

# Bottomlands Leasing and Permit Criteria Work Group Recommendations

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## BACKGROUND

The governor's Executive Order No. 2009-1 instructs the Great Lakes Wind Council to include in its report:

- Options for how the public could be compensated for bottomlands leasing and wind rights for wind energy systems, and
- Recommendations for legislation and for changes in administrative rules and policies related to the siting and development of offshore wind energy systems.

These directives in the executive order raise the following questions:

- How should bottomlands access be provided to wind energy developers?
- How should the public be compensated for the use of the bottomlands and wind rights?
- How will public resource values be protected, or at least not substantially impaired, during the siting, operation, and decommissioning of offshore wind turbines and related facilities?

This paper includes a list of recommendations developed by the work group.

## PERMITTING AND LEASING STATUTE

Presently, access to Michigan's Great Lakes bottomlands is regulated by the Michigan Department of Environmental Quality (MDEQ) under the Great Lakes Submerged Lands Act, Part 325 of Act 451 of 1994, Natural Resources and Environmental Protection Act (NREPA) as amended (M.C.L. 324.325 et seq.). This act regulates the use of Great Lakes bottomlands by requiring a permit for any occupation or alteration of the bottomlands, such as dredging, construction of a marina, or shore protection.

The work group discussed whether an amendment to Part 325 or a new statute would be the appropriate method to accommodate siting and development of offshore wind generation in Michigan's Great Lakes. The work group determined that the wind development process would likely progress in a series of stages: site identification; site assessment; development proposal; and operations. With this in mind, the work group decided that both amendment to Part 325 and a new statute are necessary.

The existing Part 325 acts as a barrier to the development of offshore wind generation in Michigan. Under the current statute, permits may not be issued for site assessment or for long-term development and energy production because Part 325 requires that all applicants for permits under that statute must be riparian and that the proposed use must be water dependent. The work group concluded that Part 325 must be amended to allow MDEQ to approve an application for the initial lease and permit under which a potential developer could conduct a site assessment.

The work group determined that a more comprehensive statute would be necessary to define the requirements for a thorough site assessment; the process for submitting a development/construction plan; and the requirements for an operations plan; the method of compensation to the state; and myriad other related issues (e.g., incentives for offshore wind development). After the site assessment is completed and approved, a long-term development/construction and operation lease and permit would be issued under the new statute.

### **Recommendations from the Work Group**

1. Part 325 should be amended to facilitate the initial site assessment permit and lease for offshore wind energy development. The amendment should indicate simply that in the case of permits and leases for offshore wind, the riparian requirement of Part 325 is not applicable.
2. Part 325 should be amended to explicitly state that the harvest of Great Lakes wind resources is a “water-dependent” use.
3. A new statute and/or administrative rule should be written and adopted that specifically regulates long-term leasing and permitting for offshore use of bottomlands for wind energy development and production.

The work group did not discuss in detail the idea of establishing a new “one-stop” permitting authority in Michigan, following the approach adopted as a best practice in Europe. This concept was presented in the 2008 Dry Run permitting exercise.<sup>1</sup> Based on the process proposed by this work group, this concept may need to be more fully discussed by the full council so that guidance on the idea can be provided to lawmakers and the executive in the final report.

## **RECOMMENDED PROCESS: ACCESS TO BOTTOMLANDS**

The work group discussed the specific regulatory method for providing access to bottomlands for wind energy developers. The group reviewed the U.S. Department of Interior’s Mineral Management Service Rule on offshore wind and elected a similar approach for granting access to Michigan’s Great Lakes bottomlands. The work group concluded that access should be granted in phases for:

- Site assessment
- Construction and operation

Access should include a permit and a lease in both phases. However, the requirements for the permits and leases will differ significantly between the two phases.

### **Lease and Permit for Initial Site Assessment**

The work group determined that the initial lease for site assessment should meet the following requirements:

- It should be relatively easy to acquire.

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<sup>1</sup> M. Klepinger, *Michigan Great Lakes Offshore Wind Permitting Dry Run, Final Report* (May 2008). Available online at [http://www.michigan.gov/documents/dleg/Report\\_on\\_Dry\\_Run\\_with\\_applns\\_252813\\_7.pdf](http://www.michigan.gov/documents/dleg/Report_on_Dry_Run_with_applns_252813_7.pdf).

- It should include a requirement for proof of a nominal bond (e.g., \$100,000) by the applicant.
- The fee to the state for the site assessment lease should be nominal and based on the area defined in the lease (e.g. a flat fee per acre or square mile, see recommendation 12 below).
- It should be for a term of ten years to allow complete site assessment and permit approval for construction and operation.
- It should include an automatic extension allowing for the exclusive right to develop that parcel subject to fulfilling all permitting requirements.
- It should allow for renewal beyond the initial ten-year period to complete site assessment as long as significant progress toward site assessment has been demonstrated during the initial lease period.
- It should be assignable with state approval.
- It should include an undefined right of easement to get to shore.

The work group recommends that leases for parcels of Great Lakes bottomlands should be made available to prospective developers through two methods:

- Nomination by the prospective developer
- State selection and competitive public auction

#### *Nomination by the prospective developer*

Under this approach, parcels of Great Lakes bottomlands that conform to the mapping criteria outlined by the Mapping Criteria Work Group can be nominated by prospective developers through a nomination and Notice of Intent (NOI) process. Submission of a nomination will require a nomination fee and basic information about the proposed project. When the MDEQ receives a nomination, a public hearing is announced and the MDEQ issues a NOI and solicits any competing interest in the parcel. If the MDEQ endorses the project outlined in a noncompetitive NOI, it will issue a lease for ten years during which time the prospective developer will be required to receive a permit from the MDEQ to do a site assessment in accordance with the requirements of the new offshore wind development statute. The site assessment lease will contain a clause for automatic extension to allow development and operation on that site subject to an approved site assessment and fulfilling all permitting requirements for construction and operation of an offshore wind development. If competing interest exists for the nominated area, the parcel will be treated the same as those parcels selected by the state and put up for public auction.

#### *State site selection and competitive public auction*

In order to encourage investment in Michigan’s offshore wind energy development, the work group concluded that it would be advisable to offer a select few parcels of Great Lakes bottomlands at a competitive public auction soon after new legislation is adopted.<sup>2</sup>

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<sup>2</sup> The new legislation may include the MDEQ as the lead agency or it may designate a joint state authority to regulate the program. The general term, “the state”, will be used in the council report to refer to this undetermined state regulatory authority.

Under this approach, the state would select a limited number of sites that conform to the mapping criteria recommended by the Mapping Criteria Work Group. The state would then offer these sites in a competitive bidding process in which a prospective developer submits a bid to the state for site assessment and potential development. The state would review bids received and select a bidder who would receive a site assessment lease for a period of ten years, during which time the prospective developer will receive a permit from the state to do a site assessment in accordance with the requirements of the new offshore wind development statute. The site assessment lease will contain a clause for automatic extension to allow development and operation on that site subject to an approved site assessment and fulfilling all permitting requirements for construction and operation of an offshore wind energy facility.

### ***Lease and Permit for Construction and Operation***

During the term of the site assessment lease, the developer will submit all required information (e.g., site assessment summary, construction plan, operation plan, decommissioning plan) to support the proposed construction and operation of an offshore wind energy facility (the complete application for development). The information required from the developer should be outlined in a checklist developed by the state (see recommendation 8 below). The state will review the application for development and approve or deny the proposal. If the state approves the proposal, it will grant a lease extension and a permit to construct and operate an offshore wind energy development.

The lease extension will include a schedule for compensation to the state (see below); it will be subject to continued adherence to permit requirements, and continued operation of the facility. This lease will become automatically renewable as long as the facility is operating within the requirements of its permits for the life of the facility. Lease extension requests should be submitted two years prior to lease expiration.

The permit for construction and operation application will outline the requirements for construction and operation, a decommissioning plan, a long-term monitoring plan, and a financial assurance plan.

### ***Other Administrative Recommendations from the Work Group***

4. This program should run on a limited trial basis and should allow for changes to the process as state officials and industry learn more about the process of developing offshore wind energy in Michigan's Great Lakes bottomlands.
5. The Department of Energy, Labor, and Economic Growth (DELEG), the MDEQ and Michigan Attorney General's office should form a work group to develop the lease documents for this program with the assistance of other state agencies.
6. The MDEQ should administer the regulatory program for the initial site assessment lease and permitting under an amended Part 325 and a state authority comprised of relevant state agencies should administer the program under the new offshore wind energy development statute.
7. Agencies that have an interest in the proposal should be coordinated throughout the application process. The process of agency coordination on decision making and notice should be defined by statute.

8. Sufficient resources should be provided to the lead state agency to allow it to administer the program. Fees for applications for development should be set by statute and should significantly offset the costs of the extensive review required for the state to approve or deny the lease and permit applications.
9. The offshore wind energy development statute should allow for the promulgation of rules; however, the statute should be sufficiently detailed as to require minimal rulemaking.
10. The occupation and alteration thresholds<sup>3</sup> that trigger a Part 325 permit should also apply to the offshore wind energy application process.
11. The state should develop a checklist of information that must be provided by the applicant as part of a completed site assessment and development plan in order for the MDEQ to adequately assess the impacts of wind energy development to the offshore area. (The MDEQ currently uses a checklist to obtain all the necessary information from an applicant before reviewing a nearshore permit application.)

## **COMPENSATING THE PUBLIC FOR USE**

The work group discussed methods for compensating the public for use of the bottomlands. The group agreed on the following combination of compensation methods:

- Rent on the area leased for the duration of the project, including site assessment, construction, and operation of the wind energy facility
- Royalties should be collected during the construction (non-production) and operation (production) phases of the project. These royalties should be phased as the development advances.

### ***Recommendations from the Work Group***

12. Rent should be collected during the initial lease of bottomlands while site assessment is being completed for a fixed time period (e.g., ten years). This would be similar to holding an option for development.
13. The rental payments should be related to the area of bottomlands occupied and the other public uses that are displaced by the development.
14. The amount of rent should not be so onerous that it inhibits offshore wind energy development. For example, 25 cents per acre per year and a \$100,000 assurance bond.
15. Once site assessment is complete, the compensation scheme should include both rental of the site and a royalty for the projected life of the project (e.g., 25 years or as long as actively producing at a predetermined level of megawatts per acre.) The compensation scheme should be phased in as the development advances from construction (non-production) to production. Royalties may be phased in order to encourage development.
16. The royalties should be related to the value of the energy produced (e.g., a percentage of revenues).

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<sup>3</sup>M.C.L. 324.32503 and 324.32513 provide for permits to be issued whenever the bottomlands are altered and lease agreements whenever the bottomlands are occupied by a private use for any non-temporary period of time.

17. The compensation scheme should be detailed in the statute.
18. Some portion of the compensation to the state should be dedicated by statute to support the MDEQ's offshore wind regulatory program with specific emphasis on mitigation of environmental impacts and long-term monitoring to protect the public trust. Another portion could be directed to energy-related public interests.

## **PROTECTION OF THE PUBLIC TRUST**

The work group discussed approaches for protecting public resource values during the siting, operation, and decommissioning of offshore wind turbines and related facilities.

### ***Recommendations from the Work Group***

19. The legislature or executive should make a determination that development of renewable energy in the form of offshore wind is in the public's best interest if sited with adequate due diligence to protect natural features, historic and cultural sites, public recreation, navigation, and tribal, commercial, and recreational fishing resources.
20. In addition to site-specific data identified by the Mapping Criteria Work Group (e.g., substrate, navigation lanes, fish spawning reefs, bathymetry), permit criteria should include sufficient specificity to allow the MDEQ to understand the risks to the public trust resources and make decisions in a manner that allows the highest level of protection while enabling the development of the offshore wind energy industry.
21. In addition to recommendation 18 above that directs some of the compensation received by the state toward support for the regulatory program, a portion of royalties collected by the state should be directed to another public use that will offset the impacts of offshore wind development (e.g., supporting related programs for offshore fisheries habitat; developing recreation opportunities; protecting and managing bottomlands, including shipwreck management; and/or contributing to additional energy efficiency advancements within the state).