

# ENERGY

## PROACTIVE STRATEGIES TO MEET RENEWABLE PORTFOLIO STANDARDS



Across the United States, states are adopting renewable portfolio standards (RPS) that require a certain percentage of the public utility energy supply to come from renewable energy. In order to meet these requirements, which have been put in place in 29 states and the District of Columbia, utilities have several options: (1) build their own renewable energy capacity; (2) use the capacity of renewable energy developers by either purchasing the developers' unused renewable energy credits (REC) and/or (3) buying the excess power that renewable energy developers generate but cannot store using net metering or feed-in tariff pricing. (Visit the Federal Energy Regulatory Commission Web site for a [list of states with RPS policies](#).)

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REC can be purchased and applied across a wide geographic area, but the amount of renewable energy they represent can vary substantially according to the different state standards. Although purchases can be made directly from renewable power producers, numerous REC brokers serve an important purpose by verifying that the REC have been properly generated and are retired once they are sold, along with facilitating purchases. There is currently no centralized market for REC purchases. However, certain programs, such as the U.S. Environmental Protection Agency's voluntary Green Power Partnership

The Deepwater Horizon explosion and oil spill in the Gulf of Mexico may expand the already substantial compliance and operational issues facing the energy sector. Aggressive efforts by regulators at the federal and state/provincial levels in the United States and Canada have been increasingly focused on encouraging renewable energy output while tightening restrictions on fossil fuel production and use. Corporate counsel who understand the challenges can realize profitable new opportunities.

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## NEW ENVIRONMENTAL ENFORCEMENT INITIATIVES RAISE CONCERNS

in which many major utilities and other corporations participate, do facilitate REC purchases from verified REC brokers. Green Power Partnership members agree to purchase renewable energy (primarily REC) in amounts proportional to their annual energy use, and the partnership serves as a pricing and marketing mechanism.

A more complicated incentive arrangement for renewable energy generators is net metering. Net metering benefits utilities by allowing them to purchase excess renewable energy generated from consumer installations, such as solar panels or wind turbines installed on the roof of a shopping center. Due to limitations of battery technology, power generation cannot practically be stored on site. If the installation generates more power than the shopping center's tenants use, a utility can purchase the excess power from the owner by netting out the power produced from the power consumed. In addition, the generator may sell the generated REC to the utility or a third-party REC broker. To do so, utilities must determine the location and amount of excess renewable power capacity available from renewable energy developers, provide transmission access for interconnection to the grid, and determine the proper cost recovery and tariff mechanisms for pricing. Because more renewable energy capacity creates more net metering opportunities, utilities may wish to encourage local government issuance of Property Assessed Clean Energy bonds, which provide tax-exempt funding through energy finance districts to property owners that develop renewable power.

REC and net metering are both effective tools for utilities to meet RPS. However, the criteria for pursuing them are constantly changing, so corporate counsel at utilities must aggressively monitor developments, seek out opportunities and structure purchase arrangements best suited to their specific needs. As more states adopt RPS and a national RPS is considered, utilities that proactively work with developers and property owners for optimal renewable energy access will be best positioned to meet the requirements and benefit from these standards.

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[Nicole C. Kibert](#) is an attorney with [Carlton Fields'](#) Real Estate and Finance Practice Group. She is [Peer Review Rated](#) and can be reached at [nkibert@carltonfields.com](mailto:nkibert@carltonfields.com).

If you work for an energy company, you should be concerned about three aggressive regulatory enforcement initiatives that the U.S. Environmental Protection Agency (EPA) has aimed at the coal industry. Each initiative unilaterally uses enforcement action to set new regulatory policy without, or even in contradiction to, a statutory basis.

### Permitting

Arch Coal, Inc. underwent a decade-long permitting process to receive approval in 2007 for its Spruce No. 1 mountaintop coal mine in West Virginia. Following detailed review by the U.S. Army Corps of Engineers, state environmental authorities

and the EPA itself, Arch Coal received regulatory authorization to begin work on the capital-intensive project. But in March 2010, the EPA announced that it intended to revoke the permit, citing concerns over water discharge quality—the first time in its history that the agency has sought to use the Clean Water Act to void a properly permitted project. Simultaneously the EPA said it would review numerous other permits already granted to surface mining operations. Arch Coal has sued the EPA in U.S. District Court for the District of Columbia, contending that a valid permit cannot be arbitrarily canceled.

### Rule Making

In April 2010, the EPA issued what it termed “guidance” regarding conductivity, the ability of suspended solids in water to transmit electricity. This guidance targeted the water runoff from coal mining operations in Central Appalachia and proposes a new

conductivity measure that is so low that it threatens to end most of these operations. By using the term guidance, the EPA avoided the formal rule-making process for adopting regulatory standards; but the agency intends to treat the guidance as equivalent to formal rules when reviewing permit applications.

### Compliance

Carbon dioxide (CO<sub>2</sub>) is not a regulated pollutant under the Clean Air Act, and the act's legislative history makes it clear that this reflects the intent of Congress. Yet after a 2007 U.S. Supreme Court decision opened the door, the EPA in December 2009 ruled that CO<sub>2</sub> and five other greenhouse gases endanger public health and welfare as defined by Section 202(a) of the act. The endangerment finding itself did not impose any emission reductions, but the EPA plans restrictions on CO<sub>2</sub> emissions from coal-fired power plants to begin to take effect as early as the start of 2011. While the apparent overturn of legislative intent has created animosity in Congress, it is uncertain if any action will be taken before the restrictions are implemented.

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The issue for corporate counsel is clear: Advancing policy initiatives through regulatory fiat in one energy segment, if upheld, can be used to target others. In-house counsel should closely follow the legal and legislative challenges to these actions to see if the EPA's new aggressiveness will be allowed to stand.

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[Chauncey S.R. Curtz](#) is the managing partner of the Lexington, Ky., office of [Dinsmore & Shohl LLP](#), where he chairs the firm's Natural Resources Practice Group. He is [Peer Review Rated](#) and can be reached at [chauncey.curtz@dinslaw.com](mailto:chauncey.curtz@dinslaw.com).



# OPPORTUNITIES AND REQUIREMENTS IN ONTARIO'S FIT PROGRAM

Through the Green Energy and Green Economy Act of 2009, the province of Ontario, Canada has established a comprehensive energy strategy that combines phase-out of the province's coal-fired electric power plants and North America's first comprehensive guaranteed pricing structure for renewable electricity production. The Feed-in Tariff (FIT) Program offers renewable energy developers the incentive of stable prices under long-term contracts, by guaranteeing that the Ontario Power Authority (OPA) will purchase all energy generated in quantities over 10 kilowatts through wind, solar, bioenergy or hydro-power installations. (Renewable projects of 10 kilowatts or less fall under the microFIT Program.)

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The FIT Program accepted its first applications in October 2009. The initial group of approved applications all involved projects that could utilize existing or planned interconnection capacity. In April 2010, the OPA announced that it would tender 184 contract offers for projects, proposing to generate more than 2,500 megawatts of renewable energy. (For more information, see [OPA's press release](#).)

Applicants that are awarded a FIT contract by the OPA are responsible for developing and bringing their renewable facility to commercial operation (including connecting to the grid) within a fixed time frame,

which varies depending upon the type of technology. However, in-house counsel for approved project developers should be aware of startup requirements that may take two years or more to meet:

- Completing a comprehensive environmental review that includes mandatory standardized setbacks and noise limitation requirements for wind energy projects. This is essential even though Ontario's provincial government also facilitated project development by eliminating the need to secure municipal zoning approval, which has hindered many wind projects in Ontario in recent years.
- Consulting adequately with any aboriginal groups that may have unresolved claims or rights is a legal requirement. From a practical standpoint, because these rights/claims cover the entire province, this typically means coming to some type of accommodation agreement with one or more aboriginal groups. There are FIT and financial support incentives for projects developed in partnership with First Nations.
- Using equipment and services that meet Ontario's domestic content requirements, ranging from 25 percent for wind power in the first two years to 60 percent for solar after the initial two years. Existing supplier infrastructure in the province is limited, and it may take time for suppliers to establish new operations that help developers reach content goals.

The challenge of meeting these criteria (particularly the latter two) makes it likely that some developers with FIT contracts may be unable or unwilling to follow through with project completion. Corporate counsel for developers that applied but were not accepted for the first round of FIT contracts should anticipate opportunities for those contracts to change hands. Also, the OPA will review FIT applications every six months as new transmission and distribution capacity is built, or comes available.

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**Richard J. King** is a partner at the Toronto office of [Ogilvy Renault LLP](#), where he co-chairs the firm's Energy and Environmental Law Practice Groups. He can be reached at [rking@ogilvyrenault.com](mailto:rking@ogilvyrenault.com).