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Offshore Wind Energy Development in Michigan's Great Lakes: Current Law and Proposed Legislation

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Background -- Offshore Wind Energy

Michigan has over 38,000 square miles of state owned Great Lakes bottomlands. However, due to current limits with wind turbine technology, wind farms are restricted to areas on the Great Lakes where the water is less than 30 meters deep.[1] For wind energy to be practicable, wind farms must be close to existing transmission facilities, so that energy generated from the turbines can be distributed to consumers. Construction of a wind energy facility requires heavy machinery and a wind farm site needs a transmission station nearby and underground lines for transmission of power.

For terrestrial wind farms, a developer typically secures access to land through easements or lease agreements and pays royalties to the landowner. The developer's role is to secure capital for construction, permits from the local zoning board and a contract with a power purchaser. Permitting decisions do fall under state authority, but are typically exercised through local zoning boards. Ordinarily the federal government has a role only if the wind farm is on federal land or uses federal dollars.[2]

Current Situation in Michigan

Michigan does not yet have a process for approving or denying requests to construct offshore wind energy facilities on Great Lakes bottomlands. The bottomlands are regulated by the Michigan Department of Natural Resources and Environment (MDNRE) under the Great Lakes Submerged Lands Act, Part 325 of the Natural Resources and Environmental Protection Act (NREPA) which authorizes MDNRE to enter into agreements for use of Great Lakes bottomlands. Current permitting for use of bottomlands under Part 325 does not include a process for development of offshore bottomlands. When the Act was written, it only contemplated edge use of bottomlands as part of the property rights of riparian owners.

[1] Report of the Michigan Great Lakes Wind Council, September 2009
[2] M.McCammon, "Environmental Perspectives on Siting Wind Farms" 17 NYU Envtl LJ 1243 (2008).

No area of the Great Lakes is subject to exclusive federal jurisdiction, but offshore wind development projects may trigger federal laws. The U.S. Army Corps of Engineers has permitting authority for offshore wind projects in the Great Lakes under section 404 of the Clean Water Act, 33 U.S.C. 1344, for any dredging or fill material, and section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, to ensure that navigation is not obstructed.

In response to proposals for offshore wind development, and the state's lack of a formal process to review these proposals, former Governor Granholm created the Great Lakes Wind Council. This 25 member advisory body was created by Executive Order 2009-1 with the charge to:

1. Recommend criteria for reviewing applications for offshore wind energy development,

2. Recommend criteria for identifying areas within Michigan that are least suited and those that are best suited for this type of development, and

3. Create frameworks for permitting and leasing with guidelines for agencies, developers and the public.

Initial public response to proposed wind farms has focused on concerns about siting of the facilities and the potential for adverse impacts. The Michigan Great Lakes Wind Council responded to these siting concerns by hiring consulting firms to map the lakes based on various criteria so that potential developers can focus on sites with minimal concerns and maximum public support. Their mapping criteria classified areas of Michigan's Great Lakes into three categories:

1. Areas for Categorical Exclusion. These are areas where the bottomlands are not suitable for development because of existing use and/or existing state or federal laws that exclude this use. Excluded areas include navigation channels, submerged utilities and coastal airport setbacks, among others.

2. Conditional Areas. These areas are not categorically excluded, but have one or more competing values, such as fish spawn areas, habitats for threatened species, harbors, shorelines, national parks, commercial fishing, and state/international boundaries. They are divided into four groups: Biological, Physical, Protected Feature and Other.

3. Favorable Areas. These are areas are not categorically excluded and do not have a competing value. They would include areas that are not excluded by current use or law and that do not have any special feature of environmental or cultural significance. Bottomlands receiving this designation are intended to meet the *Portage* factors for assessing environmental risk under the Michigan Environmental Protection Act (MEPA, now Part 17 of the NREPA)[3] and are not located near coastlines. The *Portage* factors are: (1) whether the natural resource involved is rare, unique, endangered, or has historical significance, (2) whether the resource is easily replaceable, (3) whether the proposed action will have any *significant* consequential effect on other natural resources, and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected.[4]

Jurisdiction and the Public Trust Doctrine

Under the Public Trust Doctrine, the State of Michigan serves as owner and trustee of the water and Great Lakes bottomlands within state boundaries and has a duty to manage and protect these resources for the benefit of residents.

The Public Trust Doctrine is derived from common law and holds that things that are common to all, like large bodies of navigable water, are natural resources that belong to the public. The sovereign's role is to act as trustee of the public rights in these natural resources. The Supreme Court in *Illinois Central Railroad Co v. Illinois,* 146 US 387 (1892) held that even if the trust is not codified, there is an implied trust in regards to the state's navigable waters.

Although it was traditionally applied to the open seas, the Public Trust Doctrine has repeatedly been applied to the Great Lakes. *Hilt v. Webber,* 252 Mich 198 (1929)*; People v. Silberwood,* 110 Mich 103 (1896). The state lacks the power to diminish those rights when conveying littoral property to private parties. *Illinois Central Railroad Co v. Illinois, supra; Nedtweg v. Wallace,* 237 Mich 14 (1926). When a state conveys littoral property to a private party, the property remains subject to the public trust. The public trust includes uses that are public in nature and for the public benefit. Under the doctrine, the state owns the land as real property in trust for public benefit. The state may make use of its proprietary ownership of these lands, but that ownership is subject to the right of the public to enjoy the benefit of the trust. *See* G*lass v. Goeckel,* 473 Mich 667 (2005).

The doctrine applies to submerged land that is adjacent to privately owned land. A riparian owner's title goes to the low water mark, and beds of the Great Lakes are not susceptible to private ownership. The state is the fee owner of land beneath the Great Lakes. *People v. Silberwood*, *supra*. The only exception to this rule is legislative action. For example, the legislature permitted a portion of the bed of Lake Michigan to be reclaimed for a public park. *See Bliss v. Ward,* 198 Ill. 104 (1902). In that case, the court

[3] MCL 324. 1701-1706

[4] *City of Portage v. Kalamazoo Cty Rd Comm'n*, 136 Mich App 276 (1984)

held that it was acceptable for the state to appropriate submerged lands for a purpose consistent with the public trust.

Part 325 authorizes the state to convey by lease the unpatented Great Lakes bottomlands in areas belonging to the State of Michigan and "held in trust by it." MCL 324.32502. According to *Glass v. Goe*ckel, supra, Part 325 does not define the scope of the Public Trust Doctrine with regard to the land lakeward of the ordinary high water mark. *Glass* determined that the private title of land owners is subject to the public trust for the portion of their land below the high water mark. Thus, others may be able to use the land below the ordinary high water mark for purposes consistent with the Public Trust Doctrine.

MCL 324.32502 requires the state to "preserve and protect the interests of the general public in the lands and waters of the Great Lakes." This section provides for the sale, lease or disposition of the unpatented bottomlands and public or private use of the waters "whenever it is determined by the department that private or public use will not substantially affect public use of lands" for the activities traditionally provided for in the common law: hunting, fishing, boating, and navigation. Part 325 also requires that such sales or lease agreements must not impair the public trust.

Protection of the Public Trust

Part 325 dictates that any lease or use of Great Lakes bottomlands in Michigan must be approved by the legislature. MCL 324.32502 does not allow the legislative branch to delegate its authority over the bottomlands to a municipality. Any process to lease or convey bottomlands must consider the public trust, as well as the requirements of Part 325.

The legislature must determine if offshore wind energy is in the best interest of the public, if sited with due diligence regarding natural features, historical and cultural areas, public recreation, navigation, and fishing. If offshore wind is determined to be in the public interest, the legislature would need to amend Part 325 and write new legislation to govern offshore wind energy, including application requirements, permit review criteria, site agreement requirements and the state's use of funds received from leases because the legislature will have to determine how the money from leases should be spent, in keeping with the public trust.

In light of the legislature's responsibilities under Part 325 and the Public Trust Doctrine, new legislation is necessary to provide for the use of waters and submerged lands of the Great Lakes for wind energy development. Legislation proposed by then Senator Patricia Birkholz in 2010 would have empowered the Public Service Commission and Great Lakes Wind Council to iron out the details of Great Lakes wind facility permitting and siting. Senator Birkholz introduced two bills, SB 1066 (to make clear that Part 325 does not apply to activities regulated by the Great Lakes Wind Development Act) and SB 1076, the Great Lakes Wind Development Act. Both SB 1066 and SB 1067 were referred to the Committee on Natural Resources and Environmental Affairs but were not acted upon by the full Senate. [5]

[5] Senators Jansen, Kuipers, Gilbert, Van Woerkom and Jelinek introduced SB 1134 which would have amended MCL 324.32503 to address offshore wind energy development. SB 1134 was also referred to the Committee on Natural Resources and Environmental Affairs but was not acted upon by the Senate in 2010. A House version (HB 5761) was introduced by Representative Hansen and referred to the Committee on Energy and Technology.

MEPA, now Part 17 of the NREPA, provides another avenue for the protection of the state's natural resources held in the public trust. Part 17 authorizes private individuals to bring suit in circuit court for equitable or declaratory relief for "the protection of the air, water or other natural resources and the public trust therein".[6] MDNRE is subject to MEPA.

Recommendations & Conclusion

Development of offshore wind farms in the Great Lakes is subject to the laws of many jurisdictions. In addition to traditional zoning laws, which have proven cumbersome and lacking in regulatory certainty for addressing projects of this size and scope, both state and federal laws are applicable. Federal laws, including the National Environmental Policy Act, 42 U.S.C.A. 4321 *et seq*., the Clean Water Act, 33 U.S.C. 1251 *et seq*., the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* and the Migratory Bird Act, 16 U.S.C 703 *et seq.,* among others, are all potentially relevant, depending on the site of the proposed wind farm. Michigan statutes, including Part 17 and Part 325 of NREPA, detail the environmental considerations of the legislature and agencies in making decisions affecting the environment, particularly outlining the state's role in protecting the bottomlands as part of the public trust.

The Michigan legislature must consider the potential impacts of allowing wind farm development on Great Lakes bottomlands and enact legislation to protect the state's environmental resources and the public trust. Legislation should provide clear and strict guidelines for permitting decisions and include protections for maintenance and restoration of wind farm sites, as well as offsets for any impacts on local populations. The Great Lakes are truly one of the world's most valuable natural resources and the State of Michigan must ensure that any new laws governing their use exemplify excellent stewardship.

[6] *Ray v. Mason County Drain Commissioners*, 393 Mich 294 (1975).