27–29, estimates the potential of demand response to reduce peak demands nationwide to be between 38 and 188 gigawatts by 2019 under various scenarios with the greatest demand response coming from retail customers after deployment of advanced metering infrastructure, approval of dynamic pricing in retail rates, and implementation of enabling technologies (the smart grid). But the 2009 *National Assessment*, pp. 23–25, recognizes that demand response will become more widely used for nonpeak uses.

With respect to meeting wind variability, FERC has clearly recognized that demand response can help transmission providers balance their systems and offset the variability of wind power. For example, in its 2010 *National Action Plan*, p. 34, FERC stated that "[demand response] applications include incorporating price-responsive demand, automating demand response in all hours of the day, using demand response to provide operating reserves and other ancillary services, and partnering demand response with wind generation and other variable resources."

FERC also found that "smart grid capability can enhance the application of demand response to accommodate integration of variable generation." *Smart Grid Policy*, 128 FERC ¶ 61,060, at 74 (2009). FERC's 2009 *Smart Grid Policy* also stated that "demand response can be particularly helpful in situations when production from variable generating resources has fallen." *Id.*

Demand response providers and wind power advocates also tout the ability of demand response to offset wind variability. For example, Darren Brady, who works for EnerNOC, Inc., a demand response provider, and Rob Gramlich, who works for the American Wind Energy Association, in their July 2009 article, *Getting Smart About Wind and Demand Response*, WIND SYSTEMS MAGAZINE (July/Aug.

2009), http://windsystemsmag.com/article/detail/15/getting-smart-about-wind-and-demand-response, state that "[d]emand response resources are well poised to provide grid operators with low-cost, efficient flexibility to handle variability on the power system, including incremental variability introduced by wind energy." *Id.* at 30.

Transmission provider representatives share the same view that demand response can serve as one piece of the resource puzzle to offset wind variability. For example, Ray Dotter, a media relations representative of PJM Interconnection, succinctly summed it up in a January 3, 2011, telephone interview, "We see demand response as one potential way to offset wind variability, but trying to quantify it is harder because of the many variables."

In the end, demand response will continue to provide, in increasing quantities, a resource for electric transmission providers to offset variable changes in generation, including wind power variability. Policymakers and industry participants generally agree that wind power variability can be met with demand response when viewed as part of a portfolio of resources used in aggregate by transmission providers to meet their system balance obligations.

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OFFSHORE WIND ENERGY FINANCIAL ASSURANCE REQUIREMENTS: WILL FEDERAL AND STATE REGULATIONS AFFECT DISTRIBUTION OF PROJECT DEVELOPMENT?

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Since 2004, when the first project was proposed in the United States, developers and regulators have discussed the potential for offshore wind projects all along the Atlantic seaboard, the Gulf Coast, and the Great Lakes. Although many Americans support the development of offshore wind because they believe that it can provide a clean domestic source of renewable energy, others oppose its development because they are concerned about ecosystem impacts, and/or worry about long-term care of the facilities. Financial assurance is one regulatory tool that regulators can use to balance these concerns by ensuring (1) compensation for losses or damages resulting from offshore wind activities and (2) performance of decommissioning and restoration when the facilities have no further useful lives. In the absence of national requirements, financial assurance requirements for offshore wind projects vary depending on the government body with jurisdiction. Because financial assurance requirements necessarily entail costs and may create an obstacle for developers lacking sufficient liquid capital, these requirements may affect the distribution of offshore wind development.

This article addresses potential concerns for offshore wind developers in relation to financial assurance requirements including scope and amount of required financial assurance, allowable instruments and eligible issuers, and schedule for establishment and maintenance of financial assurance. Specifically, this article compares financial assurance regulations for three key geographic areas of offshore wind energy development: the Atlantic seaboard administered by the Department of the Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE); submerged lands in the Great Lakes administered by the state of Michigan; and submerged lands in the Gulf of Mexico administered by the state of Texas.

Background

Financial assurance, an increasingly common component of national, state, and local industrial regulations, is a tool aimed at safeguarding taxpayers and injured parties against the risk of industry's noncompliance with regulatory obligations by requiring industry to demonstrate financial resources at a time prior to the accrual of the obligations, often by requiring the initial demonstration prior to project construction, and maintenance of financial assurance until all obligations have been satisfied. Financial assurance requirements attempt to guard against the situation where the owner/operator enters bankruptcy, dissolves, or shelters assets overseas.

For offshore wind energy, there are various types of obligations that financial assurance can cover in order to transfer the risk of abandonment or bankruptcy from the taxpayer and injured parties to the owner/operator of the offshore facility: rental payments, remediation of and compensation for environmental and other damages caused by facility operations, and decommissioning of the facility.

Federal Regulations

Federal financial assurance regulations are administered by BOEMRE and apply to federal lands extending from 3 to 200 nautical miles from the coast. The regulations, 30 C.F.R. Part 285 *Renewable Energy Alternative Uses of Existing Facilities on the Outer Continental Shelf*, were proposed in July 2008 by the former Mineral Management Service and were finalized in April 2009.

Under these regulations, financial assurance is required to cover decommissioning costs and all monetary obligations of the lease (e.g., 12 months of rental payments) in an amount determined by BOEMRE on a case-by-case basis. The agency is given discretion to authorize a structure that has a continuing beneficial use to remain in place following site assessment activities, reducing the amount of required financial assurance for the decommissioning phase of operations. For commercial leases, financial assurance must be equal to or greater than $100,000 and for limited leases, rights-of-way grants, or right-of-use and easement grants, financial assurance must be greater than or equal to $300,000. However, these thresholds fail to represent

the actual amount of financial assurance that developers may need to demonstrate prior to receiving BOEMRE approval of plans for construction and operations. For example, the 2008 draft environmental impact statement for the Cape Wind Energy Project estimates that decommissioning costs will be close to $25 million.

Allowable instruments include surety bonds; pledges of cash; certificates of deposit or savings accounts; negotiable U.S. government, state, and municipal securities or bonds; investment-grade rated securities; insurance; a demonstration of financial strength and reliability (i.e., self-assurance); third-party guarantees; or other acceptable financial assurance instruments. Several of these options (e.g., third-party guarantees and self-assurance) were deemed acceptable only after stakeholders provided comments on the proposed rule criticizing the omission of financial instruments that are accepted for other industries, such as offshore oil and gas. Moreover, the final regulations include little information about eligible issuers of allowable instruments.

Financial assurance will not be released until seven years after the lease ends or a longer period as necessary to (1) complete any appeals or litigation related to the assured obligation or (2) receive agency approval of all outstanding obligations covered by the financial assurance. The agency may draw upon the financial assurance if the lessee fails to comply with any term or condition of the lease, grant, or applicable regulations; or defaults on a condition under which the financial assurance was accepted.

Michigan Regulations

In January 2009, Michigan created the Great Lakes Wind Council (GLWC), an advisory body for making policy recommendations related to offshore wind energy development in Michigan. The GLWC published reports in 2009 and 2010 that examined the potential for offshore wind energy development and model legislative guidance for offshore policy. The GLWC recommended that financial assurance be required for decommissioning and that insurance be required to cover bodily injury, property damage, and environmental damage in an amount determined by the Department of Natural Resources and Environment. The instruments recommended by the GLWC include performance bond, escrow, cash, certificates of deposit, irrevocable letter of credit, or "other security," leaving unclear whether self-assurance or corporate guarantees would be acceptable. On November 10, 2010, House Bill No. 6564 was introduced to the Michigan legislature proposing financial assurance requirements that follow those recommended by the GLWC reports for wind projects developed on bottomlands or under waters within the state's jurisdiction in the Great Lakes.

The proposed bill states that financial assurance is required to cover "terms and conditions in the lease," decommissioning, and "necessary environmental protection measures, including potential remediation of any contamination of the air, water, or bottomlands" in an amount determined by the department. Similar to the federal regulations, the bill provides the department with the discretion to authorize a structure to remain in place. Also, in order to account for the difficulty in predicting potential liabilities, such as remediation for possible contamination, the bill limits, as proposed by the GLWC, the amount of financial assurance required to cover remediation and other potential liability to an amount not to exceed 1 percent of the cost of the facility. Additionally, the bill requires a general liability insurance policy to cover bodily injury, property damage, and environmental damage in an amount determined by the department.

Allowable instruments include performance bonds, escrow, cash, other equivalent securities, or any combination of these instruments. The bill does not explicitly allow letters of credit, self-assurance, or corporate guarantees; nor does it include language on instrument issuer eligibility.

Prior to conducting any activities, evidence of financial assurance and a certificate of liability insurance must be submitted to the department. Evidence of updated financial assurance is also required if a site assessment lessee elects to proceed with facility construction and operation. Thereafter, every three years, or as the department considers necessary, a lessee is required to update its financial assurance and adjust the amount to assure that it is sufficient for the purposes of the regulations.

The financial assurance must remain in effect for the duration of the lease or until all lease conditions have

been fulfilled, including decommissioning and restoration. Failure to provide or maintain financial assurance constitutes grounds for the department to order suspension of activities. If the lessee fails to comply with the approved plans, the department may seek forfeiture of the financial assurance and take action to implement removal plans.

Texas Regulations

The Texas General Land Office (GLO) is the state agency responsible for leasing state-owned lands for offshore wind development. Due to a stipulation made when the Texas Republic joined the United States in 1845, Texas has unique offshore sovereignty, beginning at the coast and extending out 10.3 nautical miles. As a result, wind companies interested in building projects offshore must sign a lease with the GLO, and according to the GLO Web site, Texas regulations are much more lenient than those administered by BOEMRE: "Developers partnering with the Land Office find the state easy to do business in. Texas' unique coastal sovereignty—out to 10.3 miles—means less federal entanglement. . . . The state's deregulated energy market . . . also favor[s] wind power entrepreneurs." Specifically, although the GLO has the discretion to require financial assurance as a condition of a lease, no formal financial assurance requirements have been enacted under Texas law for wind development on state submerged lands.

Comparison and Conclusions

Although the owner or operator of a proposed offshore wind energy project may be required to provide financial assurance, the scope, amount, allowable forms, eligible issuers, and schedule for demonstration and maintenance of required coverage will vary greatly depending on the location of the proposed facility. The most notable difference between the regulatory frameworks analyzed in this paper is the scope of the financial assurance requirements, spanning from nonexistent in Texas to covering both decommissioning and liability coverage in Michigan (if the proposed bill passes), with BOEMRE in the middle requiring financial assurance for decommissioning but not liability coverage. Another way in which Michigan's regulations may be more stringent than BOEMRE's regulations is the acceptable financial assurance instruments; BOEMRE explicitly allows self-assurance while Michigan's bill does not indicate whether self-assurance will be accepted.

These differences arguably may affect the distribution of offshore wind development. In fact, this argument was made by the press secretary of the Texas GLO on December 7, 2010, on the Web site www.popularmechanics.com: "I was about to write a press release to congratulate Cape Wind for getting their approval and let them know when they're done jumping through hoops up there they can come build off the Texas Coast." And the press secretary's argument is supported by the current status of offshore wind leases across the country. As of December 7, 2010, Michigan had granted no leases for offshore wind development; BOEMRE had approved one offshore wind farm after nine years of regulatory review; and the GLO had issued eight leases covering more than 570 square kilometers off the Texas coast, with estimates for the permit process to take weeks or months.

Although more lenient financial assurance regulations may raise concerns from stakeholders and taxpayers about potentially inadequate siting policies, stricter regulations may result in slower permitting processes and deter growth in the offshore wind energy market. The regulations analyzed in this article demonstrate the wide range of financial assurance requirements for offshore wind and, arguably, the potential for financial assurance policy to affect the distribution of offshore wind energy development.

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THE WIND NORTH OF THE 49TH PARALLEL: U.S. INVESTMENT OPPORTUNITIES THROUGH CANADIAN WIND ENERGY TAX INCENTIVES

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The growth of the wind energy industry in Canada is supported by a number of renewable energy tax incentives under the Income Tax Act (Canada) (Canadian Tax Act) and the Income Tax Regulations (Canada) (regulations). Canadian corporate tax rates and renewable energy tax incentives provide opportunities for U.S. investors, but require careful tax planning to maximize effectiveness.

There are three significant Canadian tax incentives available with respect to wind energy:

1. accelerated capital cost allowance (CCA) for certain assets;
2. immediate write-offs in respect of Canadian renewable and conservation expenses (CRCE); and
3. the benefits of being able to issue so-called flow-through shares.

In addition, certain tax credits may be available for scientific research and experimental development (SR&ED) related to wind energy.

The ability to access these tax incentives depends on a variety of factors, such as the type of investment, residence (Canadian resident or nonresident) and the type of investor (e.g., single purpose funds, fund-of-funds, individual, corporation, etc.) and the entities comprising the investment structure (i.e., corporation, partnership, or trust). Certain investment structures allow investors to maximize their ability to access the tax incentives described below, while strict limits are imposed on the use of other structures. As a result, careful tax law planning is required for every wind energy project and for investors considering an investment in wind energy.

Capital Cost Allowance

Most electricity generating and distributing equipment only qualifies for a CCA rate of 4 percent or 8 percent. However, accelerated CCA rates are available for certain types of wind energy assets qualifying under class 43.1 or 43.2 of the regulations. In order for property to qualify under class 43.1 or 43.2, it generally must be

1. situated in Canada;
2. acquired by the taxpayer for use by the taxpayer, or by a lessee of the taxpayer, for the purpose of earning income from a business carried on in Canada or from property situated in Canada; and
3. not have been used for any purpose before the taxpayer acquired the property.

Renewable energy assets, including wind energy assets, qualifying under class 43.1 or 43.2 are eligible for depreciation on a declining balance basis at a rate of 50 percent (subject to a "half-year rule" in the year of acquisition) for property acquired after February 22, 2005, and before 2020. For equipment acquired before or after that time, the rate is 30 percent.

In order to qualify under class 43.1 or 43.2, the wind energy asset must be "available for use." must not be used, reconditioned, or remanufactured (except in very limited circumstances) and must fall within the following definition:

> A fixed location device that is a wind energy conversion system that is used by the taxpayer, or a lessee of the taxpayer, primarily for the purpose of generating electrical energy, and consists of a wind-driven turbine, electrical generating equipment and related equipment, including control, conditioning and battery storage equipment, support structures, a powerhouse complete with other ancillary equipment, and transmission equipment.

There are a number of assets that may be part of a wind energy system that would not be eligible under class 43.1 or 43.2, including electrical distribution equipment and facilities, other backup generating equipment, vehicles, telephone equipment, access roads, sidewalks, and a variety of other assets.

A taxpayer's ability to maximize accelerated CCA may be limited by the "specified energy property"

regulations, which may limit the amount of CCA deductible in any particular year to the income earned from the class 43.1 or 43.2 assets. This restriction generally does not apply where the owner uses the property in its own business or when certain ownership conditions are satisfied (for example, where the owner is a "principal business corporation" or a partnership each member of which is a "principal business corporation"). Careful planning considerations are required with respect to the specified energy property regulations.

Canadian Renewable and Conservation Expenses

CRCE is a category of deductible expenses that are included in a taxpayer's Canadian exploration expense (CEE) pool. In general terms, CRCE are those development costs associated with the development of a project that consists primarily of equipment eligible for inclusion in CCA for class 43.1 or 43.2 (as described above). Such expenses would generally be considered CRCE if they are payable to arm's-length persons or partnerships that are Canadian residents or a Canadian partnership (i.e., a partnership all of the members of which are Canadian residents). As a result, planning considerations will be required when U.S. investors are involved.

Only certain development costs in respect of a class 43.1 or 43.2 project will qualify as CRCE, including expenses for making a service connection to the project for the transmission of electricity to a purchaser; the construction of a temporary access road to the project site; a right of access to the project site; clearing land to the extent necessary to complete the project; process engineering for the project; the drilling or completion of a well for the project; and, notably, *a test wind turbine that is part of a wind farm project of the taxpayer*.

Certain expenses are also specifically excluded. However, these expenses may be deductible under other provisions of the Canadian Tax Act or allocated to the cost of capital or depreciable property. In addition, it is important to note that it will not be possible for expenses incurred after the project commences to earn income to qualify as CRCE.

As with CEE expenses, generally, CRCE expenditures are fully deductible in the year in which they are incurred. Unused CRCE may be carried forward and deducted against income earned in future years.

Flow-Through Shares

In certain circumstances, expenditures added to a corporation's CEE pool may be renounced and passed on to the corporation's shareholders through the so called flow-through share rules under the terms of a flow-through share agreement. In general, such agreements allow a principal business corporation to raise funds for financing its proposed energy conservation or renewable energy project by issuing flow-through shares.

A principal business corporation for purposes of the flow-through share rules includes, among other things, a corporation the principal business of which is any of, or a combination of (1) the generation of energy using property described in class 43.1 or 43.2; and (2) the development of projects for which it is reasonable to expect that at least 50 percent of the capital cost of the depreciable property to be used in each project would be the capital cost of property described in class 43.1 or 43.2.

The 2010 Canadian federal budget expanded the definition of principal business corporation to include a corporation whose principal business is the distribution of energy using property described in class 43.1 or 43.2. Thus, it is a question of fact as to whether the principal business of a corporation satisfies the criterion specified in the Canadian Tax Act and regulations, which must be determined by reference to all of the surrounding circumstances, and in particular, a review of all the various activities carried on by the corporation and the assets to be acquired and used in the project.

In general terms, a corporation that issues flow-through shares would be entitled to renounce or flow-through qualifying expenses to the holders of such shares, with the result that those shareholders would be entitled to deduct the expenses as if they had incurred them themselves. It should be noted that there are many legislative and administrative restrictions and

requirements that must be satisfied in order for a corporation to be able to issue flow-through shares and renounce expenses to holders of flow-through shares.

Scientific Research and Experimental Development

The SR&ED program is a Canadian federal tax incentive program to encourage businesses to conduct SR&ED in Canada. Claimants can apply for SR&ED investment tax credits for expenditures on wages, materials, machinery, equipment, overhead, and outside SR&ED contracts. A qualifying "Canadian-controlled private corporation" can earn a refundable investment tax credit of 35 percent up to the first $2 million of qualified expenditures for SR&ED carried out in Canada, and 20 percent on any excess amount. Other Canadian corporations, proprietorships, partnerships, and trusts can earn a nonrefundable investment tax credit of 20 percent of qualified expenditures for SR&ED carried out in Canada.

Work qualifying for SR&ED must be systematic and must address scientific or technological uncertainties or advance understanding of science or technology, and can include experimental development to advance, improve, or innovate materials, devices, products, or processes, as well as support work in engineering, design, programming, data collection, or testing in support of experimental development. "Routine" data collection or testing, and "routine" engineering are not included.

Cross-Border Considerations

The current Canadian federal corporate income tax rate is 16.5 percent for 2011, which will be reduced to 15 percent in 2012. The corporate income tax rate in the province of Ontario is currently 11.5 percent, which it is proposed will be reduced to 11 percent in 2012 and 10 percent in 2013 (effective July 1 of the particular year). Accordingly, the combined federal and Ontario general corporate tax rates in the following years should be 28 percent in 2011, 26 percent in 2012, and 25 percent in 2013.

From a U.S. investment perspective, the repatriation of profits and allocation of losses will likely require careful planning by both Canadian and U.S. tax lawyers. Benefits may be available under the Canada-US Income Tax Convention (treaty) to provide relief from double taxation. One of the attractive benefits under the treaty is the exemption from withholding tax on most interest payments between residents qualifying for benefits under the treaty. However, given Canada's lower corporate tax rates, depending upon the circumstances, some U.S. investors may find it attractive to reinvest surplus revenue in Canada.

Careful planning considerations are required when structuring investments through "fiscally transparent entities" and to provide for tax-effective exit strategies.

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Gowlings is an international law firm with expertise in all aspects of wind energy project development and finance, including tax-efficient investment structures designed to assist stakeholders in developing innovative and forward-looking solutions in developing wind energy projects. Gowlings is also the Canadian member of Taxand, a global network of leading tax advisors.

This article is by no means exhaustive of all of the tax implications related to these matters. It is not intended to be comprehensive with respect to tax incentives for wind energy generation and should not be construed as legal advice. The availability of any particular tax incentive should be considered on a case-by-case basis and professional advice should be sought prior to any investment in wind energy assets. In addition, certain provincial tax incentives may be available and should be considered.

Call for Nominations

The Section invites nominations for the following awards:

Environment, Energy, and Resources Government Attorney of the Year Award

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2010 calendar year [consideration may be given to allowing projects that occurred in the 2009-2010 or 2010-2011 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2010 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 16, 2011.
These Awards will be presented at the ABA Annual Meeting in Toronto in August 2011.

2011 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship

The *2010 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship* was established in 2002 to recognize and honor the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship. This may include a major development in law or policy that serves to enhance conservation, responsible development, prudent resource use, and pollution abatement or mitigation, or it may be a recognition for a sustained period of leadership in the development of law and policy in this area. The Award may also be given for significant achievements in legal practice or in business, including corporate charitable contributions of funds, land, or resources; in written articles; in teaching; in advocacy before courts, agencies, legislators, or other institutions; or for any other significant achievement that evidences excellence in environmental, energy, and resources stewardship.

Nomination deadline: June 13, 2011.
The Award will be presented at the 19th Section Fall Meeting in Indianapolis in October 2011.

2011 ABA Award for Distinguished Achievement in Environmental Law and Policy

The ABA Standing Committee on Environmental Law ("SCEL") and the Section of Environment, Energy, and Resources invite nominations for the *2011 ABA Award for Distinguished Achievement in Environmental Law and Policy*. This award recognizes individuals or organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Nomination deadline: March 31, 2011.
The Award will be presented at the ABA Annual Meeting in Toronto in August 2011.

For further details about these awards, please visit the Section Web site at
http://www.abanet.org/environ/sectaward/