



Sharing Ideas, Building Connections Within Division 10

Winter 2015

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Division 10 Steering Committee

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The Energy is Building

This Edition of our Division's Newsletter comes at an exciting time. Energy, environmental, green and sustainability issues are all over the news and are remaining at the forefront of design and construction initiatives around the country. Division 10 is staying on top of these developments and is very pleased to present articles touching on all aspects of its mission to deliver updates on these topics. The incorporation of green/sustainable/energy efficiency requirements into the laws and codes of many jurisdictions must be appreciated for its impact on the industry and buildings as a whole. Likewise, incentives for energy efficiency and savings will likely impact building approaches, but these credits and deductions and other initiatives must be precisely understood. Finally, regulations tied to wind energy and its impact on the environment are important considerations, especially as the move towards green power must carry with it an appreciation of surrounding environmental conditions. Fortunately, in this issue of *2x4x10*, we have articles covering all of these topics, giving us all a deeper look into the issues involved. We are also extremely grateful of the internal drive and contribution of the Division 10 members themselves, as they continue the environment of momentum and energy that makes Division 10 the powerful force that it is within the Forum. We look forward to seeing many of you at the Forum's Annual Meeting in Boca Raton.



Edward Gentilcore

- Ed Gentilcore

THE INTERNATIONAL GREEN CONSTRUCTION CODE: Coming Soon to a City Near You



Tamara J. Lindsay

Ever since the City of Austin, created the nation's first green building certification program in 1990,¹ green building programs have expanded and improved throughout the United States. Over the course of the past fifteen years, cities and states have increasingly used green building programs to provide incentives or requirements for sustainable development.² As a result, the green building industry is currently said to double every three years, resulting, in 2012, with American design and construction firms reporting that 48% of their work involved green building.³

2012 International Green Construction Code (IgCC)

In 2014, the District of Columbia further cemented its place as a pioneer in the green building movement by becoming the first major city to adopt all the major chapters and Appendix A of the 2012 International Green Construction Code ("IgCC"). This adoption expands DC's green building requirements to apply to projects over 10,000 square feet, and does so with code-based language designed specifically to be used as a mandatory requirement. Similar to DC's earlier leadership in green building, it is reasonable to expect other jurisdictions across the country to begin to adopt local versions of the 2012 IgCC. Indeed, as of January 2015, at least 14 other jurisdictions had adopted some form of the 2012 IgCC, including Phoenix, Dallas, Boulder, and Baltimore.⁸

The IgCC is a model code that was developed by the International Code Council ("ICC") as an overlay and to expand existing building and energy codes to include sustainability measures for the construction project and its site. While green building certification programs like LEED and ENERGY STAR have transformed the design and construction industry as described above, those programs alone are intended to be voluntary rating systems recognizing superior performance. As a result, these programs do not establish or enforce minimum code requirements. The IgCC, on the other hand, does.

The 2013 DC Green Construction Code ("DCGCC"), which adopts the model 2012 IgCC along with various local amendments, significantly upgrades the requirements for those engaged in construction in the District of Columbia. In particular, this upgrade reflects the expanded applicability of the DCGCC relative to the DC Green Building Act of 2006. As of March 2014, the DCGCC is mandatory for the following projects over 10,000 square feet:⁹



Casius Pealer

In 2006, the District of Columbia became the first major American city to require green building certifications for both private and public construction projects.⁴ The DC Green Building Act of 2006 required all private projects over 50,000 square feet to achieve LEED certification or higher, and that all public projects achieve at least a LEED Silver rating. Affordable housing projects receiving public financing were required to meet the Enterprise Green Communities standard. Two years later, DC became the first North American city to mandate that the utility use of both municipal and commercial buildings be benchmarked and publicly reported using the EPA's ENERGY STAR Portfolio Manager.

In the years since DC enacted these innovative green building laws, many other cities and states have followed the District's lead. A recent report from the U.S. Green Building Council ("USGBC") identifies "more than 220 meaningful [green building] policy victories" across all fifty states just between 2011 and 2014.⁵ Partly as a result of these expanded local policies, over 40% of all nonresidential building-starts in 2012 were green, as compared to 2% of all nonresidential building-starts in 2005.⁶ Still, the District of Columbia continues to rank first among American cities by a large margin for the number and square footage of LEED and ENERGY STAR certified buildings and/or projects per capita.⁷

In 2014, the District of Columbia further cemented its place as a pioneer in the green building movement by becoming the first major city to adopt all the major chapters and Appendix A of the 2012 International Green Construction

- a. new commercial projects (including tenant build-outs);
- b. new multifamily residential projects (at least four stories); and
- c. demolition and site work.

Projects subject to the DCGCC are required to address a range of traditional green building issues, including site development and land use, material and resource efficiency, energy conservation, water conservation, and indoor environmental quality.¹⁰ Building commissioning is also required for new equipment and systems covered by the code. A final commissioning report must be available within 180 days of receipt of the certificate of occupancy.¹¹

In addition to these core requirements, new construction projects and Level 3 Alterations (where the work area exceeds 50% of the aggregate area of the building), are required to identify a specified number of project electives from Appendix A of the DCGCC. For instance, projects can receive an elective credit if they opt to divert 20% more construction waste from the landfill than required by the code,¹² and another credit if they purchase at least 8 kWh/sf/year of green power for five years.¹³ These project electives ensure a higher overall performance, but also provide some measure of flexibility for project teams. New construction projects must select 15 elective options, and Level 3 Alterations must select 13 electives.

For projects larger than 50,000 square feet, the DCGCC becomes even more aggressive in addressing environmental impacts beyond the individual project site. For example, the DCGCC requires projects of this size to account for the recycling and local sourcing of materials and other building components, either by conducting a whole building life cycle assessment or by documenting certain properties of the building materials used.¹⁴ That documentation requires that 40% of all building materials have at least one of the following properties: (1) previously used materials; (2) made with recycled content; (3) recyclable; (4) bio-based; or (5) locally manufactured.

Projects have several alternative compliance pathways for satisfying the DCGCC requirements, including by achieving certification through one of the following green building rating systems:

LEED, Enterprise Green Communities, or ICC-700 (bronze level or higher, including applicable ENERGY STAR requirements).¹⁵ These alternative “above code” compliance pathways are incorporated into the DCGCC in order to avoid creating a disincentive through multiple reporting requirements for projects that choose to pursue a voluntary third party certification. In this respect, the DCGCC gives the District “more control and flexibility over its sustainable building activity”¹⁶ while maintaining established and more market-based pathways for compliance.

In addition to the 2012 IgCC, the District of Columbia has also adopted the 2012 International Energy Conservation Code (“IECC”) with minor amendments, and the 2012 editions of the International Building Code, International Residential Code, International Property Maintenance Code, International Fire Code, International Existing Building Code, International Mechanical Code, International Fuel Gas Code, International Plumbing Code, and the International Swimming Pool and Spa Code, and the 2011 edition of the National Electrical Code.

The 2013 DC Energy Conservation Code (“DCECC”), for its part, requires new buildings to be as much as 30% more efficient than the 2006 version of the IECC¹⁷ and is intended to “regulate the design and construction of buildings for the effective use and conservation of energy over the useful life of each building.”¹⁸ While the DCGCC applies only to projects of certain sizes, the DCECC is required for all projects, regardless of size, and includes a significant number of changes over the previous 2009 IECC. One example of a seemingly small change is that the 2012 IECC (and the DCECC by extension) requires certain spaces to have “manual-on occupancy sensors” also known as “vacancy sensors.” This device is identical to a regular occupancy sensor except in that it only automatically turns the lights off, and they must be manually turned on again. Full automatic-on occupancy sensors are allowable “in public corridors, stairways, restrooms, primary building entrance areas, lobbies, and where occupants would be endangered due to safety and security.”¹⁹

...[T]he adoption of the DC Green Construction Code “portends a new green regulatory scheme that may well be a national model.”

The Path to Greenness

A key element of DC’s success in establishing green building requirements is the collaborative process used to identify, debate and ultimately move forward with those requirements. Beginning in early 2012, the District’s Construction Codes Coordinating Board (“CCCB”) painstakingly reviewed the IgCC and the District’s then-existing building codes in an effort to streamline and condense the codes into a single regulatory scheme. In order to facilitate this effort, the CCCB established a Green Technical Advisory Group (“Green TAG”). Through the Green TAG, more than 100 individuals and experts from local industry and public interest groups contributed to the decision-making process. This inclusive process allowed the CCCB to proactively address issues and identify solutions that built a broad consensus.

Alongside its review of the IgCC and the District’s previous building code, the CCCB and the Green TAG also considered what local amendments would be required for the DCGCC to address the District’s specific needs, including environmental priorities and the market’s ability to adapt to the new regulations. First drafts of the DCGCC were published in December 2012 and went through three rounds of public comment before being submitted to the Mayor and City Council for final approval in March of 2014.

In addition to the District’s commitment to proactively involving stakeholders in the early stages of constructing the DCGCC, it also implemented innovative funding and compliance mechanisms to ensure the code’s success. In the first instance, the District’s permitting process includes a fee that is deposited into a fund set aside for the development and implementation of green building initiatives. The so-called “Green Building Fee” is assessed at the following rates: New construction at a rate of \$.002 per square foot; alteration and repairs valued at \$1001.00 to \$1 million at a rate of .13% of construction value; and alterations and repairs valued at more than \$1 million at a rate of .065% of construction value.²⁰ Through this fund, the DC Department of Consumer and Regulatory Affairs and the District Department of the Environment have been able to hire new staff to work almost exclusively on green building initiatives. The fund has also provided much needed investment for building energy and water benchmarking

programs and also includes a grant program for the development of policies and solutions that “lead the way in enacting innovative policies that drive toward greater social, environmental and economic sustainability” for the city.²¹ Examples of programs funded through the green building grants include “an assessment of the building data sources that are currently available in the District, and a feasibility study of a ‘big data’ smart building platform;” and a program that seeks to “increase the awareness of existing ‘green’ elements of the DC metro area’s Multiple Listing Services (MLS) system;” and another project with the goal of increasing “awareness and implementation of green appraisals in the commercial real estate and finance communities” throughout the city.²²

The second component of DC’s strategy to ensure green building success is through enforcement mechanisms. The 2006 DC Green Building Act requires financial security in the form of a surety bond, letter of credit, binding pledge or cash payment of up to \$3 million should a covered project fail to achieve the required LEED certification within 2 years of receipt of its certificate of occupancy. In 2012, the District included an additional compliance option through a binding pledge with up to a \$10 per square foot penalty for noncompliance. Both the bond and binding pledge serve not only as motivation for companies to build in compliance with the DCGCC, but also as a tangible penalty for those who fail, which then provides a source of funds to assist other projects to achieve the requisite green building standards.

Finally, to facilitate awareness and understanding of the DCGCC and its heightened building requirements, the District has created a significant number of educational resources in a variety of media. One example is the Green Building Roadmap,²³ an interactive web-based tool that helps developers and owners identify which elements of the DCGCC or DCECC are applicable to a particular project. This online resource also includes information on storm water and other environmental regulations that might apply, utilizing answers to basic project-related questions such as a project’s size, property type and zoning district. Other educational and technical resources include a Green Building Program Manual, Reference Guides, Submittal Templates, and Energy Code Verification

Worksheets—all of which are available online. Plus, during the past two years, staff from these agencies have been involved in more than 75 presentations and trainings on the Green Building Act and the DCGCC.²⁴

Conclusion

According to Stuart Kaplow at Green Building Law Update, the adoption of the DC Green Construction Code “portends a new green regulatory scheme that may well be a national model.”²⁵ This new national model was certainly the goal of the ICC in partnering with USGBC and other industry organizations to develop the 2012 IgCC. Indeed, the ICC promulgates its codes on a three year cycle, and there is already a 2015 version of the IgCC, which was formally approved by the ICC on November 14, 2014, and as of this writing is scheduled to be released in February 2015. One of the key additions to the 2015 version of the IgCC is its inclusion of an outcome-based compliance path, whereby owners would demonstrate compliance by providing 12-months of actual utility data.²⁶ This new option is intended to provide owners and architects with more flexibility, while also easing the burden on building code officials charged with enforcing the code.

Look for jurisdictions around the country to increasingly reference both the 2012 and 2015 versions of the IgCC in their building code updates. Although these particular codes may be new to many project designers, builders and owners—your clients—the general trend of following the green building leadership of the District of Columbia will be familiar.

¹ U.S. Department of Energy, *Database of State Incentives for Renewables and Efficiency* (2015), http://dsireusa.org/incentives/incentive.cfm?Incentive_Code=TX19R&re=0&ee=0 (last visited, January 21, 2015).

² See e.g., American Institute of Architects, *Local Leaders in Sustainability: Green Incentives* (2008), available at <http://www.aia.org/advocacy/publicpolicy/incentives/AIAB028722> (last visited, January 21, 2015).

³ McGraw-Hill Construction, *World Green Building Trends SmartMarket Report* (2013), available at http://www.worldgbc.org/files/8613/6295/6420/World_Green_Building_Trends_SmartMarket_Report_2013.pdf (last visited, January 21, 2015).

⁴ DC Department of the Environment, *Green Buildings in the District of Columbia* (September 10, 2014), available at <http://ddoe.dc.gov/publication/green-buildings-data-one-pager> (last visited January 23, 2015).

⁵ U.S. Green Building Council, *Better Buildings. Better Policy: A compilation of green building policy adoptions in the United States, 2011-2014* (August 19, 2014), available at http://www.usgbc.org/sites/default/files/STATE_WINS_REPORT_2014-3.pdf (last visited, January 21, 2015).

⁶ *Green Building Facts*, U.S. Green Building Council, October 17, 2014, accessed January 24, 2015, <http://www.usgbc.org/articles/green-building-facts>.

⁷ *Green Buildings in the District of Columbia*. As of September 2014, the District was credited with 524 LEED certified projects totaling 100.5 million square feet, and 208 ENERGY STAR projects totaling nearly 66.8 million square feet.

⁸ International Code Council, *International Codes – Adoption By Jurisdiction* (January 2015), available at <http://www.iccsafe.org/gr/Documents/jurisdictionadoptions.pdf> (last visited, January 21, 2015).

⁹ The scope of the *DC Green Construction Code* is described in the *2013 DC Construction Code*, Section 101.4.9.3, available at http://www.ecodes.biz/ecodes_support/Free_Resources/2013DistrictofColumbia/13Building/13DCBuilding_main.html

¹⁰ The *2013 DC Green Construction Code* can be found online at http://www.ecodes.biz/ecodes_support/Free_Resources/2013DistrictofColumbia/13Green/13DCGreen_main.html (last visited, January 28, 2015)

¹¹ *Id.*, Section 903.

¹² *Id.*, Section A105.1.

¹³ *Id.*, Section A106.17.

¹⁴ *Id.*, Section 505.

¹⁵ DC Department of Consumer and Regulatory Affairs, “DC’s First Green Construction Code,” (panel discussion, Galludet University, Washington, DC, September 24, 2013), available at http://dcra.dc.gov/sites/default/files/dc/sites/dcra/event_content/attachments/gc_GreenCode.pdf (last visited January 23, 2015).

¹⁶ See, Bhosale, *Insight on District of Columbia Green Construction Code*.

¹⁷ “District of Columbia to Publish New Construction Codes,” Executive Office of the Mayor, March 26, 2014, accessed February 19, 2015, <http://mayor.dc.gov/release/district-columbia-publish-new-construction-codes>.

¹⁸ Elizabeth J. Cappiello, *New DC Construction Codes Take Effect*, August 14, 2014, available at <http://lexology.com/library/detail.aspx?g=af9dfa5d-2eca-4459-8462-4cb159fd940e> (last visited January 24, 2015).

¹⁹ Brian Baumgartle, PE, “Lighting Control Requirements: What’s Current and What to Expect,” Consulting-Specifying Engineer, January 26, 2014, accessed January 24, 2015, <http://www.csemag.com/single-article/lighting-control-requirements-what-s-current-and-what-to-expect/0ec0a9a12ebf85a4c998c79c67095d6a.html>.

²⁰ Green Building Act, <http://dcra.dc.gov/page/green-building-act-gba> (last visited January 23, 2015).

²¹ Green Building Fund Grants,” DC Department of the Environment, April 28, 2014, accessed January 23, 2015, <http://ddoe.dc.gov/publication/green-building-fund-grants>.

²² See, *Id.*

²³ *The Green Building Roadmap is available at <https://roadmap.buildgreendc.org/#/>.*

²⁴ *See <http://dcra.dc.gov/page/green-building-documents-publications>.*

²⁵ *Stuart Kaplow, Can Green Building Law Save the Planet?, 3 U. Balt. J. Land & Dev. 131, 18 (Spring 2014).*

²⁶ *“Outcome-Based Pathway Is Voted Into the 2015 IgCC,” Institute for Market Transformation, November 20 2014, accessed January 23, 2015, <http://www.imt.org/news/the-current/outcome-based-pathway-is-voted-into-the-2015-igcc>.*

About the Authors

Tamara J. Lindsay is an associate attorney in the New Orleans office of Coats, Rose, Yale, Ryman & Lee, P.C. Ms. Lindsay’s experience includes public bid protests, litigation involving construction contract breaches in default, Louisiana construction liens and Miller Act claims, and appearing before public executive and legislative committees on behalf of telecommunications companies. Ms. Lindsay currently serves as the Young Lawyer Division liaison to Division 3 of the Forum on Construction Law and was recently selected to serve on the Forum’s YLD steering committee.

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Help Wanted!

Session Speakers Needed

Allen Estes and Ed Gentilcore are the Co-Chairs of the 2016 Mid-Winter Program in San Francisco, California, to be held at the Westin St. Francis on January 21-22, 2016. They are still in need of two session speakers, one experienced in construction labor and employment issues and another very familiar with ethics aspects of electronic data storage, preservation and management. Please reach out to Allen, aestes@gordonrees.com, or Ed, ebg@sgkpc.com, with any suggestions on speakers.

LinkedIn

Division 10 subgroup page on LinkedIn is up and running. We need development and content assistance. Please join the page and submit any contributions to Matt DeVries, mdevries@burr.com.

D 10 Energy and Environment e-Newsletter

If you are interested in contributing to the e-newsletter and have a potential topic involving energy, green/sustainability, or environmental legislation impacting the construction industry, please contact Peter W. Yoars, Jr., Esq., pyoars@kmgslaw.com.

All articles published in *2x4x10* will be considered for republishing in *Under Construction*.

BETTER LATE THAN NEVER: Retroactive Energy Tax Extenders Leave Little Guidance



John W. Hofmeyer IV

Congress continues to flounder in its attempts to pass meaningful legislation in a timely manner. The retroactive energy tax extensions in the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295 (2014) (the “TIP Act”), are no exception. Although the TIP Act ultimately received strong bipartisan support in the House (378-46)¹ and the Senate (76-16)², neither vote occurred until December of 2014, leaving the President to sign the TIP Act into law on December 19, 2014, just days before the Act’s provisions expired on December 31, 2014.

Though the TIP Act offers other tax credits and deductions for individuals³, businesses⁴, and defined benefit plans⁵, this article focuses on the \$12.6 billion⁶ in energy tax extenders found in Subtitle C of Title I of the TIP Act (the “Energy Tax Extenders”), and the implications those provisions have on Title 26 of the U.S. Code, the Internal Revenue Code (“IRC”). The Energy Tax Extenders include eleven independent tax credits that I have grouped as (I) credits and deductions for physical property, (II) biofuels and renewable fuels and resources credits, and (III) dispositions to implement FERC and state electric restructuring policy.

Credits And Deductions For Physical Property

The TIP Act offers tax credits and deductions for personal energy efficient improvements, energy efficient homes, energy efficient commercial buildings, facilities producing energy from renewable resources, and alternative fuel vehicle refueling property but none of these programs extend to construction that began after 2014.

Personal Credits (§ 25C)

The TIP Act first extended the nonrefundable personal tax credit based on “qualified energy efficiency improvements” and “residential energy property expenditures” found in IRC § 25C.⁷ This credit applies only to costs an individual, or the individual’s proportionate share as a tenant-stockholder or member in a condominium management association,

incurs for renovations or additions to the taxpayer’s principal residence located in the United States.⁸

Although the TIP Act makes IRC § 25C credits available for property put into service in 2014, the TIP Act did not modify the \$500 lifetime and \$200 exterior windows limitations on the credit for qualified energy efficiency improvements imposed in 2010.⁹ This means that most individuals that took advantage of the § 25C credits in any previous tax years beginning in 2006 will not be able to utilize the extension even if they otherwise qualify. If the taxpayer qualifies and has not exceeded the limitation in previous years, the taxpayer must reduce its basis in the property in an amount equal to the credit received.¹⁰

Energy Efficient New Homes (§ 45L)

A similar, but much more advantageous credit to the residential contractor and manufactured home builder is the extended credit for energy-efficient new homes. Through IRC § 45L, the TIP Act extended the \$1,000 business credit for homes utilizing 30% less energy than the average comparable home, so long as improved building envelope components make up at least 1/5th of the reduction in energy.¹¹ That credit increases to \$2,000 if the home meets the higher standard of utilizing 50% less energy than the average comparable home with improved building envelope components making up at least 1/3rd of the reduction in energy use.¹²

Unlike the personal credit under § 25C, the § 45L credit provides a direct benefit to the contractor instead of the owner. As such, § 45L helps contractors producing qualified homes to more competitively price the units for sale against lower-cost less-efficient conventional construction. Sadly, although eligible contractors should receive a windfall for actions they took in 2014, the delayed passage of the Act gave contractors no time to parlay the benefits into future pricing or advertising because the eligible contractor had to sell the home to the ultimate consumer “for use as a residence during [2014]”.¹³

The retroactive nature of the tax extension leaves eligible contractors with two choices going into 2015: (1) price products as if Congress will once again retroactively extend IRC § 45L through 2015 or lose \$1,000 to \$2,000 per home if Congress does not pass such an extension or (2) price the products higher, possibly selling less products, but receiving a windfall of \$1,000 to \$2,000 on those products if Congress passes another retroactive extension in 2015. Neither option is optimal to incentivize energy efficient home design, as is presumably the purpose of the Act.

Energy Efficient Commercial Buildings (§ 179D)

The TIP Act extended the itemized deduction for businesses relating to energy efficient commercial buildings through calendar year 2014. The maximum deduction allowed under IRC § 179D is \$1.80 per square foot if the commercial building property's energy usage is 50% percent less than the reference building due to use of energy efficient lighting, HVAC, and building envelope components.¹⁴ Even if the commercial building property fails to meet the 50% percent level, some deduction may be allowed, up to \$0.60 per square foot.¹⁵ With current responsible building practices, much of the work completed by contractors today qualifies, at least partially, for the § 179D above-the-line deduction.

It should be noted that while the owner of private commercial buildings should claim the deduction, the law permits contractors and designers to claim the § 179D deduction to government owned buildings when the government agency assigns such deduction to the contractor or designer.¹⁶ Contractors and designers alike should review the work they completed in 2014 and previous years to determine if they qualify for this deduction and if so, seek the appropriate certifications from the government entity owning the building.

It is also important to note that in determining the proper deductions allowed, contractors and/or designers of government buildings may look back up to three years and owners of commercial buildings may look back up to six years during the period the tax deduction was allowed.¹⁷ The contractor or designer must elect a change in accounting or amend their previous returns in order to claim this deduction. Furthermore, parties claiming the § 179D deduction must also reduce the claimed basis in the property by the amount of the allowed deduction.

Production Tax Credits (§ 45) or Investment Tax Credits (§ 48)

The TIP Act extended the IRC § 45(d) renewable electricity production credits to include the following facilities the taxpayer originally placed in service during the 2014 calendar year: §

(1) wind, § (2) closed-loop biomass, § (3) open-loop biomass, § (4) geothermal or solar energy, § (6) landfill gas, § (7) trash, § (9) qualified hydropower, and § (11) marine and hydrokinetic renewable energy. Pursuant to IRC § 45(b)(2), the 2014 credit for energy produced from qualified wind, closed-loop biomass, geothermal energy, and solar energy facilities is \$0.023 per kilowatt hour.¹⁸ The 2014 credit for open-loop biomass, landfill gas, trash, qualified hydropower, and marine and hydrokinetic energy facilities is \$0.011 per kilowatt hour.¹⁹

Prior to and instead of claiming the § 45 production tax credit, the taxpayer may claim the § 48 investment tax credit by making an irrevocable election to treat the facilities qualifying under § 45(d) listed above as energy property.²⁰ As with many benefits available under the TIP Act, the TIP Act requires that the taxpayer begin construction on the facility prior to January 1, 2015 to qualify for § 48(a)(5) investment tax credit. This means that such credits may be available for work provided by contractors and completed after January 1, 2015, so long as construction initially commenced during 2014.²¹

Credit for Alternative Refueling Property (§ 30C)

The last energy based property credit provided for under the TIP Act is the IRC § 30C alternative fuel vehicle refueling property credit claimed on Form 8911. Under the TIP Act, taxpayers may claim a credit of 30% of the cost of refueling property used for ethanol; normal, compressed, and liquefied natural gas; liquefied petroleum gas; hydrogen; some mixtures of biodiesel kerosene and diesel fuel; or electricity.²² The maximum deduction for qualified property under § 30C remains at \$1,000 for residential and \$30,000 for qualified non-residential applications.²³ Although this credit does not flow to the construction professional directly, alerting consumers to this extension may help foster additional development, especially if Congress passes an extension of this tax break early in 2015.

Biofuels And Renewable Fuels And Resources

Although initial drafts of the TIP Act included extensions of credits for biofuels and biodiesel through 2015, by the time of its passage, the TIP Act extended the fuel related credits and allowances only through December 31, 2014. At the time of writing this article, there is no pending legislation to renew either provision in the near future for 2015.

The TIP Act extended a series of fuel related credits that may impact contractors directly and indirectly: the second generation biofuel producer credit, incentives for biodiesel and renewable diesel, production credits for facilities producing energy from

...the TIP Act directly and indirectly impacts wide swaths of the construction industry by reducing the 2014 tax liability of some construction professionals, as well as the tax burden of some of their business and residential clients due to actions they already took in 2014.

certain renewable resources, the special allowance for second generation biofuel plant property, and excise tax credits relating to certain fuels. While the TIP Act also extended the production credit for Indian coal facilities, IRC § 45 requires that such facilities be placed in service before 2009 to qualify for the credit and thereby such an extension through 2014 will have minimal effect on the construction industry.

Biofuel and Biodiesel Production Credits

The TIP Act extended the credits provided under IRC § 40 to registered second generation biofuel producers and qualified § 40A producers. As amended, IRC § 40 allows qualified producers to claim on Form 478 a credit of \$1.01 per gallon of biofuel produced and sold or used in the United States in 2014.

IRC § 40A provides a similar nonrefundable credit of \$1.00 per gallon of produced biodiesel.²⁴ To qualify, the biodiesel must be used in its pure form as fuel, used for the production of a qualified biodiesel mixture, or sold for use as a fuel without mixing with a traditional diesel fuel.²⁵ Additionally, § 40A(b)(4) provides for a \$0.10 per gallon agri-biodiesel producer credit for qualified agri-biodiesel production by a producer that produces less than 15 million gallons of biodiesel.

The § 40 and § 40A credits also interact with the extensions of IRC § 6426 and § 6427. Pursuant to § 40(c) and § 40A(c), the taxpayer must reduce any credits by any benefit provided to the taxpayer under § 6426, and § 6427(e).

IRC § 6426 provides for a credit against the excise taxes imposed under IRC §§ 4081 and 4041 for biodiesel mixtures, alternative fuels, and alternative fuel mixtures including for liquefied hydrogen.²⁶ The credit per gallon under § 6426 is \$1.00 for biodiesel used in producing a biodiesel mixture,²⁷ \$0.50 for pure alternative fuels,²⁸ and \$0.50 per gallon of alternative fuel used in producing an alternative fuel mixture.²⁹ The TIP Act also extended IRC § 6427(e) to apply to § 6426(c)(3) biodiesel and § 6426(d)(d) alternative fuel mixtures in 2014, thereby enabling blenders to claim the credits due as a payment under § 6427(e), a refundable credit under § 34, or a nonrefundable tax credit under § 40A.³⁰

The TIP Act as passed provides a retroactive

windfall for businesses already producing qualified biofuel, biodiesel, and renewable diesel. Putting capital back into the biofuel and biodiesel industries through these credits may have an indirect effect on growing development in the industry and subsequent increase in construction of new and upgraded facilities. However, any growth attributable to the credits would be based on the mere possibility of another retroactive extension of the § 40 and § 40A credits to include 2015 production. If history is any guide, another short-term extension is likely. Even so, such short-term extensions are unlikely to stimulate new construction because of the time between initial investment and production, minimizing the benefit of these production tax breaks in the year of the initial investment.

Allowance for Second Generation Biofuel Plant Property

Despite early drafts extending the additional allowance for qualified second generation biofuel plant property through 2015, the TIP Act only extended the special allowance for second generation biofuel plant property through December 31, 2014. Therefore, absent another retroactive extension, only taxpayers that built and placed qualified second generation biofuel plant property into service before January 1, 2015 may elect to claim the depreciation deduction of fifty (50%) of the adjusted basis of the property under IRC § 168(l). This is another windfall for those that took a risk and put property into service in 2014. Again, the TIP Act does not provide any incentive for developing additional facilities in 2015 or renovating existing facilities.

Dispositions To Implement Ferc Or State Electric Restructuring Policy

The TIP Act also extended the taxpayer's IRC § 451(i) election for recognizing "qualified gain" over eight years from a qualifying electric transmission transaction. It is worth noting that taxpayers may use this election through 2014; however, due to the projection that this § 159 of the TIP Act will have no effect on revenue from 2015-2024³¹, an in depth analysis would be necessary to understand its implications.

CONCLUSION

Although original drafts of the bill included energy tax extensions through 2015, the TIP Act as passed in December 2014 only extended the energy tax sections addressed through December 31, 2014. Given its passage only twelve days before its retroactive tax breaks expired again, the TIP Act ultimately leaves contractors, designers, and owners uncertain on the true benefits and costs of business and how to proceed in 2015. The House Ways and Means Committee acknowledged the same when it noted that the TIP Act merely served to prevent increases of some taxes in 2014.³² However, there may be some light on the horizon as the same committee espoused the goal to “continue to pursue its efforts to make certain expiring tax provisions permanent to provide certainty and stability to families and businesses.”³³

For now, the TIP Act directly and indirectly impacts wide swaths of the construction industry by reducing the 2014 tax liability of some construction professionals, as well as the tax burden of some of their business and residential clients due to actions they already took in 2014. Ultimately, the TIP Act failed to incentivize future developments of energy efficient property in 2015 or provide certainty to the construction industry on its road ahead in developing and implementing alternative forms and more efficient uses of energy.

¹ <http://clerk.house.gov/evs/2014/roll544.xml>, retrieved

² http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00364, retrieved

³ Subtitle A—Individual Tax Extenders of Title I of the Tax Increase Prevention Act of 2014.

⁴ Subtitle B—Business Tax Extenders of Title I of the Tax Increase Prevention Act of 2014.

⁵ Subtitle C—Extenders Relating To Multiemployer Defined Benefit Pension Plans of Title I of the Tax Increase Prevention Act of 2014.

⁶ Calculation based on the Joint Committee on Taxation estimates over the ten-year budget window (fiscal years 2015 through 2024) as shown in *Section-By-Section Summary of H.R. 5771, The “Tax Increase Prevention Act of 2014”*, Committee on Ways and Means, December 1, 2014, prepared by Ways and Means Committee Tax Staff—Rep. Dave Camp, Chairman.

⁷ 26 U.S.C. 25C(a).

⁸ 26 U.S.C. 25C(c).

⁹ 26 U.S.C. 25C(b)(1)-(2); see *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*, Pub. L. No. 111-312, 124 Stat. 3296 (2010).

¹⁰ 26 U.S.C. 25C(f).

¹¹ 26 U.S.C. 45L(a)(2).

¹² 26 U.S.C. 45L(a)(2).

¹³ 26 U.S.C. 45L(a)(1)(B) and (g).

¹⁴ 26 U.S.C. 179D((B) and (c)(1).

¹⁵ 26 U.S.C. 179D(d)(1)(A).

¹⁶ See *Amplification of Notice 2006-52; Deduction for Energy Efficient Commercial Buildings*, Internal Revenue Bulletin: 2008-14 (April 7, 2008).

¹⁷ For more information on claiming § 179D deductions see Form 3115 and *Rev. Proc. 2012-39*, Internal Revenue Bulletin 2012-41 (October 9, 2012).

¹⁸ See *Credit for Renewable Electricity Production, Refined Coal Production, and Indian Coal Production, and Publication of Inflation Adjustment Factors and Reference Prices for Calendar Year 2014*, Internal Revenue Bulletin: 2014-22 (May 27, 2014).

¹⁹ See *Credit for Renewable Electricity Production, Refined Coal Production, and Indian Coal Production, and Publication of Inflation Adjustment Factors and Reference Prices for Calendar Year 2014*, Internal Revenue Bulletin: 2014-22 (May 27, 2014).

²⁰ 26 U.S.C. 48(a)(5).

²¹ For more complete information on treatment of particular wind turbine facilities under § 48 see *Property Qualifying for the Energy Credit under Section 48*, Internal Revenue Bulletin: 2015-4 (February 2, 2015).

²² 26 U.S.C. 30C(a) and (c).

²³ 26 U.S.C. 30C(b).

²⁴ 26 U.S.C. 40A(b)(2)(A).

²⁵ 26 U.S.C. 40A(b)(1)-(2).

²⁶ 26 U.S.C. 6426(c), (d), and (e).

²⁷ 26 U.S.C. 6426(c)(2).

²⁸ 26 U.S.C. 6426(d)(1).

²⁹ 26 U.S.C. 6426(e)(1).

³⁰ For more information on claiming the alternative payments see *Biodiesel and Alternative Fuels: Claims for 2014; Excise Tax*, Internal Revenue Bulletin: 2015-6 (February 9, 2015).

³¹ Calculation based on the Joint Committee on Taxation estimates over the ten-year budget window (fiscal years 2015 through 2024) as shown in *Section-By-Section Summary of H.R. 5771, The “Tax Increase Prevention Act of 2014”*, Committee on Ways and Means, December 1, 2014, prepared by Ways and Means Committee Tax Staff—Rep. Dave Camp, Chairman.

³² *Section-By-Section Summary of H.R. 5771, The “Tax Increase Prevention Act of 2014”*, Committee on Ways and Means, December 1, 2014, prepared by Ways and Means Committee Tax Staff—Rep. Dave Camp, Chairman.

³³ *Section-By-Section Summary of H.R. 5771, The “Tax Increase Prevention Act of 2014”*, Committee on Ways and Means, December 1, 2014, prepared by Ways and Means Committee Tax Staff—Rep. Dave Camp, Chairman.

About the Author

John Hofmeyer received his Bachelors of Architecture from Iowa State University and JD from the University of Iowa. He has direct construction experience from the point of view of the designer and contractor, which he uses in his practice including Iowa, Minnesota and Wisconsin.

Upcoming Forum Events

- 2015 Annual Meeting
The Construction Lawyer's Bucket List
April 16-18, 2015
Boca Raton Resort & Club,
Boca Raton, FL
- 2015 Fall Meeting
October 8-9, 2015
Hilton Austin, Austin, TX
Rooms are now available. The web address for reserving your room for the 2015 Fall meeting at the Hilton Austin is: https://resweb.passkey.com/Resweb.do?mode=welcome_gi_new&groupID=49811571
Also, Austin City Limits is being held during the time we are there. Make sure to get your tickets early!
- 2016 Mid-Winter
January 21-22, 2016
Westin St. Francis,
San Francisco, CA
- 2016 Annual Meeting
April 28-30, 2016
Nashville, TN

Important Division 10 Events

- Joint Discussion Breakfast with Division 12 and the Section of Litigation - Construction Litigation Committee: Saturday, April 18, 2015. Melissa Beutler, Vice President and General Counsel of Big-D Corporation, will be talking about the Model Jury Instructions for Construction Litigation, Second Edition.
- Social Event with Division 12 and the Section of Litigation - Construction Litigation Committee during 2015 Annual Meeting in Boca Raton, FL. Stay tuned for details!
- Full Division Call/Business Meeting: scheduled for June. Stay tuned for details!
- Check out the Division 10 Deliverables Calendar on our web page, <http://apps.americanbar.org/dch/committee.cfm?com=CI110000>

2015 MASSACHUSETTS OCEAN MANAGEMENT PLAN: Project Challenges And Opportunities



Michael Bosse

The 2015 Massachusetts Ocean Management Plan (“2015 Plan”), released on January 6, 2015, is the first amendment to Massachusetts’ 2009 Ocean Plan, which was established following passage of the Massachusetts Oceans Act in May of 2008.¹ The 2008 Oceans Act gave authority to Massachusetts’ Executive Office of Energy and Environmental Affairs for formal oversight, coordination and planning for the State’s ocean waters and ocean-based development. The 2015 Plan updates the original 2009 Plan, and offers significant changes based on the data and evidence gathered from 2009 to 2015. Published in two volumes, the Plan highlights Massachusetts’ dedication to continued responsible stewardship of coastal and ocean resources and the sustainable resources that they support.

This article will summarize the 2015 Plan, summarize existing projects and their importance to the Commonwealth, and highlight the barriers that are presented to future construction and energy projects in the Commonwealth’s waters and in adjacent federal waters. If this Plan’s objectives could be summarized in one word, it would be “balance.” The Plan seeks to balance existing uses and possible future uses, all while seeking to maintain sustainability. These two volumes require careful study and review by anyone who works in the development and construction of energy projects in Massachusetts. As the first update since 2009, this Plan presents challenges, but certain opportunities for those who work in the alternate energy space and want to continue to do so in Massachusetts in the second half of this decade.

Wind Energy

Massachusetts has set a goal of developing 2,000 megawatts of wind-power capacity by 2020. Offshore wind resources continue to be thought of as significantly contributing to this goal, so long as they are compatible with other ocean uses and resource protection. Although there have been no projects planned in the state-designated Wind-Energy Area since 2009, there has been progress in

planning for two potential commercial wind leasing projects in offshore federal waters south of Martha’s Vineyard and Nantucket, and east of Block Island.

As many also know, Cape Wind was issued the nation’s first commercial lease to construct and operate an offshore wind power facility in a leased area in Nantucket Sound. The project was to consist of 130 wind turbine generators each with 3.6 megawatt capacity, with a total output capacity of 468 megawatts. The project was to be connected to land in the Town of Yarmouth by two 115-kilovolt submarine transmission cables that were to connect to the grid landside. Unfortunately, Cape Wind hit a major roadblock right after this report was released, as utilities that had contracted to purchase the energy terminated their agreements, after an end of 2014 financing deadline wasn’t met.

The 2015 Plan also discusses the interaction between Massachusetts and wind development in federal waters adjacent to Massachusetts’ waters. First, the federal government and the State jointly announced in June of 2014 the publication of sale notices for commercial leasing for wind power on the Outer Continental Shelf off of Massachusetts. These notices detailed the auction format, the four leases available, the proposed lease conditions, and the criteria for evaluating the bids at auction. In November of 2014, the federal government issued the final sale notice and set the sale date for the leases at January 29, 2015. Second, New Bedford Marine Commerce Terminals have had important advances. The New Bedford terminal, broke ground in May of 2013, is the first facility in the nation that was designed specifically to support the construction of offshore wind projects. The project also includes the dredging and removal of about 250,000 cubic yards of contaminated sediment generated prior to World War II. This project, located in New Bedford Harbor, is close to the proposed-Cape Wind project site and the two new federal lease areas and is expected to provide valuable support in the construction of offshore wind in these areas.

One of the significant changes to the 2009 original Plan, however, concerns the possible restricting of offshore wind development in some areas. In the Act, the planning area is defined as the water and submerged lands of the ocean, including the seabed and the soil, lying between a line described as the “Nearshore Boundary of the Ocean Management Planning Area” and the seaward boundary of Massachusetts. In the 2009 Plan, the vast majority of the planning area was open to all uses, activities and facilities subject to existing siting and management standards. The 2009 Plan established three categories for the planning area: Prohibited, renewable energy, and multiuse. These three areas were carried to the 2015 Plan, with revisions.

The prohibited area in 2009 was coincident with the Cape Cod Ocean Sanctuary area. In that area, a variety of uses were restricted, including the generation, transmission and distribution of electric power. The 2015 Plan does not alter these prohibited areas.

The original 2009 Plan also called for several renewable energy areas, including the Gosnold Wind Energy Area and the Martha’s Vineyard Wind Energy Area, as locations that were presumptively suitable for commercial-scale wind energy development. These two areas constituted just two percent of the planning area’s 2,145 square miles, and were thought to be areas that were excellent wind resources with suitable water depth and with an absence of conflict with other uses or sensitive resources. The 2015 Plan provides additional review for the Gosnold and Martha’s Vineyard Wind Energy Areas, but based upon the review of data from 2009 to 2014, the likely result is that there will be a failure of large commercial scale wind energy projects in these areas. Nevertheless, the areas may still be suitable for smaller pilot or community scale projects.

The 2009 Plan also listed three other locations for possible wind energy development that were designated as “provisional sites.” The 2015 Plan removes these provisional areas from the plan. These provisional sites are still available for wind energy projects, but may only occur through amendments to the plan.

Tidal Energy

The 2015 Plan addresses the current state of Tidal Renewable Energy projects as well. Massachusetts

has several areas that have been identified as having potential for tidal renewable energy. Although this technology is still developing, as of 2009, three projects had preliminary permits from the Federal Energy Regulatory Commission (FERC).

As of January of this year, however, only one of the projects, the Muskeget Channel Tidal Energy Project, had satisfied FERC’s schedule for activities, target dates and reporting on studies. The Muskeget Project is a joint partnership between the Town of Edgartown, the Marine Renewable Energy Collaborative of New England, and the University of Massachusetts-Dartmouth’s School for Marine Science and Technology. That project is planned to be phased and at full pilot scale will include 14 tidal energy units that could generate up to 5 megawatts per year. The 14 units will sit 25 feet below the sea surface and will cover 206 acres of channel area. The 2015 Plan provides continued support for the work on the planning and analysis for a pilot-scale phase of this possible tidal energy project.

With respect to other potential projects, pilot tidal projects are presumed to be of appropriate scale under the 2015 Plan if they are licensed under the FERC pilot project process, fulfill the community benefit standards of the Plan, and are in compliance with any other existing regulatory standards.

Erosion and Flooding

Erosion and flooding is another significant aspect of both the 2009 and 2015 Plans. Erosion and flooding is a common problem for many Massachusetts coastal communities, and can lead to property and infrastructure damage as well as diminished real estate values and habitats. Climate change will continue to exacerbate these issues going forward as we experience higher sea levels.

The original Plan recognized that many areas in coastal communities were vulnerable to erosion and flooding, both at current sea levels and at anticipated-higher sea levels in the future. The 2009 Plan recognized the potential uses of ocean sand resources for beach nourishment, but also stated the need to balance uses with the protection of marine ecosystems and existing water-dependent uses.

Significant work in this area has occurred since 2009. For instance, the Climate Change Adaptation Report

*The Plan
seeks to
balance
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and possible
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all while
seeking to
maintain
sustainability.*

was published in 2011 by the Energy and Environmental Affairs Office and the Climate Change Adaption Advisory Committee. This report was the first broad overview for Massachusetts and described the predicted impacts of climate change and the vulnerabilities of different natural resources, infrastructure, public health, and the economy. The report both identifies observed and predicted changes to climate, but also suggests different strategies that can be used to adapt to the changing climate, including promoting habitat enhancement projects, prioritizing placement of sediment on public beaches, and use of soft engineering to supply sediment to beaches and dunes to minimize risk to existing coastal development. The 2015 Plan advances planning for potential uses by identifying data and information on ocean sediments and conducting a preliminary assessment of areas to avoid based on publicly accessible online data and mapping.

In July of 2013, the Massachusetts Legislature passed its budget, which included creating the Coastal Erosion Commission. The Commission was charged with documenting the levels and impacts of erosion in Massachusetts and developing strategies for the future. The Commission started its work in March of 2014, has held five commission meetings, five regional workshops and created three working groups. The Commission published its draft report in January of 2015, which contained recommendations and high level themes, including the need to factor in the effects of climate change, support for innovative pilot projects, the importance of understanding coastal sediment dynamics, and the need to strengthen provisions for clean sediment be placed on public beaches.

Continuing Collection of Data

The original 2009 Ocean Management Plan included a baseline assessment that provided a catalog of the planning area, the current knowledge of human uses, natural resources, the environment and economic statistics in Massachusetts and nearby federal waters. Volume II of the 2015 Plan updates the data from 2009 in these areas, and for this Plan, places particular focus on climate change, marine life and habitats, and water-dependent uses in the Plan. With respect to climate change, the Plan reported that sea temperature has changed more dramatically south of Cape Cod, with a clear increasing trend of .02 Fahrenheit a year. The data also showed that the winter sea surface temperature increased more rapidly than the summertime temperatures. With respect to rainfall, the data showed that the average rainfall in the 2000s was greater than any other decade in Massachusetts since the 1860s. The increase in sea level has been approximately .11 inches a year since 1921, which equates to a .92 foot increase for a period of 100 years.

Regional Planning

Finally, the 2015 Plan establishes further regional ocean planning in New England. The 2009 Plan described the importance of coordination and cooperative partnerships to ensure success. One of the most important developments was an Executive Order, issued in July of 2010, establishing the National Policy for Stewardship of the Ocean, our Coasts, and the Great Lakes. That Order, issued by President Obama, called for the formation of formal regional ocean planning bodies to implement an ocean planning process to analyze current and anticipated uses of coastal and ocean resources. Responding to that Order, the Northeast Regional Planning Body (RPB) began meeting in November of 2012 and included representatives from all New England states, 10 federally recognized tribes, 10 federal agencies, and the New England Fishery Management Council. While not a regulatory body, the RPB worked to develop a regional ocean plan to guide future agency action consistent with existing authorities. The Northeast RPB met five times in advance of the 2015 Plan. The Northeast RPB established a framework that identified the goals and objectives to produce a regional ocean plan by early 2016. This plan will cover human activities in ocean areas, including commercial fishing, marine transportation and commerce, recreational boating, as well as information on ocean ecosystems such as areas used by marine mammals, fish and birds.

Conclusion

Anyone interested in development and construction of wind energy, tidal energy, and construction in the ocean or on the coast of Massachusetts should study the 2015 Plan. It represents the Commonwealth's attempt to continue to protect the ocean's existing resources while allowing for environmentally responsible development going forward. While another plan will presumably be issued towards the end of this decade, for the coming years, the 2015 Plan will act as a guide for the management of Massachusetts' ocean waters.

¹ *The 2015 Massachusetts Ocean Management Plan can be located at: <http://www.mass.gov/eea/waste-mgmt-recycling/coasts-and-oceans/mass-ocean-plan/>. The author has not provided citations throughout this article; however, the article summarizes the highlights of Parts I and II of the 2015 Plan.*

About the Author

Michael Bosse, Esq. is the Chair of Bernstein Shur's Construction Law Practice Group and a member of the firm's Litigation Practice Group. Mike regularly represents contractors, subcontractors, suppliers, and owners in state and federal courts in Massachusetts, New Hampshire, and Maine. Mike lectures frequently on all facets of construction law to participants in the construction industry.

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