

## Surging Ahead, Wind Power Still Faces Challenges

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*Monday, Jan 28, 2008* --- As the generating capacity of the U.S. wind energy market surges at unprecedented rates, a number of factors are threatening the burgeoning industry, most notably the possible expiration of the federal production tax credit.

The American Wind Energy Association said earlier this month that the industry installed 5,244 megawatts in 2007, increasing the nation's total wind power generating capacity by 45% and injecting more than \$9 billion into the U.S. economy.

The trade association said that wind farms in the United States will generate about 48 billion kilowatt-hours of wind energy in 2008, which is more than 1% of the U.S. electricity supply.

Gregory Lawrence, a partner in the energy and derivatives markets group at McDermott Will & Emery, said that although demand for wind power was high in the U.S., it faced significant roadblocks.

"Wind development in the U.S. faces some important challenges that could result in a boom or bust cycle where wind projects may change hands several times, face construction delays and regulatory risk, look for off-takers, and possibly be part of an investment bubble by financial players that may not have fully vetted the technical and regulatory aspects of wind development," Lawrence said.

He and other lawyers in the field agreed that the challenges include not only the federal production tax credit, but litigation over the aesthetics of wind farms, high demand for turbines, interconnectivity with power grids and competition from other forms of renewable energy.

### *Federal Production Tax Credit*

"Without the wind energy tax credit, the industry would be in a very, very sad state," said Reed Rubinstein, a shareholder with Greenberg Traurig LLP.

The law currently allows an income tax credit for the production of electricity from qualified wind energy facilities and other sources of renewable energy. The credit, which is currently 2 cents per kilowatt-hour of electricity produced, is only applicable to utility-scale wind turbines, not smaller turbines used to power individual homes or businesses, AWEA said.

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However, the tax credit will expire at the end of 2008 unless Congress acts. Proponents said that the credit has been extended by one or two years since it was established in 1992.

The credit lapsed in 2000, 2002 and 2004, and AWEA said the market saw a subsequent drop in development each time. It said that because developers plan wind farms in advance, projects are already being stalled or slowed because extensions haven't been granted.

"I think the folks that follow this closely think there will be an extension provided for wind sometime this year," said David S. Lowman, Jr. a partner with Hunton & Williams LLP. "But one has to deal with Congress's PAYGO rules (which means new spending or tax changes cannot add to the federal deficit) and one also has to understand this is an election year and it's always risky to make projections in an election year."

"There's an expectation it will be extended, but currently there's not a vehicle," Lowman concluded.

Girard Miller, a partner with Fulbright & Jaworski LLP, also cited the possible expiration of the tax credit as a big problem.

"It's still built into most business models," he said, adding that letting the credit expire would cut development like the blade of a saw.

### *Aesthetic And Environmental Litigation*

The fiercest litigation challenges that wind farms face are lawsuits alleging developments are ugly, decrease property values or endanger the environment or wildlife, particularly birds.

Louis "Sey" Zimmerman, a partner with Fulbright & Jaworski LLP, said these type of suits were similar to what a neighbor would bring against someone for having something obnoxious in his or her backyard. "It's an old-fashioned nuisance suit. They say it hurts their property values."

Rubinstein said, "Some people just don't want to see [wind farms]. If there is an ecological concern about wind energy, the one that seems to have an empirical basis is the possibility that birds will fly into them."

For example, a proposed class action lawsuit filed in the U.S. District Court of the District of Kansas in 2005 alleged a proposed wind farm would cause permanent and irreparable damage to the area's environment. The case, however, was dismissed later that year. That dismissal was later affirmed by an appeals court.

Currently, plans for a wind farm in Nantucket Sound, off the Massachusetts coast, have faced tough opposition from residents of the tourist haven concerned about the effect on the view, among other things.

The development would consist of about 130 turbines that would produce up to 468 megawatts of electricity. The Minerals Management Service, part of the U.S. Department of the Interior, said in a report released earlier this month that the development would have a negligible impact on the area.

The report said the farm would have a moderate impact on the view of the sound from the shore, but that it would not affect the viability of the recreational areas.

### *Demand For Turbines*

Attorneys also said the supply of turbines needed for wind farm development did not satiate demand.

Lawrence said there was a dearth of turbines because many companies have stockpiled them. “There are two or three major producers and demand has outpaced supply for years.”

Lowman said the lack of supply partly went back to the tax credit not being extended. If potential turbine manufacturers saw there was a consistent demand, he said, a manufacturing base would develop.

“Many of the turbines that are being used in the U.S. are manufactured in Europe,” he said. “Their manufacturing base is more mature and they are not seeing the same stop and go policies.”

### *Transmission Interconnection*

Wind farms can have difficulties with transmission interconnectivity and access given their often remote locations and the variability of wind.

Stephen Krebs, a partner with Baker Botts LLP, said the access to transmission was one of the biggest problems with the market. “The tendency is for wind farms to be in places where people don’t live,” he said. “But farms need to have the power transmitted from those remote areas. It raises a whole lot of questions, such as who is going to pay for it.”

Zimmerman said that in many areas the transmission infrastructure was never built, so the construction of wind projects requires construction of high-voltage power lines. And in some areas, providers encounter problems with capacity down the line from where the wind farm plugged into the grid.

The developer has “to tap into the grid at some point and the greater the amount of power that’s going to be loaded into the grid, the greater the impact will have on the grid. It may have an impact 100 miles away,” Zimmerman said.

### *Competition With Other Forms Of Renewable Energy*

Lawrence said that some other forms of renewable energy, such as

hydrokinetic energy, could become significant competitors to wind. Other renewable sources may have higher availability, he said.

For example, the Federal Energy Regulatory Commission issued its first license license for a hydrokinetic energy project in December. The development will be located in the Pacific Ocean off the coast of Washington state.

Zimmerman, however, said all forms of renewable energy could ideally be used together to provide alternatives.

“I don't see the different sources as being in competition at all,” he said. “Wind is variable. Solar is variable. Tidal is variable. The idea is to get a package of different sources and ... when they are all available, we should see a fairly steady stream of electricity.”