

Energy and Clean Technology Alert: Massachusetts Finalizes Renewable and Alternative Energy Regulations

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On June 12, 2009, the Department of Energy Resources (DOER) released final regulations for Renewable Portfolio Standards (RPS) and the Alternative Energy Portfolio Standard (APS), as mandated by the Green Communities Act of 2008 (GCA). DOER's regulations increased the levels of fuels, resources, and technologies that are eligible for renewable energy certificates (RECs), created a new Class II category to support older renewable generating facilities, and formed the APS to encourage innovative energy technologies.

The final regulations culminate an extensive rulemaking process as required under M.G.L. Chapter 30A for DOER, which issued two sets of emergency regulations, effective January 1, 2009 and March 31, 2009, respectively. These final regulations underscore the Commonwealth's commitment to expanding renewable energy capacity and investing in an ever-growing clean energy industry.

RPS Class I

As set forth in the final regulations, the minimum percentage of annual electricity sales with RPS Class I renewable generation attributes will rise from 0.5% annually to 1% per year, resulting in a 4% requirement for 2009 and a 15% goal in 2020. After 2020, the minimum standard will increase by 1% per compliance year. Retail electricity suppliers may discharge their minimum renewable obligations by making an Alternative Compliance Payment (ACP). The current Class I ACP rate is \$60.92 per megawatt hour, based on last year's rate and adjusted according to the Consumer Price Index.

In addition, new eligible resources have been added under Class I regulations, including algae as a type of Eligible Biomass Fuel, geothermal energy, marine & hydro-kinetic energy, and hydroelectric energy. In meeting the Class I standard, retail suppliers must provide a portion of the required renewable energy from in-state, on-site systems.

RPS Class II

The GCA established RPS Class II, which is designed to support the operation of renewable energy facilities that went online prior to December 31, 2007. DOER's regulations require electricity suppliers to provide 3.6% of kWh sales from Class II renewables annually to end-use customers in Massachusetts. The ACP rate is \$25 per megawatt hour to satisfy the Class II requirements.

RPS Class II regulations also provide a Waste Energy Minimum Standard that requires retail electricity suppliers to provide 3.5% of kWh sales to end-use customers in Massachusetts from waste energy, or make an ACP payment of \$10 per megawatt hour. Waste Energy eligibility is conditioned upon MassDEP approval of the facility's participation in or operation of a MassDEP-authorized recycling program, an allocation of at least 50% of the facility's proceeds from the sale of RECs to such a recycling program, and the facility's compliance with the MassDEP's emission standards for solid waste facilities, which includes stringent mercury limits.

Alternative Energy Portfolio Standard

The newly established Alternative Energy Portfolio Standard requires that retail electricity suppliers provide a minimum of 1% of their electric energy sales with APS Alternative Generation Attributes. This percentage will rise to 20% by 2020, followed by an increase of 0.25% per compliance year. The eligible APS technologies include coal gasification, including capture and permanent sequestration of carbon dioxide; combined heat and power (CHP); flywheel energy storage; paper-derived "fuel cubes"; and energy efficient steam technology. The APS alternative compliance payment rate for 2009 is set at \$20 per megawatt hour.

Legislative Comments and the DOER Response

During the final stage of the rulemaking process, the Joint Committee on Telecommunication, Utilities and Energy (Joint Committee) requested that DOER make numerous changes to the draft regulations. Among other things, the Joint Committee requested that DOER re-evaluate whether the \$25 ACP for RPS Class II would produce RECs at a level adequate to meet the goals of the program, or whether that amount should be raised. The Joint Committee questioned DOER's exclusion of landfill gas resources outside of control areas adjacent to ISO New England, arguing that the State should continue to seek out all available sources of renewable energy. It also requested that Class I hydropower regulations be reviewed, suggesting that if an efficiency improvement was accomplished with no additional environmental impact on a watershed, eligibility should be granted without future site-specific review. The Committee also expressed concern that DOER's regulations would give review authority to a non-governmental organization, the Low Impact Hydropower Institute (LIHI).

DOER responded to the concerns of the Joint Committee in a letter dated May 29, 2009. DOER explained that the ACP level chosen for the RPS Class II program was fully researched, and argued that it provides a fair and reasonable upper limit on the amount that should be paid for compliance. It did not make any change to the final regulations to broaden the geographic reach of eligible landfill methane gas sources. It did not make changes to the regulations regarding hydroelectric power eligibility, arguing that it would not be feasible to determine whether an efficiency improvement met statutory standards when its impact was separated from the rest of the facility. DOER maintained that granting review authority to the LIHI was the best approach, but emphasized that it ultimately retained decision-making authority in a case where an owner of a facility was denied certification by LIHI.

Mintz Levin and ML Strategies can provide additional information and guidance regarding the new regulations and the regulatory process.

If you have any questions about the new regulations or the regulatory process, please call your Mintz Levin service professional or any of those listed below.

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