

1

A Bright New Tenant on the Roof

Climate Change

Paul D. Durbin 312.460.4211

2

Keeping Pace with PACE

Climate Change

Michael P. McGee 313.496.7599

3

Federal Stimulus Money Continues to Flow

Climate Change

Mark J. Bennett 248.267.3269

4

EPA Finalizes GHG Reporting Rule

Climate Change

Anna M. Maiuri 248.267.3260

2011 International Climate Law & Policy Symposium

Climate Change

Mark J. Bennett 248.267.3269

A Bright New Tenant on the Roof

SOLAR POWER IS GROWING RAPIDLY in the United States—fueled primarily by advances in photovoltaic technology and governmental policies.

Today, developers are customizing solar power systems for commercial, industrial, governmental, and non-profit customers. As a result, solar arrays are being installed on rooftops across the country.

Many states have adopted renewable portfolio standards (RPS) which require electricity suppliers to produce a specified percentage of their power from renewable energy sources by a date certain. Several states also mandate that a portion of the RPS come from solar. For a complete list see: http://www.dsireusa.org/documents/summarymaps/Solar_DG_RPS_map.pptx. To meet this obligation, electricity suppliers produce solar power, purchase solar renewable energy credits (SRECs), or face a penalty.

Solar power generators earn an SREC for every 1000 kWh of solar power produced. Certified by the state, SRECs are tradable and subject to market pricing. SREC revenue is one of the primary revenue streams for solar developers and a critical means of financing a project.

Before initiating construction of the solar panel system, the solar developer and property owner enter into a power purchase agreement (PPA) and site lease. The PPA governs the generation and sale of power from the rooftop or ground mounted installation. The owner will receive a guaranteed solar electricity rate that provides price certainty over the PPA term as well as a hedge against rising utility rates. The PPA will include an annual rate escalator of 2 – 5%.



The PPA establishes the price per kWh, solar panel system size, buyout provisions, rooftop improvements, and term. With rising electricity rates, solar power kWh prices are often much lower than utility rates. In addition, solar produces at peak times when solar radiation is optimal and electricity demand is high. Under the PPA, the developer typically finances the entire cost of the system and owns the SRECs. In return, the property owner is obligated to buy all power generated on site.

PPA terms are generally 20 years in length to align with the useful life of most solar panel systems. The property owner often negotiates the right to buy the system during the term of the agreement (buy-out rights). At the end of the term, the developer may convey the solar panel system to the property owner.

The property owner will also enter into a site lease to allow the developer access to and use of the rooftop for maintenance of the solar power system. Site leases may have market or nominal rental payments. Depending on the property use, the property owner will need to establish clear rules on access to the property and responsibility for improvements.

Solar power is in its infancy in the U.S. As long as policymakers continue to support its expansion, solar energy will continue to grow in the decades to come. In states with strong solar energy policies, property owners are already realizing the benefits of on-site solar power systems while securing a cleaner energy profile.

Climate Change
Paul D. Durbin 312.460.4211



Keeping Pace with **PACE**

Property Assessed Clean Energy (PACE) is an innovative financing tool that allows property owners to install renewable energy systems and make energy efficiency improvements to their property while paying back the cost of the improvement as a voluntary assessment on their property tax bill.

The assessment is voluntary in the sense that a homeowner can opt-in to participating in the program. If the property is sold, the subsequent owners assume the pay-back obligation. The funds to finance the improvements are raised from municipal bond sales, Federal Stimulus funding, or other sources. Repayment is secured by a senior lien that is attached to the property which runs with the land in the event of a property transfer. PACE programs are intended to be cash positive as the energy savings from the improvements are expected to be more than the assessment payment.

PACE legislation has been passed in over 20 states in the last two years and is under consideration in a number of other states, including Michigan. The Michigan bill, HB 5640, has passed the House of Representatives and is under consideration in the Senate.

The residential PACE market was stopped after the Federal Housing Finance Agency (FHFA) issued a letter on July 6, 2010, stating that Fannie Mae and Freddie Mac should not accept mortgages with PACE assessments because the programs present "significant safety and soundness concerns." The letter left municipalities in a quandary over how to handle the significant Federal Stimulus dollars that were earmarked for PACE programs. The California Attorney General has filed a lawsuit challenging the agency's decision. House Democrats have introduced legislation, the PACE Assessment Protection Act of 2010, which is intended to develop a compromise with the FHFA before the bill is signed into law. Despite the uncertainties in the residential market, commercial PACE programs are continuing to expand.

Commercial programs operate much like the residential programs and provide a method to finance energy efficiency improvements and renewable energy installations that are paid back over a number

of years on the property tax bill. Commercial programs are not impacted by the FHFA letter because Fannie Mae and Freddie Mac do not hold commercial mortgages. Multi-family housing will likely be precluded from participating in PACE programs because Fannie Mae and Freddie Mac do hold multi-family housing mortgages. The mortgage holder must consent to the PACE assessment before the building owner can participate in the program, thereby alleviating many of the concerns of the lending community. In an uncertain real estate market, PACE may provide the proper incentive for building owners to invest in energy efficiency upgrades and renewable energy technology to make their buildings more attractive to tenants. Many property owners are finding that "green" buildings are commanding a higher rate in the marketplace.

One issue with commercial PACE programs is how they will be viewed according to Generally Accepted Accounting Principles (GAAP) on a corporation's balance sheet. Will they be considered a loan or a lien? If viewed as a loan, it will negatively impact the business's debt capacity, whereas if it is viewed as an assessment, it would not adversely impact the debt capacity of the business.

In addition, lenders that are involved with properties that have PACE assessments must be cognizant of the risk involved with implementing new technologies and structuring mortgage covenants to mitigate lender risk in case of default.

Commercial PACE programs are continuing to grow across the U.S. If you would like assistance with financing an energy efficiency improvement or a renewable energy installation using a PACE program, or are involved in a real estate transaction involving a PACE assessment, please contact us.



Climate Change
Michael P. McGee 313.496.7599

FEDERAL STIMULUS MONEY

Continues to Flow

Under the American Reinvestment and Recovery Act (ARRA), Michigan has been awarded nearly \$1.3 billion dollars in federal stimulus money dedicated to energy efficiency and renewable energy.

As of the beginning of September, only \$193 million had been disbursed toward projects, which leaves nearly \$1.2 billion yet to be contracted for.

Oakland and Wayne Counties were awarded \$4.9 million dollars each under the Energy Efficiency and Conservation Block Grant Program which was funded under ARRA; Kent County was also awarded \$2.8 million under the same program.

The Michigan Department of Energy, Labor and Economic Growth (DELEG) was awarded \$30 million dollars for retrofit ramp-ups. The funds are targeted at improving the energy efficiency of residential homes across Michigan and efficiency upgrades of commercial buildings in Detroit. Private entities have also been awarded significant amounts: \$680 million



has been awarded to numerous companies for battery manufacturing and \$89 million was dedicated toward transportation electrification.

There is significant capital that has yet to hit the market from the ARRA stimulus funds and there will be considerable economic opportunities for companies that are working in the energy efficiency and renewable energy sector.

A current list of awardees can be accessed on the DOE web page at: <http://www.energy.gov/recovery/documents/recoveryactfunding.xls>

Climate Change
Mark J. Bennett 248.267.3269

EDITORIAL BOARD

Mark J. Bennett
Troy, MI
248.267.3269

Michael P. Coakley
Detroit, MI
313.496.7531

Dennis J. Tobin
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647.259.6282

Anna M. Maiuri
Troy, MI
248.267.3260

Paul D. Durbin
Chicago, IL
312.460.4211

EDITORIAL DIRECTOR

Eric M. Jamison
ejamison@wayne.edu

Wayne State University
Law School

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MICHIGAN
Detroit
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Ann Arbor
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Grand Rapids
+1.616.454.8656
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+1.517.487.2070
Saginaw
+1.989.791.4646
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ILLINOIS
Chicago
+1.312.460.4200

NEW YORK
New York
+1.212.704.4400

OHIO
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+1.614.203.7800

CANADA
Toronto
+1.416.599.7700

Windsor
+1.519.977.1555

CHINA
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MEXICO
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+52.81.8335.0011

POLAND
Gdynia
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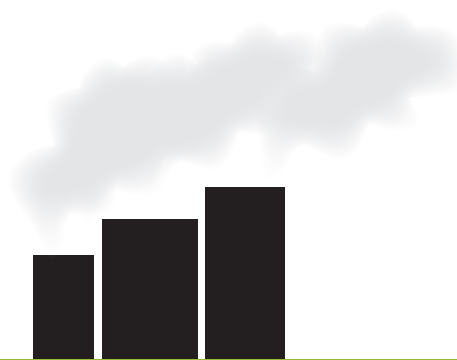
Warsaw
+48.22.447.4300
Wroclaw
+48.71.722.5090



QUESTIONS,
COMMENTS AND
TO SIGN UP FOR
E-HOT POINTS:

silkworth@millercanfield.com

millercanfield.com



EPA FINALIZES GHG Reporting Rule

The Environmental Protection Agency (EPA) expanded the scope of its final mandatory greenhouse gas reporting rule to cover four new source categories. The final rule was expanded to include: magnesium production sites, underground coal mines, industrial waste water treatment and industrial waste landfills. This means that the new source categories may be subject to additional reporting criteria or reporting methods under the final mandatory greenhouse gas reporting rule.

The EPA made a final decision to not include ethanol production facilities or food processing plants under the reporting rule. The decision to not include ethanol producers and food processors does not mean they are exempt

from reporting if they are over the 25,000 ton reporting threshold. It only means that such facilities will not be viewed as a distinct subpart of the statute which may trigger additional reporting criteria.

Entities affected by this rule will be required to track emissions starting January 1, 2011, and submit their first report to the EPA by March 31, 2012. The rule does not require the control of greenhouse gases, but only requires the monitoring and reporting of emissions. More information can be accessed at: <http://www.epa.gov/climatechange/emissions/remaining-source-categories.html>



Climate Change
Anna M. Maiuri 248.267.3260

2011 INTERNATIONAL CLIMATE LAW & POLICY SYMPOSIUM

On the heels of the recent event held in cooperation with Wayne State University Law School that was attended by over 120 professionals, plans are under way for the second annual program to be held in the spring of 2011. We welcome any suggestions as to topical focus and speakers which you might find of interest. Please contact Mark Bennett with comments.

Climate Change
Mark J. Bennett 248.267.3269



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